

**ORAL TRADITIONS:  
PRACTICAL CONSIDERATIONS FOR COMMUNITIES  
IN LIGHT OF THE *DELGAMUUKW* DECISION**

**Darwin Hanna**

**July 25, 2000**

This paper is based upon research which was conducted under the auspices of the Assembly of First Nations (A.F.N.) in relation to the Supreme Court of Canada's judgment in *Delgamuukw v. British Columbia*.

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**Introduction**

For Aboriginal people, the oral tradition has maintained a record of every aspect of Aboriginal peoples' traditions, customs, and ways of life. For Aboriginal communities, oral traditions can be used for a variety of purposes, including asserting and protecting Aboriginal rights and title. In the Canadian court system, Aboriginal people have the onus of proving the existence of Aboriginal rights and title. The highly heralded decision of the Supreme Court of Canada in *Delgamuukw v. British Columbia*<sup>1</sup> has created a new era of hope for the recognition of Aboriginal rights and title as the Court recognised that Aboriginal rights and title may be established through oral history evidence. The *Delgamuukw* decision dictated that courts must "come to terms with oral histories of aboriginal societies"<sup>2</sup> in its recognition that most "Aboriginal societies 'did not keep written records'"<sup>3</sup>. Since the pronouncement of the *Delgamuukw* decision, there has been much discussion and work within the Aboriginal community to implement Aboriginal rights and title. With the knowledge that oral history evidence can establish Aboriginal title, many Aboriginal communities have set forth to document their oral history. The

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\* I am a member of the Lytton First Nation of the Nlha7kapmx Nation, situated partly in what is known as British Columbia. Currently, I am a practicing partner with the Vancouver law firm of Callison & Hanna, Barristers & Solicitors, specializing in Aboriginal law. Much of the practical knowledge that is shared in this paper is based upon my experience from being a co-compiler and co-editor with Mamie Henry in the publication *Our Tellings: Interior Salish Stories of the Nlha7kapmx People* (Vancouver: UBC Press, 1995). Overall, the paper was written with the assistance of my law partner, Cynthia Callison, who is a member of the Tahltan Nation. I am grateful to John Borrows, Albert Peeling, Carl Johnson, Kent McNeil and Laurie Wilson for reviewing an earlier draft of this paper, and for providing helpful comments and suggestions which I have incorporated into this paper.

<sup>1</sup> [1998] 1 C.N.L.R.

<sup>2</sup> *Ibid.*, at para. 86.

<sup>3</sup> *Ibid.*, at para. 87.

researching of oral history may pose many challenges to Aboriginal communities in particular to: consultation, methodology, consent, confidentiality, translation, and copyright. The purpose of this paper is to provide practical guidance to Aboriginal communities in their quest to research oral history in furtherance of their self-determination objectives over governance, lands and resources.

This paper provides an overview of the relevance of oral traditions within Aboriginal communities, the effect of the *Delgamuukw* decision on the utilization of oral traditions in court, and research methods Aboriginal communities may consider utilizing for the documentation of their oral traditions. By conducting oral history research, Aboriginal communities may be in a better position to exercise and protect Aboriginal and treaty rights and title.

### **Oral Traditions Within Aboriginal Communities**<sup>4</sup>

In Aboriginal communities, the transmission of every aspect of Aboriginal peoples' lives is almost exclusively through oral traditions. Oral traditions of Aboriginal peoples include: storytelling, political discourse, song, prayer, teachings, gossip, and daily conversation. Oral traditions are the repositories of all knowledge and history for Aboriginal nations and communities from generation to generation. From the accumulated knowledge of elders, stories are repeatedly told for: entertainment and instruction; history is told to provide knowledge of the past; creation stories are told to reveal the origin of life; laws are told to guide behavior; and spirituality taught beliefs, morals, and philosophy. Through repeated communication of the oral tradition, the listener soon becomes the holder of that oral tradition. Often stories were continuous, with each visit the story-teller told another chapter. Sometimes oral traditions are recorded on physical objects to document important events, histories, stories, and laws, such as totem poles; designs on clothing, baskets, jewellery; rock paintings (pictographs); and carved rocks (petroglyphs).

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<sup>4</sup> Certain passages that appear in this section were published in the article "Appropriation of Aboriginal Oral Traditions" *University of British Columbia Law Review* (1995) Special Issue 165 and are reprinted with the permission of the author Cynthia Callison.

Oral traditions belong to nations, communities, families, and individuals, and are often shared with others. Certain oral traditions are treasured family possessions that are not revealed to outsiders, while other oral traditions are sometimes shared openly at community meetings, weddings, funerals, cultural events and gatherings. Oral traditions are interrelated and intertwined in all aspects of the traditions and life of Aboriginal communities. The passing and sharing of oral traditions depends upon the context and situation. Songs, dances, ceremonies, and stories are some of the means by which the distinct identities of Aboriginal communities are preserved, extended, witnessed and expressed.

The very term “oral tradition” can be misleading. These traditions are not simply "oral" after all, but have features and characteristics that go far beyond simple story-telling, including gestures, masks and performance. Oral traditions have a unique context socially and a particular place in the community. Unless there is recognition of these characteristics the meaning of oral tradition may be not be fully understood.

In terms of promoting Aboriginal methodologies and interpretations, certain eurocentric assumptions and terms of reference must be discarded. Aboriginal traditions have been referred to by a number of terms since contact: myths, fables, legends and stories. Each of these terms confuses and obscures the original meaning of the oral tradition. Since each oral tradition is unique, such categorization robs the tradition of its individual identity. The term “myth,” for instance, has a pejorative sense and is associated with lies, fancy or untruth in the Western tradition, an irony considering that the classical Greeks considered their myths to be history and true in every sense of the word. Today, when Western society examines the stories told of the time of creation, the immediate assumption is that these things never took place or are works of the imagination. An examination of oral traditions has to assume that these events did take place and that they are real in the minds of the story-tellers when communicating their stories to their audience. We must remove ourselves from the Western terms that undermine the value of these traditions as having reality in the absolute sense.

Despite the negative effects of colonialism, oral traditions have survived and flourished in Aboriginal nations and communities by repeated retelling at gatherings, feasts, and ceremonies, and by retelling as part of everyday living and activities. Every Aboriginal person is a possessor of oral traditions. In Aboriginal communities, history is maintained through oratory and is part of the communities oral traditions.

The Royal Commission on Aboriginal Peoples examined the Aboriginal conception of history:

... the Aboriginal historical tradition is an oral one, involving legends, stories, and accounts handed down through the generations in oral form.

...In the Aboriginal tradition the purpose of repeating oral accounts from the past may be to educate the listener, to communicate aspects of the culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority and prestige.<sup>5</sup>

Oral history has also been described as "... the unwritten cultural, historical and spiritual knowledge passed down by family and community members to others over time ...".<sup>6</sup> and that oral history "... is the most important source of specific information about a community's history, members, beliefs and activities from the past".<sup>7</sup> Oral history not only contains how communities have lived, but also provides guidance and invokes responsibilities that younger Aboriginal people must carry to prepare themselves for the future.

There are two types of oral history that have been preserved: living oral traditions collected among communities today, and those oral traditions collected, translated transcribed, and published since contact. Both types of oral history can be beneficial for an Aboriginal community. The oral histories of Aboriginal communities are often researched informally or formally by community members, community governing bodies,

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<sup>5</sup> Report Of The Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back, Volume 1* (Ottawa: Supply and Services, 1996) at page 33.

<sup>6</sup> Leigh Ogston, editor, *Researching The Indian Land Question In B.C.: An Introduction to Research Strategies & Archival Research for Band Researchers* (Vancouver: Union of British Columbia Indian Chiefs, 1998) at section 6.01.

<sup>7</sup> *Ibid.*

and non-Aboriginal people. Oral history is often utilized for the following purposes: maintenance and preservation of culture and family histories; education; community development; litigation; negotiation; consultation; land-use planning; settling disputes; resolving Specific Land Claims; and negotiation of Comprehensive Land Claims. For example, in a Specific Land Claim submission negotiation in which I was involved, an Aboriginal community submitted oral history evidence from elders that conflicted with the archival evidence of the Specific Claims Branch of DIA in respect of a reserve surrender vote meeting. The oral history evidence indicated that there was no vote, while a single piece of archival evidence indicated there was a vote in favour of the surrender. The Aboriginal community was able to use this historical contradiction to obtain more favourable terms in the settlement of their Specific Land Claim. Based upon the foregoing uses, oral history is very important for the furtherance of Aboriginal aspirations, culture, life and institutions, and for the protection of Aboriginal and treaty rights, and title. This paper will now examine when oral history evidence can be utilized to interpret treaties, and the legal tests set out by the Supreme Court of Canada that Aboriginal people have to satisfy to have their Aboriginal rights and title recognized.

### **Treaty Rights**

Oral history can be used in negotiation and litigation as an aid in interpretation of treaties. In the recent Supreme Court of Canada decision in *R. v. Marshall*<sup>8</sup>, the Court set forth three situations in which oral history can be utilized to assist the interpretation of treaties that are the subject of litigation:

1. Oral history evidence is admissible "... to show that a written document does not include all the terms of an agreement;"<sup>9</sup>
2. Oral history "... evidence of the historical and cultural context, and [understanding] of a treaty may be received even absent any ambiguity on the face of the treaty;"<sup>10</sup> and

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<sup>8</sup> [1999] 4 C.N.L.R. 161.

<sup>9</sup> *Ibid.*, para. 10.

<sup>10</sup> *Ibid.*, para. 11 .

3. “Where a treaty was concluded verbally and afterwards written up by representatives of the Crown, ... [the Crown can not] ... ignore the oral terms while relying on the written terms”<sup>11</sup>.

History has shown that treaties and agreements between Aboriginal groups and the Crown are often interpreted by Courts when a dispute arises in the interpretation of the treaty or agreement. Accordingly, it is very important for Aboriginal groups that have entered into agreements or treaties, whether historical or modern, with the Crown to document the oral understanding of the terms of the agreement or treaty.

### **Aboriginal Rights**

Since 1982, when Aboriginal and treaty rights were granted constitutional protection by section 35 of the *Constitution Act*, Aboriginal people have faced the challenge of having their rights “recognized and affirmed” by the Canadian government and courts. Section 35(1) of the *Constitution Act* provides as follows:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The Supreme Court of Canada decision in *R. v. Van der Peet* set out the following test to determine whether an Aboriginal person or group has established an Aboriginal right which is constitutionally protected by section 35(1):

In order to be an Aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.<sup>12</sup>

The Court then set out certain factors that have to be considered to assess whether the Aboriginal person or group has satisfied the test. The Court indicated that in determining whether the test has been satisfied, set out as a factor that, “Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal Claims”<sup>13</sup>. To satisfy this factor:

... a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of Aboriginal claims, and of the

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<sup>11</sup> *Ibid.*, para. 12.

<sup>12</sup> [1996] 4 C.N.L.R. 177 at para. 46.

<sup>13</sup> *Ibid.*, at page 207.

evidentiary difficulties in proving a right which originates in times when there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by Aboriginal claimants simply because that evidence does not confirm precisely with ... evidentiary standards ...<sup>14</sup>

This factor allows for the utilization of oral history evidence to prove Aboriginal rights in Courts. This approach was affirmed and expanded in the *Delgamuukw* decision<sup>15</sup>, which is reviewed below.

### **Aboriginal Title**

The Supreme Court of Canada decision in *Delgamuukw* has confirmed the existence of Aboriginal title. Aboriginal title confers the following land-use rights for the benefit of Aboriginal groups:

1. "Aboriginal title encompasses the right to *exclusive* use and occupation of land" for the general welfare of the Aboriginal group;
2. Aboriginal groups possessing Aboriginal title have "*the right to choose* to what uses land can be put ..."; and
3. Aboriginal groups have the right to economically benefit from their Aboriginal title lands.<sup>16</sup>

Thus, Aboriginal title lands held by an Aboriginal group are extremely important for their sustenance and development.

The *Delgamuukw* decision sets out a test for the proof of Aboriginal title. According to the *Delgamuukw* decision, an Aboriginal group claiming Aboriginal title must prove the following:

1. The land must have been occupied prior to sovereignty;

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<sup>14</sup> *Ibid.*, para 68.

<sup>15</sup> See *supra* note 1 at para. 80.

<sup>16</sup> *Supra* note 1, at para.166.

2. If present occupation is relied upon as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation; and
3. At sovereignty, occupation must have been exclusive.<sup>17</sup>

The *Delgamuukw* decision provides some guidance on how Aboriginal groups can establish pre-contact occupation of lands:

... the Aboriginal perspective must be taken into account alongside the perspective of the common law [in relation to proof of occupancy]. Professor McNeil has convincingly argued that at common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to land ... Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources ... In considering whether occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed" ...<sup>18</sup>

Accordingly, to meet the first part of the Aboriginal title test, Aboriginal groups will have to carry out oral history research, supplemented by archaeological, historical, linguistic, geographical and anthropological research, to document physical occupation of their lands. For many Aboriginal groups this will be an onerous task due to:

- limited funding to document the physical occupation of lands; and
- the vast array of traditional uses and practices undertaken through-out their lands.

In relation to the continuous occupation component of the Aboriginal title test, the *Delgamuukw* decision acknowledged that the task for Aboriginal groups of documenting physical occupation of land will be difficult in providing that present occupation of lands may satisfy the first two parts of the Aboriginal title test:

Conclusive evidence of pre-sovereignty occupation may be difficult to come by. Instead, an Aboriginal community may provide evidence of present

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<sup>17</sup> *Ibid.*, at para 143.

<sup>18</sup> *Ibid.*, at para. 149.

occupation as proof pre-sovereignty occupation in support of a claim to Aboriginal title.<sup>19</sup>

Based upon the *Delgamuukw* decision, it is important for Aboriginal groups to maintain and revitalize the use of their lands. As well, oral history documentation of current use of their lands is equally important as documentation of pre-contact use of lands.

In relation to satisfying the exclusive occupation component of the test, the *Delgamuukw* decision provides the following examples of how an Aboriginal group can prove that they were occupying the land exclusively at the time of sovereignty:

- existence of trespass laws<sup>20</sup>;
- granting of permission to other Aboriginal groups to use or reside on lands temporarily<sup>21</sup>; and
- existence of Aboriginal system of governance.<sup>22</sup>

Based upon the foregoing Aboriginal title test, Aboriginal groups will have to document their oral histories if they want to establish by legal standards Aboriginal title to lands they claim ownership to.

### **Use Of Aboriginal Oral Traditions In Litigation**

Prior to the *Delgamuukw* decision, the law of evidence undervalued or excluded Aboriginal oral history evidence as being considered hearsay, unverifiable, and unreliable. For example in the *Bear Island* case, Steele J. stated that oral history "may be contradicted by factual records".<sup>23</sup> Courts consistently denied that oral history could be used as a primary source of historical knowledge.<sup>24</sup> This concept was followed by McEachern J., as he then was, in the lower decision of the British Columbia Supreme

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<sup>19</sup> *Ibid.*, at para. 152.

<sup>20</sup> *Ibid.*, at para. 157.

<sup>21</sup> *Ibid.*, at para. 157.

<sup>22</sup> *Ibid.*, at para. 159.

<sup>23</sup> *Attorney General for Ontario v. Bear Island Foundation* [1985] 1 C.N.L.R. 1 (Ont. S.C.) at 17, aff'd [1989].

<sup>24</sup> *Horseman v. R.* [1990] 3 C. N.L.R. 95 (S.C.C.) at 111.

Court in *Delgamuukw*<sup>25</sup> where he conveyed the unwillingness of the court to accept the *adaawk* and *kungax* - oral histories of the Gitksan and Wetsuweten peoples - as "direct evidence of fact" with the very minimal exception of confirmation of the presence of these groups in their territories. These views of oral history by the judiciary were corrected by the *Delgamuukw* decision.

One of the most important aspects of the *Delgamuukw* decision concerns the treatment of Aboriginal oral histories and traditions tendered as oral evidence in court proceedings. Courts must "come to terms with oral histories of aboriginal societies"<sup>26</sup> in its recognition that most "Aboriginal societies 'did not keep written records'"<sup>27</sup>. In *Delgamuukw*, the Supreme Court of Canada determined that Aboriginal rights and title may be established through the following evidence:

- (a) Oral histories, including ancient origin stories and recounted histories of ancestors' use of land;<sup>28</sup>
- (b) Aboriginal laws which shape the organized society whose prior occupation is the source of title to the land;<sup>29</sup>
- (c) Physical occupation both past and present;<sup>30</sup>
- (d) Post-contact practices directed at demonstrating which aspects of the aboriginal society have their origins pre-contact;<sup>31</sup> and
- (e) Expert evidence, such as archaeological, historical and anthropological evidence.<sup>32</sup>

These factors should always be considered by Aboriginal communities when undertaking oral history research. As well, the Supreme Court of Canada in the *Delgamuukw* decision gave the following direction regarding the treatment of oral evidence by courts:

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<sup>25</sup> *Delgamuukw v. R.* (March 8, 1991) No. 0843 (B.C.S.C.) at 58.

<sup>26</sup> *Supra* note 1, at para. 86.

<sup>27</sup> *Ibid.*, at para. 87.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, at para. 141.

<sup>30</sup> *Ibid.*, at para. 100 and 101.

<sup>31</sup> *Ibid.*, at para. 152.

<sup>32</sup> *Ibid.*, at para. 87.

- (a) A court must take into account the perspective of the aboriginal people claiming the right;<sup>33</sup>
- (b) Aboriginal rights demand a unique approach to the treatment of evidence which accords due weight to the perspective of Aboriginal peoples;<sup>34</sup>
- (c) Trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims and must interpret that evidence in the same spirit;<sup>35</sup>
- (d) This requires the court to come to terms with the oral histories of aboriginal societies;<sup>36</sup> and
- (e) To adapt the laws of evidence in order that oral histories as proof of historical facts can be accommodated and placed on an equal footing with the types of historical evidence the courts are familiar with.<sup>37</sup>

As the law of evidence is primarily common law or judge-made,<sup>38</sup> new rules concerning oral traditions adopting the *Delgamuukw* decision should emerge from case law which accords oral history evidence with the same weight as archival, documentary, and expert evidence and which accepts aboriginal perspectives of oral traditions and histories. For example, in a recent case involving an Aboriginal rights defence, four elders testified in their language concerning their origin story. This evidence was accepted by the judge who found that the place of origin was significant to the Aboriginal community based on their oral history.

It is worth noting that the method of inquiry to ascertain facts is adversarial in the Canadian judicial system. The judge finds facts based on the merits of the two positions put before her. This adversarial method requires advocates on each side to present their respective positions with the strongest arguments and leads to a presentation of vital

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<sup>33</sup> *Ibid.*, at para. 81.

<sup>34</sup> *Ibid.*, at para. 82.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, at para. 84.

<sup>37</sup> *Ibid.*, at para. 87.

<sup>38</sup> The *Canada Evidence Act* and various provincial evidence acts cover only a small portion of the law of

testimony in a way that may distort it. Distortion of oral traditions by expert witnesses in environmental and resource conflicts has occurred. Distortion may unintentionally occur to the oral history evidence of Aboriginal people given the passions and prejudices associated with the adversarial method. When oral traditions are collected as pieces of evidence to support positions, interpretations are influenced by anthropologists, historians, ethnographers, and by decision-makers.

In interpreting oral histories, the understanding and acceptance of Aboriginal customs and traditions is critical. In determining whether Aboriginal rights exist, Courts are directed to find a way to "accommodate" oral history and to attempt to understand it from the Aboriginal perspective. When listeners are hearing this information from a different cultural point of view, they may not understand the information in a meaningful way. The judiciary in this country may be ill-equipped to hear and understand Aboriginal oral history. Not only do they have to be trained to understand Aboriginal oral traditions, they have to be willing to receive that education. Through education and greater Aboriginal involvement in the judicial system, the judiciary may become more knowledgeable about and accepting of oral history evidence.

It is painfully evident that the destinies of Aboriginal communities depend on how oral evidence is collected and how it is interpreted. Through proper documentation of oral traditions, Aboriginal communities will be in a better position to protect and exercise their Aboriginal rights and title, and treaty rights. Having reviewed the importance of oral traditions in litigation, the following research methods and considerations are outlined.

### **Researching And Documenting Oral History**

As the protection of Aboriginal and treaty rights, and title partially depends upon the ability of Aboriginal communities to conduct thorough oral history research, research must be undertaken strategically and respectfully. Research provides greater insight into how Aboriginal people related to: one another, others, animals, plants, trees, land, water,

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evidence.

spirit world, sky, and universe. According to Linda Tuhiwai Smith, “Research is about satisfying a need to know, and a need to extend the boundaries of existing knowledge through a process of systematic inquiry.”<sup>39</sup> Research also provides a means to Aboriginal communities to correct false or incorrect knowledge created by non-Aboriginal researchers. Research is about setting the cultural and historical record straight.

Researchers should consider the following topics prior to embarking on a project to document the oral traditions of an Aboriginal community:

- Purpose;
- Consultation;
- Funding Sources and Budget;
- Consent and Confidentiality;
- Methodology;
- Translation and Transcription;
- Honorariums;
- Oral Traditions and Copyright Law;
- Solutions To Copyright; and
- Historical Documents and Affidavits.

The following is an overview of the practical considerations Aboriginal communities should consider when embarking upon an oral tradition research project.<sup>40</sup>

### **Purpose**

Prior to embarking on an oral history study, the community should assess their needs to document their oral history. The decision to conduct oral history research is an exercise of self-determination for an Aboriginal community. If the community decides that there is a necessity to carry out oral history research, goals for the research should be clearly defined at the outset. Goals of documenting oral history may include; passing the knowledge to younger generations, education, and protection of aboriginal and treaty rights. It is highly recommended that any researcher of oral history have a mandate from

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<sup>39</sup> Linda Tuhiwai Smith, *Decolonizing Methodologies – Research And Indigenous Peoples* (Dunedin: University of Otago Press, 1999) at 170.

<sup>40</sup> For further detailed information on carrying out oral history research, see *supra* note 6 at Chapter 6, and Elisa Hart, “Getting Started in Oral Traditions Research”. *Occasional Papers of the Prince of Wales Northern Heritage Centre, No. 4* (Yellowknife: Government of the Northwest Territories, 1995).

the community or governing body of the community prior to embarking on a oral history research project. To carry out oral tradition research properly "...requires the collective knowledge, effort, and commitment of the people..."<sup>41</sup>

If the oral traditions and language remain vibrant, then documentation of oral history may not be a priority. However, many communities are less fortunate, in that oral transmission of the practices and customs of the people has not fully continued. Thus, a community may want to document their oral history formally. Invariably, Aboriginal communities have had their oral traditions documented since contact. The community has to assess whether there is an ongoing need to document their oral traditions, in light of the fact that oral knowledge is ever-evolving with each generation. As well, at some point in time, all Aboriginal communities are affected by government and third party activity or proposed activity.

In respect to carrying out oral history research to support court cases to advance or protect Aboriginal and treaty rights, and title, Aboriginal communities must be aware that oral history evidence is normally presented to a court through:

- testimony;
- documentary evidence (i.e., written, tape-recording, videotape); and
- affidavits.

An affidavit is defined as "a written or printed declaration or statement of facts, made voluntarily, and confirmed by oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation."<sup>42</sup> There are many rules that govern the admissibility and exclusion of evidence in courts beyond the scope of this paper. Aboriginal communities should consult with their legal counsel for advice on how to carry out their oral history research if the purpose of such research is for court to ensure that their oral history will be relevant and admissible as evidence in court.

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<sup>41</sup> *Supra* note 39 at 129.

<sup>42</sup> Joseph Nolan and Jacqueline Nolan-Haley, *Black's Law Dictionary* (St. Paul, Minn.: West Publishing Co. 1990) at 58.

## **Consultation**

In many cases, proposed activities and existing activities of government and third parties within a community's traditional territory may negatively affect the exercise of Aboriginal and treaty rights, and title. Where an activity may affect the exercise of Aboriginal and treaty rights, and title, the government has a fiduciary obligation to consult with the Aboriginal community affected to accommodate the exercise of Aboriginal rights, to address the concerns of the community, and to avoid or minimise the interference with Aboriginal and treaty rights, and title.<sup>43</sup>

Government have a fiduciary duty to inform itself of the practices and customs of the community that may be affected by the activity prior to making a decision. Through consultation meetings with aboriginal communities and studies undertaken by government and the community, government may be informed of the Aboriginal practices and customs that may be affected by the development. If an Aboriginal community wants to engage in a consultation process with government to protect their rights and title, they should consider sharing information with government in respect of their practices and customs.

In the sharing of sensitive cultural information, communities will inevitably be placed in an onerous position as a gate-keeper or guardian of information, and will have to determine what and how much information will be shared with government. In any event, Aboriginal communities should indicate that their rights and title will be affected and disclosure of cultural information will depend on certain factors, such as mutual respect and the relationship between parties. It may be decided that only general information be shared. As well, it may be decided that specific information not be disclosed until legal advice is obtained, and elders and community members consent. If cultural information at consultation meetings with government is provided, this information should be documented for reference later.

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<sup>43</sup> For a full discussion on the Crown's duty to consult see Sonia Lawrence and Patrick Macklem, "From Consultation To Reconciliation: Aboriginal Rights And The Crown's Duty To Consult" (February 2000) *The Canadian Bar Review*.

Often, the Aboriginal community will not know the full impact a proposed activity will have on the exercise of their rights and title. The Aboriginal community should request that government provide funding to the community to undertake a study to assess the impact of a proposed activity will have on the community. Government legislation and regulations sometimes provide that the third party proponent of the activity will have to commission a study., i.e. archaeological impact assessment, traditional use study, or cultural heritage study. Communities should be wary about participating in such studies, as often the proponent's commissioned studies favour the proponent's development interests and the community may have very little control over the use and interpretation of oral information documented for the proponent's study. Aboriginal communities should always consider commissioning and overseeing any studies done within their traditional territories. A study conducted at the outset of any proposed activity will provide the community with valuable information to assist the community in providing an informed response to government and proponents. As well, a study commissioned by an Aboriginal community may highlight deficiencies and assumptions of the government or proponent study. Further, Aboriginal communities should demand that government or the proponents not make any decisions or commence work until the communities studies are completed and have been considered by all parties.

### **Funding Sources and Budget**

Documenting oral traditions can be very expensive. An Aboriginal community undertaking an oral history project may incur costs for the following expenses: administration, salaries, contract fees, training, honorariums, travel, equipment (tape-recorder, cam-corder, tapes, camera, computer), and report printing. It is recommended that high-quality recording equipment be purchased for recording clarity. Recording clarity makes it easier for transcribers and translators to ensure that their work is reliable and correct. Often, the transcriber and translator will have to listen to the tape many times to get certain words and phrases correct. As well, you never know what the recording may be used for in the future with the permission of the story-teller, i.e. for broadcast on radio or television, education purposes, or evidence in court.

As communities do not receive any funding to document their oral traditions from government funding transfer agreements, the community will have to secure their own funding to carry out their research. There are many government and private funding sources that a community may be eligible to receive funding from. It may be worth contacting other Aboriginal communities that have conducted oral tradition research to ascertain how they funded their research, and to obtain copies of their funding proposal applications to use as a funding application precedent. Most funding agencies will require a budget for the proposed research. Accordingly, it is recommended that prior to engaging in actual research, a budget should be developed.

When funding cannot be secured or the funding obtained is insufficient, the community should explore alternatives. It has been my experience that many academics, professionals and students from colleges and universities are willing to donate their time and their collected information to assist communities in their efforts to protect their rights and title. Many of these people have worked with Aboriginal communities, and may have documented oral traditions from the community in the past. Often they will share their research experiences and techniques with you. As well, academics are often called upon to be expert witnesses in Aboriginal right and title court cases for the purpose of collaborating oral history evidence with the anthropological, archaeological and historical record. Thus, having connections and working relationships with academics is a valuable asset for Aboriginal communities.

### **Consent and Confidentiality**

At the beginning stages of any oral history research project, the Aboriginal community should discuss, prepare and adopt policy and protocols for the interview process and for the subsequent use of oral history information obtained from interviews. For example, the Royal Commission On Aboriginal Peoples developed Ethical Guidelines For Research (the “Guidelines”)<sup>44</sup> for researchers conducting research for the Commission.

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<sup>44</sup> Report Of The Royal Commission On Aboriginal Peoples, *Renewal: A Twenty-Year Commitment*, Volume 5 (Ottawa: Supply and Services, 1996) Appendix E.

The Guidelines are quite useful in providing the standards in which consent is to be obtained from informants:

1. Informed consent shall be obtained from all persons and groups participating in research. ...;
2. Consent should ordinarily be in writing. Where this is not practical, the procedures used in obtaining consent should be recorded;
3. Individuals or groups participating in research shall be provided with information about the purpose and nature of the research activities, including expected benefits and risks;
4. No pressure shall be applied to induce participation in research;
5. Participants should be informed that they are free to withdraw from the research at any time; and
6. Participants should be informed of the degree of confidentiality that will be maintained in the study.<sup>45</sup>

Communities conducting research may consider these informed consent guidelines along with other guidelines they may develop.

The community or agency conducting the research may consider a written confidentiality agreement and policy that may set out the following conditions for conducting interviews:

1. interviews and any supporting documentation will be kept confidential by the agency;
2. informants will be the copyright holders of the information;
3. interview tapes and transcripts will be held in trust by the agency;
4. the agency will provide a copy of the interview tape and transcript to the informant;
5. the agency will only use the interview information for specific named purposes;
6. the agency will provide a method for the informant to revoke their consent; and
7. the agency will not publish, disclose or release interview information without the prior written approval on the informants.

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<sup>45</sup> *Ibid.*, at page 326.

It is strongly recommended that the community or agency receive a written consent from the informant for the use of the interview information. The issue of informed consent and confidentiality is very important, and should be raised by the researcher at the commencement of any interview. It is important that any consent forms be drafted in plain language without unnecessary legal terms. In a situation where the informant speaks her Aboriginal language or can not read, then it is advisable that a person interpret and read out the consent form to the informant and involve younger family members in the consent process. Even though Aboriginal understandings are mostly communicated through oral means, obtaining a written consent from an informant will go a long way in resolving any potential conflicts in the future, particularly if the informant passes away. The informant may want to prepare a will that specifies the informants' wishes in respect to the use of informants oral tradition information. If the informant dies intestate (without a will) and a researcher wishes to utilise certain information obtained from the informant, the researcher should be in contact with the informants children and relatives to seek permission.

### **Methodology**

There are a variety of methods to document the oral traditions of an Aboriginal community. One method is for the community to establish a committee. A committee may set forth the parameters of any research, develop a work plan, provide guidance, and oversee the research tasks to ensure that the research objectives are being carried out. The committee can act as a liaison with the governing body of the community, community members, and with outside agencies.

If an Aboriginal community has to hire staff or contractors to carry out the research, it may be beneficial to have a staff comprised of a mixture of social science university graduates, self-taught community members, and elders. Community members are preferred researchers as they will have the inside knowledge and understanding to facilitate the informant to convey information sought. From my experience, it is ideal for an elder and younger member to work together as a research team drawing from each others strengths, i.e. translation skills of the elder and technological skills of the younger

member. The elder can “act as a guardian of the researcher, mediating their journeys through the community and through the research.”<sup>46</sup> If there is a potential that the research will be utilized in court proceedings, it is recommended that at least one of the researchers be able to be qualified as an expert witness so they can present the research findings in court through testimony or affidavit evidence. To be qualified as an expert witness, “it must be demonstrated that the witness possesses special knowledge and experience going beyond the trier of fact [a judge].”<sup>47</sup> Depending upon the subject matter before a court, elders may be qualified as an expert witness to provide her opinion and conclusions just as an anthropologist, ethnographer, historian or archaeologist..

Prior to conducting any interviews, the researcher should conduct a review to ascertain whether there has been any previous oral tradition research within the community. It has been my experience that anthropologists, historians, ethnographers, linguists and archaeologists have conducted research in Aboriginal communities since contact, and have continued to do so on an intermittent basis since then. The vast majority of published oral traditions have been collected by non-Aboriginal scholars and investigators with their own approaches, methods and agenda. Their agendas have influenced the transmission and interpretation of the oral traditions, and have great impact on current views of Aboriginal culture. As well, many communities and members of communities have embarked on informal or formal oral tradition research projects, particularly in the last twenty years. From my experience, it is most useful to contact previous researchers and to obtain copies of their research reports and publications, and to obtain copies of their interview tapes. In this way the researcher can make an inventory of prior documented oral traditions. The inventory can be utilized to:

1. provide background knowledge for the researcher;
2. assist in developing a questionnaire;
3. share with informants to trigger their memories; and
4. ensure that work is not needlessly duplicated.

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<sup>46</sup> *Supra* note 39 at page 139.

<sup>47</sup> John Sopinka, Sidney N. Lederman and Allan W. Bryant, *The Law Of Evidence In Canada, Second Edition* (Vancouver: Butterworths, 1999) at 623.

Before engaging in the interview process, determine which members of the community will be solicited for information. Ideally, a cross-representation of informants from the community will provide a greater understanding and insight into the oral history of a community. Obviously, as elders are the primary keepers and guardians of oral history, they may be the targeted group for interviews. However, one also has to be cognisant that younger members may be very knowledgeable about their traditions. It may be preferable to select members who are fluent in their Aboriginal language and/or are teachers of their culture and language. One determining factor for asking a participant for an interview is whether the proposed participant and interviewee are related or have something in common. A researcher is more likely to be received by an informant if the researcher is known to the informant. If the researcher knows that the informant may not share information with the researcher due to a personal conflict, the researcher may arrange to have another researcher conduct the interview and to have ongoing contact with the informant. If a non-community member researcher is conducting an interview, a community member known to the informant should be present.

There are a number of interview methods to be considered by a researcher. The most common method is to conduct one-on-one interviews. It maybe preferable to conduct the interview at the informants' residence or such other place where the informant is comfortable. If the information sought is in respect of a place, the researcher may ask the informant whether they want to conduct the interview at the place or just make a visit to the place. Conducting site visits always puts into perspective a story. Oral history may also be obtained by conducting group interviews with a family or several community members. In this way, the informants can work together to ensure that the oral history is complete and they can work together to try to resolve any gaps in a story.

If the research project is specific, the researcher may want to consider developing a written questionnaire for use during interviews. The questionnaire may include open and closed questions, covering such topics as follows:

1. hunting, trapping and fishing practices and places;

2. knowledge of family history;
3. identification of place names and trails;
4. uses of plants and trees;
5. cultural, spiritual, village, and historic sites;
6. laws, customs, and traditions;
7. dwellings and camps;
8. re-location of villages;
9. establishment of reserves;
10. role of Indian agent;
11. resource management;
12. education, training and schooling;
13. governance and legal system;
14. professions and trades;
15. treaties and agreements with the Crown and settlers;
16. methods of transportation and travel;
17. economy and trade;
18. ceremonies (birth, name, marriage, death);
19. rites of passage; and
20. creation and historical stories.

Often an informant will provide oral history information in a holistic fashion. Sometimes an informant will tell a story that weaves together current events, history and creation stories. According to Linda Tuhiwai Smith, “Many indigenous creation stories link people through genealogy to the land, to stars and other places in the universe, to birds and fish, animals, insects and plants.”<sup>48</sup> The greatest strength for a researcher is patience and intuition. Depending on the situation, a researcher may have to depart from a structured interview questionnaire to keep the respect of the informant and where the informant is not knowledgeable in a particular topic. For social science researchers, departing from a structured interview may be regarded as compromising the objectivity

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<sup>48</sup> *Supra* note 39 at page 148.

of research findings. However, for Aboriginal communities information is knowledge and knowledge is power. Departing from a structured interview should not be construed as compromising research results or compromising the ability for the Aboriginal community to present the information in court. For court proceedings, the information sought should be accurate, truthful and reliable.

It is important that the researcher be an active participant in the interview process. The researcher should not hesitate to engage in discussion, ask questions or provide their own insight. The listener is as important as the storyteller is for the sharing of their knowledge. In terms of collection of oral history, it is a very difficult process because it is not merely a "compilation of facts", but an understanding of the story, song or ceremony, which is meant to be conveyed. Through active participation, the researcher will be able to prepare a report document that best reflects the oral history shared.

It has been my experience that the informant will dictate how structured and formalized an interview will be. Usually, field research will be dictated by the setting and timing. The research will depend upon the level of trust between the researcher and informant. The researcher shouldn't expect that an informant will divulge or even share their life history and knowledge in the first interview session.

At the outset of the interview the researcher should advise the informant of the research work that you are undertaking, the information that you are seeking, and how the information will be utilized. The researcher is more likely to solicit information if the informant understands that his or her information will be a benefit to the community.

For preservation and cultural-retention purposes, it is preferable to use a tape-recorder and/or video recorder in an interview process. A researcher should always ask permission before recording an informant. If a researcher utilises recorder equipment, he or she should strategically place the equipment so that it is unobtrusive while making a clear recording. The informant should be given control when the recording starts and ends. Often an informant will convey interesting information before and after a

recording. The researcher should respect and keep confidential all information given off-the-record by informants.

For cultural or personal reasons, some informants may not want to be tape-recorded or video-taped at all. The researcher may then ask if she could make notes of some of the information shared. Even if the informant advises that no notes can be taken, the information shared by her is still valuable, because now the oral knowledge has been passed down and shared within the community. At the end of the day, the information shared is more important than the process in which it was obtained. However, researchers should not use dubious methods of obtaining information.

The researcher may consider providing the following items to the informant to refresh the informants' memory:

1. historical pictures;
2. archival documents;
3. pictures of important sites and cultural items;
4. copies of books and articles that cover the traditions and language of the community;
5. information provided by other informants; and
6. maps.

The researcher should possess a field research diary, which records important matters, such as: information about the informant; date, time and location of interview; notation of physical gestures; and information not recorded on tape. A field research diary will be of great assistance for the researcher for preparing reports and compiling the interview information.

### **Translation and Transcription**

If an informant provides information which is tape-recorded, a determination will have to be made whether to and how to convey the information into the written word. For researchers this will be the most difficult task.

### **Translating From An Aboriginal Language To The English Language**

If information is provided in an aboriginal language, a decision will have to be made whether to translate the information into the English language. There are a variety of methods that may be chosen to undertake this task. One method is to ask the informant to repeat the information in the English language, if that person has a working knowledge of the English language. A second method is to play the tape-recording to a translator, then have the translator signal for you to stop the tape, and the translator provides an oral translation in English which is tape-recorded. A third method is to have the translator listen to the tape-recording, and have the translator write down their translation.

Alternatively, a linguist may be utilised to record the information verbatim into a written form utilising a linguistical writing system developed for the Aboriginal language. The translation of information is a very time-consuming task, as often the tape-recording has to be rewound and re-played over and over again until the translator is satisfied with their translation.

The translation of information from an aboriginal language into the English language will always result in a loss of meaning. It is well known that Aboriginal concepts and ideas cannot be properly understood through translation texts. Translations, although opening up Aboriginal culture to others, may also compromise the accuracy and integrity of the oral tradition themselves. Many translators have communicated to me that they can not translate certain phrases and words, as there is no equivalent in the English language, particularly in relation to spiritual practices and beliefs, and creation stories. Translators may vary depending upon the translator being utilised and the information being translated. For example, a translator may be fluent in the Aboriginal language, but may not be able translate certain information due to:

- no prior experience with or knowledge of the information;
- being from a different dialectal area, or generation; and
- limited English vocabulary.

It has been my experience that translators may not translate certain “dirty” parts of a story and sometimes translators will embellish a story and add their own interpretation of the

story. Due to the variety of translation abilities and practices of translators, it may be beneficial to have information translated by more than one translator.

### **Transcribing Oral Information To Writing**

Like translation, transcribing information communicated orally to written form is a tedious and time-consuming task. Transcribing is achieved by playing the tape-recording, and writing down the information. A decision will have to be made whether the transcription will be done verbatim or edited for grammar. Even punctuation and spelling issues can pose challenges. At the outset, the information may be recorded verbatim, and the transcription presented to the informant to ascertain whether the informant wants the transcription left verbatim or edited for grammar. The researcher may need to read the transcript to the informant if the informant does not read or has sight problems.

Another issue, is whether to utilise Aboriginal words in the text of the written text by utilising linguistical spelling systems. Utilising Aboriginal words in a written text of the transcription and research report will often serve to indicate the importance of the word, particularly for place names, and underscores the difficulties of translation of words.

No matter how detailed a translator or transcriber is, once information is translated and transcribed meaning is always lost. The reader of the information cannot observe hand gestures, body movements, and settings that were integral to communication of the oral history. As well, the reader cannot hear voice inflections or know what discussion took place before and after the oral history was recorded.

### **Honourariums**

One of the most difficult issues for researchers is how to acknowledge the holder of the knowledge for sharing their oral tradition knowledge. Researchers should be guided by community and cultural protocol. The relationship must be reciprocal. In many communities, honourarium payments and/or gifts are the norm. The extent of the honourarium may depend upon the amount of time the informant spends with the

researcher. Some informants may refuse an honourarium, while others may want to be paid as much as you are being paid per hour. Sometimes a gift may be an appropriate honourarium. For example, books, articles, historical photographs, medicinal plants, chores, errands, trips, etc. The informant may be satisfied that she was able to pass on her knowledge to a younger member of the community.

### **Oral Traditions and Copyright Law**

Copyright of oral traditions will always be an issue for a community undertaking research.<sup>49</sup> Many aboriginal people are aware of the legal term “copyright”, but there is a great deal of misunderstanding as to what copyright means and how it applies to oral traditions. As copyright and oral traditions invoke justified concern for aboriginal communities, the legal implications of copyright surrounding the collection of oral traditions should be assessed by any community undertaking oral tradition research.

Copyright means the sole right of the owner of the copyright to publish, produce, reproduce or distribute, in any material form (book, paper, script, CD, tape, video), broadcast (TV or radio) or perform (concert, theatre, drama play, story-telling, lecture) any original literary, dramatic, musical or artistic work. Rights and obligations of copyright arise solely from the *Copyright Act*<sup>50</sup> in Canada.<sup>51</sup> The *Act* protects the form ideas or concepts are expressed in and imposes requirements to invoke that protection. Copyright gives the rights holder limited opportunity to profit from their original innovation and creativity, and to control how their work will be made available to the public. A holder of copyright has a right to publish their work and to prohibit others from doing so. A work protected by copyright can not be copied without the permission of the copyright holder.

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<sup>49</sup> A longer discussion of the legal implications can be found in Cynthia Callison’s article “Appropriation of Aboriginal Oral Traditions” *University of British Columbia Law Review* 1995 Special Issue 165. See also Brascoupe, Simon and Karin Endemann, “Intellectual Property And Aboriginal People: A Working Paper” (Ottawa: DIAND and Industry Canada, Fall 1999).

<sup>50</sup> R.S.C.1985,c.C-42.

<sup>51</sup> *Compo Co. v. Blue Crest Music Inc.* (1980), 45 C.P.R.(2d) 1 at 13 (S.C.C.).

The collection of oral traditions by aboriginal communities may give rise to some copyright protection. This protection is limited by the nature of copyright, which requires that the creative work satisfy the criterion of originality and be fixed in a material form. Section 5(1) of the *Copyright Act* requires originality for copyright protection of literary, dramatic, musical or artistic work. The work must originate from the author; must be the product of his labour and skill; and must be the expression of his thoughts.<sup>52</sup> Oral traditions express original and distinctive thoughts from individuals within Aboriginal communities. For example, a story based on earlier communication is created by the current storyteller when their version stresses, develops, deletes or modifies parts of the story. These changes express the storytellers own original thoughts and the story is now a product of the storytellers own independent creativity. Some stories are intrinsically original as they are only known by one storyteller. Other stories have well-known plots but still differ with every storytellers' version.

Sections 2 & 3 of the *Copyright Act* were interpreted to require expression of a work be in material form, capable of identification, and having permanent endurance for copyright protection to arise.<sup>53</sup> Oral traditions lack sufficient expression for copyright without some method of fixation. There are various methods of fixation, including writing, sound recording, audio-visual recording, and translations and transcriptions when reduced to a written form. Translations attract copyright when the interpreter has created an original work. Transcriptions which merely copy down stories verbatim may not evoke copyright as literary works require originality, labour, skill and creativity. Often a researcher will compile the oral traditions into collections or compilations of stories gathered from different storytellers. The compiler may hold copyright to the compilation while the story-teller(s) may maintain any copyright to their stories. This could generate multi-layers of protection for the story-teller, translator, editor, and compiler.

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<sup>52</sup>*Canadian Admiral Corporation v. Rediffusion Inc.* (1954), 20 C.P.R.75 at 91 (Ex.Ct.).

<sup>53</sup>*Ibid.*, at 86.

Section 6 of the *Copyright Act* limits copyright for a term of the author's life plus fifty years or the collector's life plus fifty years, independent of individual contributors' copyright terms.<sup>54</sup> At the end of the term, copying and resetting the work can begin. Oral traditions could be legally appropriated at the expiration of the copyright term.

### **Solutions To Copyright**

One illustration is for an Aboriginal community to dictate contract terms to researchers conducting oral history studies which specify that the Aboriginal community and informants retain copyright to all information including oral traditions collected and maintain confidentiality for some matters such as spiritual practices. Quite often an Aboriginal community will reach an agreement with the informant whereby the community holds the copyright in trust for the informant. Often government drafted contribution funding agreements will include clauses that provide the government with ownership of the copyright of the research and studies. Accordingly, an Aboriginal community has to be diligent to ensure that copyright to oral traditions is not relinquished to government in an agreement. Another illustration is to obtain releases and agreements from academics and professionals who are collecting oral traditions in Aboriginal communities that provide the community and/or the informants copyright ownership to the information collected. It should be noted that academic thesis are automatically available to the public when completed and that other academic research is regularly published. With respect to anthropological and archaeological research as a component of resource development, joint terms of reference should be negotiated for copyright ownership and permitted use of copyright information.

### **Historical Documents and Affidavits**

Occasionally, researchers may come across historical documents that contain transcriptions, translations, and interpretations of oral history, or affidavits of community members utilized in earlier court cases. If these documents are over thirty years old, they may be admissible in litigation as “ancient documents”, if the document,

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<sup>54</sup>*Chappell & Co. v. Redwood Music Ltd.*, [1981] R.P.C. 337 at 348 (H.L.).

...is produced from proper custody, is presumed in the absence of circumstances of suspicion, to have been duly signed, sealed, attested, delivered, or published according to its purport.<sup>55</sup>

Accordingly, when Aboriginal communities are conducting and compiling oral history research, they should treat the research results with a view that they may be utilized in litigation at a later date. To increase the chances of having an oral history document admitted as evidence at a later date, the document should be created and sworn as an affidavit or exhibited as part of an affidavit.

In certain court proceedings, evidence may be allowed to be produced in affidavit form. Often Aboriginal communities will often consider having their elders swear affidavits to ensure their information is preserved, particularly for lengthy court proceedings.

McEachern J., as he then was, in the lower *Delgamuukw* decision of the British Columbia Supreme Court, refused to admit the territorial affidavits of the Gitksan and Wet'suwet'en peoples based upon the reputation exception to the hearsay rule, as he questioned "the degree to which the declarations amounted to a reputation because they were largely confined to the appellants' communities"<sup>56</sup>. However, the Supreme Court of Canada in the *Delagmuukw* decision found that McEachern was in error by excluding the affidavits of the Gitksan and Wet'suwet'en peoples:

... the trial judge also erred in his treatment of the territorial affidavits filed by the appellant chiefs. Those affidavits were declarations of the territorial holdings of each of the Gitksan and Wet'suwet'en houses and, at trial, were introduced for the purposes of establishing each House's ownership of its specific territory.<sup>57</sup>

The Court further stated that,

The affidavits rely heavily on the declarations of deceased persons of use or ownership of the lands, which are a form of oral history. But those declarations are a kind of hearsay and the appellants therefore argued that the affidavits should be admitted through the reputation exception to the hearsay rule.<sup>58</sup>

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<sup>55</sup> *Halfway River First Nation v. B.C. (Ministry of Forests)* [1999] C.N.L.R. at para. 117.

<sup>56</sup> *Supra* note 1 at para. 104.

<sup>57</sup> *Ibid.*, at para. 102.

<sup>58</sup> *Ibid.*, at para. 103.

The Court found it “problematic” that the trial judge excluded the territorial affidavits. Accordingly, the Supreme Court of Canada has provided authority that affidavits of Aboriginal people that contain oral history are admissible as evidence.

### **Conclusion**

With the Supreme Court of Canada’s acceptance of oral history evidence to prove Aboriginal rights and title, Aboriginal communities are in a position to control their destinies by conducting oral history research in furtherance of their rights and title. As well, Aboriginal communities can utilize oral history to safeguard their treaties and agreements with the Crown. Knowing the parameters of legal thinking on the existence of Aboriginal rights and title, Aboriginal communities can undertake oral history research in a fashion that is respectful and in keeping with cultural norms while satisfying the evidentiary requirements of courts. Undoubtedly Aboriginal communities will at one time or another have to conduct oral history research to protect or affirm their rights and title. Through planning, Aboriginal communities can ensure that the research that they carry out is both meaningful and relevant for the purpose that it is required. By considering and/or adopting the practical considerations set forth in this paper, Aboriginal communities will be in a more knowledgeable position to carry out their oral history research. Oral history is just one tool that Aboriginal communities can utilize in their goal of self-determination over their lands and resources. In one instance, an Aboriginal Nation undertook oral history research. This research was utilized by the Chiefs of the Aboriginal Nation to provide them with information so that they could make an informed decision on a proposed land-use development. Oral history research utilized in this fashion is an exercise of self-determination and self-government.

The *Delgamuukw* decision showed an awareness by the court that oral histories are the bona fide record of Aboriginal existence in Canada. The *Delgamuukw* decision has provided much hope to Aboriginal communities. This can be seen as a positive step forward in the enlightenment of Canadian society regarding Aboriginal peoples. However, the effort to fit oral history into the existing structure and to satisfy the legal tests will require a lot of hard work for Aboriginal communities. With good research,

many Aboriginal communities can overcome barriers so as to use their knowledge to protect and assert their Aboriginal rights and title, and treaty rights. History will show whether courts have come to terms with the oral history of Aboriginal peoples. No matter what how courts interpret oral history, oral history is the very foundation of Aboriginal communities. Oral history is about learning, reflecting and extending on the past for the benefit of future generations.