

LISTENING FOR A CHANGE: THE COURTS AND ORAL TRADITION*

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 that passed by her window, and she knew the stories that made sacred each place where they 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 reservation 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 the knowledge Aunt Irene carried a little more. I can remember visiting her house with Grandpa Josh (her brother), my mother, and 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 great details about my great-great-great grandfather and grandmother, and everyone down through their line until my generation. I

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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 would talk about, than to any unusual behavior 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 Masters thesis I was working on at the time, which was a genealogical legal history of the Cape Croker Indian reserve.¹ The framework she provided helped me make sense of the fragmentary archival material that I had been sorting through prior to that visit. It was as if she had presented the picture of the puzzle I was building, but which I still held in scattered pieces up until that point. Her wonderful narrative helped me to resolve the papered remnants of our history into something approaching a recognizable representation. I later triangulated her stories with those of my great-uncle Fred, "Chick" (Walter Johnson), John Nadgiwon, 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

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¹ John Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 *Osgoode Hall Law Journal* No. 2 at 291-354. Cape Croker is also known as the Chippewas of the Nawash reservation. The people are Anishinabek, sometimes also called Ojibway.

my great-great grandfather's treaty-making activities that simply were not available in the written record. Peter Kegegone Jones, my great-great grandfather, had signed two treaties in 1854² and 1857³ that promised many material goods and services in return for non-native people settling on our territory. In fact, Peter's signature was the first one on the 1857 treaty. These treaties covered over 500,000 acres of prime land in South-western Ontario, extending east from Goderich on Lake Huron to Arthur in central-south-western 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 that included increasing capital payments through trust fund deposits and payments,⁴ large reserves,⁵ the provision of education, the building of infrastructure (such as roads, public buildings and docks), housing,⁶ hunting, fishing, and timber rights.⁷ In fact they

² For the text of Treaty 72 see, Canada, *Canada: Indian Treaties and Surrenders*, (Ottawa: Queens Printer 1891-1912) at 195 - 196.

³ For text see Ibid. at 213.

⁴ "We want a written paper from the Government saying that the principle 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". PAC RG 10, vol. 541, pp. 101-109, "T.G. Anderson, Superintendent of Indian Affairs, to the Chiefs of the Central Superintendency".

⁵ "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." Ibid.

⁶ 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.

PAC RG 10, v. 117, pp. 169, 150-169, 202. "Report on Negotiation Proceedings Regarding surrender of the Saugeen Tract (Treaty # 72), 3 November 1854."

were told "that from the sale of the land [they] would soon have a large income, would all be able to ride in carriages, roll in wealth and fare sumptuously every day".⁸ Yet, despite this detail, I discovered that the written record was incomplete. It was only through Aunt Irene's oral accounts that a fuller picture emerged as to why such agreements were made. She told me that despite its monetary implications, Peter and his people signed the treaty first and foremost as an exercise of self-respect and self-determination. Many in the band wanted to remove themselves from the destructive influences of alcohol that was becoming a problem in their community in Owen Sound.⁹ This insight deepened my understanding of why my ancestors would agree to their removal from their productive farms and hunting grounds as part of their treaty negotiations. It helped me to appreciate the great value of oral tradition in compiling a more complete representation of the past.

⁷ A band petition to Queen Victoria in 1860 indicates what they were promised during treaty:

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 ...

PAC RG 10, v. 266 at 163, 303-309., "Petition of Cape Croker to Queen Victoria", April 17, 1860.

⁸ Enemikeese (Conrad 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 of Canada West* (London: William Nichols Printer, 1867) at 51.

⁹ Ten years after my visit with Aunt Irene I found a document that contained the same information she had orally related to me. The letter was written after 1985 (no specific date given) in her own handwriting and addressed to Peter Schmalz, a teacher who had done research among the Anishinabek of southern Ontario. Her account reads:

My People came here from what is now Brooke close to Owen Sound. The reason for moving from that well-established village was the coming of the pioneer farmers and the fur traders. Many of these pioneers were squatters on Indian land. They also brought with them the "Demon Drink" as my grandfather called intoxicants. The idea, of these white people, was to get the Indians to become drunkards who would do anything for a bottle of "firewater", from giving away his furs to giving up his children or his land. Chief Peter Kegedonce 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.

1) THE CHALLENGES OF ORAL HISTORY

While I saw the value of oral tradition, I also recognized that it could present some unique challenges to making sense of what went before. Oral history presents both risk and insight because it simultaneously intermingles the events that took place in the past *and* the meaning that people ascribe to those events.¹⁰ As the Royal Commission on Aboriginal Peoples noted "oral history is enmeshed with the stories of a lifetime".¹¹ The blending of incident and interpretation presents special problems of verification for oral history sometimes different from those contained in a documentary reconstruction of the past.¹² For example, many of my Aunt Irene's stories about my great-great grandfather contained references to supernatural events which would potentially undermine their credibility 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 of their coupling with these more unorthodox elements.

From my study of Anishinabek (Ojibway) documentary history I was familiar with the literature that cast doubt on the reliability of oral traditions in drawing inferences and conclusions about the past. Nicolas Perrot, a primary and leading source for Anishinabek

¹⁰ Alessandro Portelli, *The Death of Luigi Trastulli: Form and Meaning in Oral History* (Albany: State University of New York Press, 1991) at 50.

¹¹ Canada, *The Report of the Royal Commission on Aboriginal Peoples, Vol. 1: Looking Forward, Looking Back* (Ottawa: Supply and Services, 1996), Chapter 3. I have used the terms "oral history" and "oral tradition" interchangeably in this paper. 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 paper will reveal, I believe that the product and process of communication are inseparably intertwined.

history wrote about Aboriginal oral traditions in the most disparaging of terms. For example, he observed that: “Among them there is no knowledge of letters or of the art of writing; and all their history of ancient times proves to be only confused and fabulous notions, which are so simple, so gross, and so ridiculous that they only deserve to be brought to light in order to show the ignorance and rudeness of these peoples.”¹³ I knew that such opinions would be hard to shake. Many early writers of Anishinabek history shared Perrot’s critical views about oral tradition, although such judgement was not uniform.¹⁴ Despite some dissent, an unreflective treatment of oral tradition still infused the prevailing culture of inquiry. I knew that “the weight of history” was against me in interrogating these views.¹⁵

I also knew that these prejudices could find expression in the more contemporary literature too. Robert Lowie, an influential American anthropologist wrote that he could “not attach to oral traditions any historical value whatsoever under any conditions whatsoever”.¹⁶ Lowie had such a low view of oral tradition that he concluded that if their

¹² Though the problems of verification for written and oral sources is not always as different as some might assume, see Paul Thompson, *The Voice of the Past: Oral History*, 3rd ed. (New York: Oxford University Press, 2000) at 118-125.

¹³ Nicolas Perrot, Memior on the Manners, Customs, and Religion of the Savages of North America in Emma Blair, ed., *The Indian Tribes of the Upper Mississippi Valley and Region of the Great Lakes, Vol. 1* (Cleveland: Arthur H. Clark, 1911) at 31.

¹⁴ See Bruce Trigger, *Natives and Newcomers: Canada’s Heroic Age Reconsidered* (Montreal: McGill-Queen’s Press, 1985) at 3-49. Perhaps, not surprisingly, the writings of early Anishinabek authors treated in a more favourable light, see William W. Warren, *The History of the Ojibway Nation* reprint (Minneapolis: Ross & Haines, 1970); G. Copway, or Kah-ge-ga-gah-bowh, *The Traditional History and Characteristic Sketches of the Ojibway Nation* 1972 Coles Facsimile edition reprint (London: Charles Gilpin, 1850); Peter Jones, *Life and Journals of Kah-ke-wa-quo-na-by* (Toronto: Anson Green at the Wesleyan Printing Establishment, 1860).

¹⁵ For discussions of the use of “weight of history” arguments against Aboriginal peoples see Joseph Singer, *Well Settled? The Increasing Weight of History in American Indian Land Claims* (1994) 28 *Georgia Law Review* 481.

¹⁶ Robert Lowie, *Oral Tradition and History*, (1915) 17 *American 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

“primitive notions tally with ours, so much the better for them, not for ours”.¹⁷ In the same vein the noted English historian Hugh Trevor-Roper also observed that it was inappropriate to write history based on oral traditions. He counseled his fellow historians that “we should not amuse ourselves with the unrewarding gyrations of barbarous tribes in picturesque but irrelevant corners of the globe; tribes whose chief function in history, in my opinion, is to show to the present an image of the past from which, by history, it has escaped”.¹⁸ Such views led Trevor-Roper to conclude that only people with written history should be studied and write “the rest is darkness...and darkness is not the subject of history”.¹⁹ This 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 being like 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 then would whisper a message in a child’s ear sitting within the circle. The child who received the message

Indian’s 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. “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* (London: McMillan Press, 1978) at 69. It is possible that at first the Assiniboine did not view the coming of the Europeans and the horse as very significant and thus did not select this event as worthy of recording in their traditions.

¹⁷ Robert H. Lowie, *Oral Tradition and History* (1917) 30 *Journal of American Folklore* 161 at 163.

¹⁸ Hugh Trevor Roper, *The Rise of Christian Europe* (New York: 1965) at 9.

would then have to pass it along to the person next to them, 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, I questioned whether this common analogy was appropriate for considering the accuracy of tribal societies’ oral traditions. I noted three potential problems. First, for many communities the transmission of oral tradition is not conveyed in such a singular, detached and decontextualized way. As such, the game of telephone oversimplifies the process of transmission in Aboriginal tradition. Oral history in numerous Aboriginal groups is conveyed through interwoven layers of culture that entwine to sustain national memories over the lifetime of many generations. The transmission of oral tradition in these societies is bound up with the configuration of language, political structures, economic systems, social relations, intellectual methodologies, morality, ideology and their physical world. These factors assist people in knitting historic memories more tightly in their minds. There are many types of traditions that are a product of this process: memorized speech, historical gossip, personal reminiscences, formalized group accounts, representations of origins and genesis, genealogies, epics, tales, proverbs and sayings.²⁰ In their aggregation, each of these cultural strands are wound together and reinforced by specific practices. These practices include such complex customs as pre-hearing preparations, mnemonic devices, ceremonial repetition, the appointment of

¹⁹ Ibid.

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

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 had 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 so completely when it reaches 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. A person might make changes to oral messages, perhaps not so much to receive the benefit of greater entertainment, but to obtain more material benefits that they hope will accrue to them because of the changes. In the case of traditions that are brought forward by Aboriginal peoples to establish their rights, there is no denying the point that there are many incentives to recount them in a way that favours the establishment of their case. They 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 that preserve accounts of tradition in a way that sustains a more multi-layered 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 which 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, there is “overwhelming evidence that many oral traditions do not remain consistent over time”.²¹ Professor von Gernet cited three reasons for the lack of consistency in oral traditions. In support of his position he first observed that memory is unreliable, and is subject to permutation and change. Second, he wrote that oral tradition is based on recycled memories, which enhances their potential for error and omissions over numerous repetitions. Third, he argued that oral traditions are adversely influenced by the context in which they are compiled. Professor von Gernet submits that since oral traditions are spoken under the influence of present concerns and values, this contaminates

²¹ Alexander 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.

their reliability for providing a true explanation of past events.²² Professor von Gernet's observations deserve attention. It is true that oral traditions can change over time and that they can be influenced by present concerns and events.

I want to unpack Professor von Gernet's observations however, and simultaneously agree and disagree with him. He gives a negative spin to the variability of oral tradition that is not always warranted. He employs words like "unreliable", "error" and "contaminate" that are not appropriate in certain circumstances. First of all, it is important to note that oral traditions can remain quite consistent through generations of time and thus can be reliable for providing a good explanation of past events. In such cases, Professor 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, Professor 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, it only 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 Professor von Gernet's negative labels. Sometimes it is just the case that there is something quite different going on in the transmission of oral history than the mere recording of past events, which can lead to its changing over time through adopting more contemporary elements. This does not mean

²² In a similar vein, Professor Tom Flanagan has also questioned uses of oral history. He has recently written 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 also apparent that written history can also violate its own rationality, can contradict facts established by overwhelming documentary evidence, and that different accounts can contradict each other. For a fuller examination of these points see Tom Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen's Press, 2000) Chapter 4.

that oral history is of no value, it just means that it sometimes (though not always) 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 that is consistent with its original formulation while it is being circulated. 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 to them. That is to say, with certain oral histories a whole different game may be being played than the verbatim transmission of information. In some oral history, simply passing the message around the circle without trying to make it part of each person may not be the object of the exercise. If we were children involved in such a game, we would have to be careful that we did not judge the people playing the game by the wrong rules. Similarly, lawyers, judges and historians observing and participating in the transmission of oral history should be cautious in judging the differing and sometimes shifting purposes of oral tradition. This counsel may be even more fitting when we recognize that sometimes the game we think we are playing can even shift back and forth in mid-stream.

2) THE "FACTS" ABOUT ORAL HISTORY

The multifaceted elements of oral tradition can make working with it difficult however. 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: "The importance of oral history may not lie in its adherence to fact, but rather in its departure from it, as imagination, symbolism and desire emerge".²³ So called "wrong" statements can still be psychologically true and reveal more about the people and events under study than the mere fact being chronicled. A group's understanding of their own past is as much a part of history as are more visible facts. "What informants believe, is indeed a historical fact (that is, the fact that they believe it), as much as what really happened".²⁴

For example, the Lemba of southern Africa have oral traditions that are regarded by some as evidence of their historical migrations. If their stories are true, then they significantly contribute 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 on their history. For two thousand five hundred years the Bantu speaking Lemba of southern Africa say they have kept alive an oral tradition about their Jewish ancestry and exodus from Judea to Africa led by a man named Buba.²⁵ They say that after travelling to the southern Arabian peninsula, they eventually settled in a place called Senna, an ancient city,

²³ Von Gernet, *supra*, note 21 at 51.

²⁴ *Ibid.* at 50.

²⁵ Tudor Parfitt, *Journey to the Vanished City: The Search for the Lost Tribe of Israel* (1993).

in present day Yemen. After many generations in Senna, for reasons not clear from their traditions, the Lemba migrated again. They journeyed across the Red Sea into eastern Africa, headed south, and eventually resettled in their present location in modern day South Africa. They say that: “we came from the north, from a place called Senna. We left Senna, we crossed Pusela, we came to Africa and there we rebuilt Senna.”²⁶ The Lemba refuse to eat pig-like animals, practice male circumcision, have twelve tribes, or clans, and maintain numerous practices that are found among many Jewish people. Not surprisingly, there were many people who doubted the veracity of the Lemba’s claims.²⁷ There is no record of Buba in written Jewish history, and there is “no shortage of those who questionably claim to be the sons of Abraham”.²⁸

However, despite understandable cynicism, recent DNA analysis suggests that Lemba oral traditions may be correct. A team of geneticists has found that many Lemba men carry a set of DNA sequences that are distinctive of the Jewish cohanim priests believed to be the descendants of Aaron.²⁹ These researchers discovered this link by examining material from the Lemba’s Y chromosome samples, which are not shuffled every generation and therefore do not obscure the lines of individual descent from father to son.³⁰ The genetic signature is also common among Ashkenazi and Serphardic priests,

²⁶ Nicholas Wade, DNA Backs a Tribe’s Tradition of Early Descent From Jews, *The New York Times*, Sunday May 9, 1999, page 1.

²⁷ See Gina Buijs, Black Jews in the Northern Province: A Study of Ethnic Diversity in South Africa (1998) 21 *Ethnic and Racial Studies* 661.

²⁸ Desmond Christy, *The Guardian (London)*, March 16, 1999, page 19.

²⁹ Wade, *supra*, note 2. The team of geneticists were Dr. Karl Skorecki, Technion Israel Institute of Technology; Dr. Michael Hammer, University of Arizona; Neil Bradman, Chair of Centre for Genetic Anthropology at University College London; David B. Goldstein, population geneticist, Oxford University, England.

³⁰ There has been an exclusion of outside males among the Lemba which would limit the Y chromosome additions to the community and may explain why the cohen modal haplotype is so pervasive within this group. *Ibid*.

and rare or absent in non-Jewish populations.³¹ What is interesting about Lemba genetic patterns is that the cohen-associated gene signature is present at the same high rates as found in the Ashkenazi and Sepharic 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 about their Jewish ancestry and historic migration to South Africa.

The oral history of the Lemba is therefore an important addition to understanding their society on two different levels. On the one hand the tradition may be important evidence of a significant historical migration that seems to be subject to scientific verification. This conjunction of oral history and external data demonstrates that there may be instances where oral history and other methodologies converge and can be used to verify one another.³² On the other hand the Lemba's account is also important because it reveals much about the Lemba's interpretation of their historical past, which would be the case even if other studies eventually reveal that the Lemba's 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

³¹ Ibid. Dr. Goldstein has found that 45% of Ashkenazi priests and 56% of Sephardic priests have the cohen gene signature, while in Jewish populations in general the frequency is 3 – 5%.

³² There have been some attempts to establish the authenticity of Aboriginal traditions through genetic corroboration. However, the inferences that can be drawn from these studies are inconclusive: see J.H. Greenburg, C.G. Turner, and S.L. Zegura, *The Settlement of the Americas: A Comparison of the Linguistic, Dental and Genetic Evidence* (1986) 27 *Current Anthropology* at 477-497; Theodore Schurr et al, "Amerindian Mitochondrial DNA Have Rare Asian Mutations and High Frequencies, Suggesting They Derived from Four Primary Maternal Lineages, (1990) 46 *American Journal of Human Genetics* 613-623. Milford Wolpoff in Erik Trinkaus, ed., *Emergence of Modern Humans: Biocultural Adaptations in the Late Pleistocene* (Cambridge: Cambridge University Press, 1989); Michael Brown, *The Search for Eve* (New York: Harper and Row, 1990) see particularly at 315. For an interesting overview of this field see Jared Diamond, *Germs, Guns and Steel: The Fate of Human Societies* (New York: W.W. Norton, 1997).

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 as described.

3) SORTING THROUGH THE PAST

This short description of the Lemba's oral history demonstrates that making use of oral history can get complicated though, and they do not even represent the hardest case. With the Lemba it seems that the past event may have actually occurred, and that the meaning they attach to this event can also tell us a lot about their identity. What do we do, however, in cases where we can't decide if the described past event actually took place? 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 provides an insight into the societies' past collective beliefs, even if the event described the tradition 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. This was the court's and early scholar's traditional approach. While this 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 groups psychological understanding of their past.

Another answer to the challenges supplied by oral tradition is to treat it as a completely different intellectual exercise from conventional historical work.³³ This

³³ Royal Commission on Aboriginal Peoples, *supra*, note 11.

approach was the official view of the Royal Commission on Aboriginal Peoples as they broadly contrasted Aboriginal and non-Aboriginal approaches to history in their final report.³⁴ The tendency to dichotomize oral and documentary history and treat the purposes of both enterprises as completely different does have certain attractions. There is no question that different emphases are broadly present in Aboriginal vs. non-Aboriginal historical traditions, which Royal Commission labeled as documentation, progress, objectivity, 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

³⁴ Ibid.:

The non-Aboriginal historical tradition 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 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 even being described that it would be arrogant to classify or characterize the event exactly for all time.

In the Aboriginal tradition the purpose of oral accounts is broader than the role of written history in western societies. It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition or to validate claims of a particular family to authority or prestige. Those who hear oral accounts draw their own conclusions from what they have heard, and they do so in the particular context (time, place, situation) of the telling. Thus, the meaning to 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

histories must be closely scrutinized, and case-by-case analysis must be supplemented with an awareness of the complex relationship in these approaches.³⁵

The similarities between oral and written history are legion. A significant portion of the documentary record started its life as oral history.³⁶ This means that each format can encounter similar challenges in verification and authentication, though this may occur in different ways.³⁷ Each format may also be subject to substantial revision, permutation and change.³⁸ Just as there are different written versions of how and why Canadian

³⁵ Recently there has been an explosion of materials that treat oral history in a sophisticated manner, demonstrating caution against over-generalization and illustrating careful case-by-case analysis. See Donald L. Frixco, ed., *Rethinking American Indian History* (Albuquerque: University of New Mexico Press, 1997); Dale Standen and David McNab, *Gis Das Winan: Documenting Aboriginal History in Ontario* (Toronto: Champlain Society, 1996); Blair Stonechild and Bill Waiser, *Loyal Till Death: Indians and the North-West Rebellion* (Calgary: Fifth House, 1997); Darwin Hanna and Mamie Henry, *Our Tellings: Interior Salish Stories on the Nlha7kapmx People* (Vancouver: U.B.C. Press, 1996); Hamar Foster and Alan Grove, *Looking Behind the Masks: A Land Claims Discussion Paper for Researchers, Lawyers and Their Employers* (1993) 27 *U.B.C. Law Review* 213 Elizabeth Tonkin, *Narrating Our Pasts* (Cambridge: Cambridge University Press, 1992); David Stricklin and Rebecca Sharpless, eds., *The Past Meets the Present: Essays on Oral History* (University Press of American, 1987); David Cohen, *The Ramapo Mountain People* (New Brunswick, NJ: Rutgers University Press, 1974); David Cohen, *Folk Legacies Revisited* (New Brunswick, NJ: Rutgers University Press, 1995); Alessandro Portelli, *The Death of Luigi Trastulli: Form and Meaning in Oral History* (Albany: State University of New York Press, 1991); Alessandro Portelli, *Oral History and the Art of Dialogue* (Madison: University of Wisconsin Press, 1997); Anne Salmond, *Between Worlds: Early Exchanges Between Maori and Europeans 1773-1815* (Honolulu: University of Hawaii Press, 1997); Anne Salmond, *Two Worlds: First Meetings Between Maori and Europeans 1642-1772* (Toronto: Viking, 1991); Judith Binney, *Redemptive Songs: A Life of a Nineteenth Century Maori Leader* (Honolulu: University of Hawaii Press, 1997); Michael Kwaioloa and Ben Burt, *Living Tradition: A Changing Life in the Solomon Islands* (London: British Museum Press, 1997); Roger Keesing, *Custom and Confrontation: The Kwaio Struggle for Cultural Autonomy* (Chicago: University of Chicago Press, 1992); Keith Basso, *Western Apache Raiding and Warfare* (Tucson: University of Arizona Press, 1971).

³⁶ Written history is often based, in the first instance, on oral history. For example, Herodutus 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 David Henge, *Oral Historiography* (New York: Longman, 1982) at 7-20. For an examination of the problems involved in re-transcribing written sources, see Patricia Kennedy, *Treaty Texts: Can We Trust the Written Word, Social Sciences and Humanities Research Exchange*, Vol. 3, No. 1, at 1, 8, 20-25.

³⁷ Vansina, *supra* note 27 at 186-201.

³⁸ The constructionist nature of historical knowledge means that one cannot study the written histories of any period or culture without discovering numerous contradictions, permutations and changes, see J.W.

confederation occurred,³⁹ so there are different oral accounts of how the Ojibway came to live on their traditional territories in southern Ontario.⁴⁰ The diversity of interpretation about these events is not necessarily a result of the way in which they were transmitted, but instead reflects the fact that there are different interpreters of history who have different interests in its reproduction.⁴¹ If called upon to recount an important event from our personal or family history, each of us might try to demonstrate a different aspect of the same occurrence to sustain our deliberate or unexamined values and beliefs. We may also write with present values in mind, and pass on both the biases and insights of our generation.⁴² We are all socialized and acculturated in different ways. These various

Meiland, *Skepticism and Historical Knowledge* (New York, 1965) and L.J. Goldstein, *Historical Knowing* (Houston, 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, "history is the re-enactment in the historian's mind of the thought whose history he is studying", see *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 Oakeshott, another leading philosopher of history, shares a similar view of history, see *On History* (Oxford: Blackwell, 1983), but neither scholar would suggest that history is not rife with contradictions, even if it because historians fail to properly access the appropriate thoughts behind past events.

³⁹ A glance through M. Brook Taylor, ed., *A Reader's Guide to Canadian History 1: Beginnings to Confederation* (Toronto: University of Toronto Press, 1994) indicates the range of opinion on this matter.

⁴⁰ I know of three different accounts that about 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, another involves their migration from the Lake Superior area. These have been various described in Selwyn Dewdney, *The Sacred Scrolls of the Southern Ojibway* (Toronto: University of Toronto Press, 1975); Basil Johnson, *Ojibway Heritage* (Toronto: McClelland and Stewart, 1976) 13-17; George Copway, *The Traditional History*, supra, note 14 at 20; Eddie Benton Benai, *The Mishomis Book: The Voice of the Ojibway* (Hayward, WI: Indian Country Communications, 1988).

⁴¹ Collingwood makes this point throughout his book in his discussion of various historians, *The Idea of History*, supra, note 38.

⁴² Benedetto 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 thus 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*, Eng. Trans. (1941) at 19. E.H. Carr also makes this point in his book *What is History*, 2nd ed. (Toronto: Penguin Books, 1990) at 16-20.

patterns of individual and cultural choice shape how we view the world.⁴³ Some will regard certain influences in historical development as primary moving forces, while others will take their cues from very different factors. All historical observation and interpretation, oral and written, is coloured by differential life experience and training.⁴⁴ While these challenges may be less apparent to those 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 who engage in its transmission.⁴⁵

Given the pervasiveness of western culture in understanding oral tradition, in the end, it may therefore be that people are more generally suspect about its veracity because it does not accord with prevalent historical and legal methodologies. When critiquing the use of oral history this 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

⁴³ Charles 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: Harvard University Press, 1995) at 148-149.

⁴⁴ R. Gordon and W. Nelson, An Exchange on Critical Legal Studies (1988) 6 *Law and History Review* 139, 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.

What is History, supra, note 42 at 11.

⁴⁵ E.H. Carr observed:

The historian, then, is an individual human being. Like other individuals, he is a social phenomenon, both the product and the conscious or unconscious spokesman of the society to which he belongs; it is this capacity that he approaches the historical past.

What is History, supra, note 42 at 35.

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 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?⁴⁶ Is it because there is a value system and unexamined bias built in to 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 he was pulled out into the air?

In examining history therefore, 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

⁴⁶ Memory may have certain advantages over writing:

The mind is still the most sophisticated recording and preserving device that humans have found. Its storage capabilities have not been fully tested. It is portable, does not need much temperature and humidity control, and is capable of complex storage, retrieval, and correlation tasks. Knowledge stored in the mind can be transmitted or transferred to other minds, and that knowledge invests those other minds with abilities to use and understand the information. Most important, a matter that is kept in mind is also *kept* in mind. Matters on paper are more easily stored and forgotten.

Paul Williams, Oral Traditions on Trial, *in Gis Das Winan*, supra, note 39 at 30-31.

about the speakers' relationship to their history".⁴⁷ When I was working with the oral traditions of Cape Croker I remember wrestling with similar questions.

To judge oral tradition as proof of past events I looked for a certain degree of consistency within the accounts and stories I received. I talked to people from different families on the reserve (Jones, Johnston, Nadjiwon, Akiwenzie). I spoke to people of different generations (elders, older, cousins), and of different but closely associated communities (Saugeen, Wasauksing, Walpole, Manitoulin). I also compared these oral accounts with written materials that dealt with the same events. This was a way of scrutinizing both the oral and written sources: to show where one or the other may have gaps, errors or other deficiencies as proof of past events. In such comparisons it is not always the case that oral sources are corrected by written sources, at times oral tradition may prompt significant revisions to the written record which have falsely misconstrued a past occurrence. In order to test the traditions I received for this kind of proof, I searched family histories, published scholarly works, graduate theses, missionary journals, Indian agency correspondence, surveyors notes, band council minutes, newspaper articles, individual's private papers, "explorers" travel maps and books, and government census material.⁴⁸

Yet, as discussed, 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.

⁴⁷ Alessandro Portelli, *The Death of Luigi Trastulli: Form and Meaning in Oral History* (Albany: State University of New York Press, 1991) at 50.

⁴⁸ Genealogy of Law, supra, note 1.

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 "outs" the researcher as a participant in the creation of historical meaning, despite attempts to "tread lightly" and not interfere with the informant's memory. As hard as I tried, it was impossible for me to hide behind a façade of objectivity when I interacted with others in the interviews and thereby became involuntarily complicit in the structure of their narratives.⁴⁹ In many respects, though not all, an interviewer implicitly defines the roles of the parties and establishes the basis of narrative by opening the conversation. My seemingly neutral requests would shape the agenda and form of the interview, and thereby influence its chronology, themes, subject matter, and style.⁵⁰ Fortunately, these agendas were constantly subject to re-negotiation throughout the

⁴⁹ "Remembering in an interview is a mutual process, which requires understanding on both sides", Paul Thompson, *The Voice of the Past: Oral History*, 3rd ed. (New York: Oxford University Press, 2000) at 157.

⁵⁰ Alessandro Portelli, *Oral History and the Art of Dialogue* (Madison: University of Wisconsin Press, 1997) at 11-12.

interview as we unconsciously tussled with one another over the significance, hypothesis, analysis, and assumptions that structured our interaction.⁵¹ Nevertheless, the fiction of non-interference in such interactions was hard to sustain when the very process of inquiry shaped the understanding of oral history.⁵² Therefore, my active and often not too hidden role in the construction of the narrative made another tool very valuable for understanding oral history. The ability to give something significant in return throughout the interview could establish a better understanding of the events under study. If I could draw on my knowledge to ask more particular 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 could be a valuable tool that helped in understanding oral history.⁵³

The questions and qualities that make oral history more intellectually accessible are available to researchers, lawyers and decision-makers that 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

⁵¹ David Stricklin and Rebecca Sharpless, eds., *The Past Meets the Present: Essays on Oral History* (University Press of American, 1987) at 12.

⁵² Elizabeth Tonkin, *Narrating Our Pasts* (Cambridge: Cambridge University Press, 1992) at 1-4.

the "factual" occurrence of past events. Internal cross-referencing reveals the "factual" truth of the community's perception of the past through the researcher's relationship of the researcher to the peoples' knowledge under study. Keeping these tools in mind might help those interested in using oral history to understand actual past events, people's 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.

4) ORAL HISTORY IN THE COURTS

Similar to my experiences with Aunt Irene, and other challenges discussed in this paper, the difficulties present in understanding oral tradition have been encountered in the context of courtroom practice and jurisprudential principle.⁵⁴ Through the years Aboriginal oral history has led judges to label Indigenous peoples as, among other things, "ignorant",⁵⁵ "primitive",⁵⁶ "untutored",⁵⁷ "savage",⁵⁸ "crude...simple, uniformed and

⁵³ Ibid. at 67-69.

⁵⁴ One backhanded example of the bias against Aboriginal peoples and their capacity to properly give evidence is found in an early *British Columbia Evidence Act* that was only repealed in 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 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. 13 Vic. C. 2, s. 5. Repealed 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 legal values and principles. For further commentary see Delia Opekokew, A Review of Ethnocentric Bias Facing Indian Witnesses, in Richard Gosse, James Youngblood Henderson and Roger Carter, eds., *Continuing Poundmaker and Riel's Quest*, (Saskatoon: Purich Publishing, 1994) at 192.

⁵⁵ *Beecher v. Wetherby*, 95 U.S. 517 at 525 (U.S.S.C.).

⁵⁶ *Calder v. A.G.B.C.* 13 D.L.R. (3d) 59 at 66 (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

inferior people”,⁵⁹ who led lives that were “nasty, brutish and short”⁶⁰. Yet despite these biases, in recent years the oral traditions of Canada’s First Nations have played an increasingly “crucial role in the litigation of Aboriginal rights”.⁶¹ In numerous cases oral histories have been brought before the courts in an attempt to prove long-standing relationships between Indigenous peoples and their environments.⁶² Aboriginal litigants have presented this evidence in the hope that courts would attach legal significance to these ancient relationships and thereby provide protection for them in their traditional territories. In some cases there has been scholarly and legal recognition of the connection between oral tradition, scientific study and the actual occurrence of past events. In others there have been some difficulties in discerning the complexities of oral history that has led to questions concerning its admissibility and weight as proof of past events.⁶³ One of the

assessing the Indian culture of 1858 by the same standards Europeans applied to the Indians of North America two or more centuries before”, (1973) 34 D.L.R. (3d) 145 at

⁵⁷ *R. v. Syliboy* (1929) 1 D.L.R. 307 at (N.S.Co.Ct.). In reference to this label Chief Justice Dickson observed that “such language is no longer acceptable in Canadian law and, indeed, is inconsistent with a growing sensitivity to native rights in Canada”, *R. v. Simon* (1985) 24 D.L.R. (4th) 390 (S.C.C.).

⁵⁸ *Johnson v. McIntosh* 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (U.S.S.C.); *Ex Parte Crow Dog* 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (U.S.S.C.).

⁵⁹ *United States v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (U.S.S.C.).

⁶⁰ *Delgamuukw v. A.G.B.C.* Part 2 (B.C.S.C.), *supra*, note 12, at 13, per McEachern

⁶¹ *Delgamuukw v. B.C.* [1997] 3 S.C.R. 1010 (S.C.C.).

⁶² Some notable cases considering Aboriginal oral evidence are *Milirrpum and others v. Nabalco Pty. Ltd and the Commonwealth of Australia* (1971) 17 F.L.R. 141 (S.C.Northern Territory); *Re Paulette et. al. 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. 360 (Ont. C.A.); *R. v. Simon* (1985) 24 D.L.R. (4th) 390 (S.C.C.); *Attorney General for Ontario v. Bear Island Foundation* [1985] 1 C.N.L.R. 1 (Ont. S.C.); *Mabo v. Queensland [No. 2]* (1992) 197 A.L.R. 1 (H.C.Aust); *R. v. Vanderpeet* (1996) 137 D.L.R. (4th) 289 (S.C.C.); *R. v. Gladstone* (1996) 137 D.L.R. (4th) 648 (S.C.C.); *Delgamuukw*, *Ibid.*.

⁶³ For a good discussion of the challenges presented to the courts in the admissibility and weight of Aboriginal evidence see Brian Gover and Mary Locke Macaulay, *Snow Houses Leave No Ruins: Unique Evidence Issues in Aboriginal and Treaty Rights Cases* (1996) 60 *Saskatchewan Law Review* 47.

challenges the court's face in dealing with oral history is that they have not traditionally given much credence to the other truths that may be present in oral history.⁶⁴

This all potentially changed in the groundbreaking case of *Delgamuukw v. British Columbia* when the Supreme Court of Canada partially acknowledged the problems associated with the interpretation of oral history. The Court wrote that a “special approach” was required in receiving and interpreting evidence from Aboriginal claimants where such evidence “does not conform precisely with the evidentiary standards” that would be applied in private law cases.⁶⁵ The differential treatment of Aboriginal evidence was justified by the *sui generis* categorization of Aboriginal rights, which recognizes their unique source and nature.⁶⁶ The Court reasoned that “although the doctrine of Aboriginal rights was 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.”⁶⁷ To apply this principle the Court instructed judges to “adapt the laws of evidence so that the Aboriginal perspective on their practices, customs and

⁶⁴ Though there are some exceptions to the courts mistreatment of Aboriginal history, for example: "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.).

⁶⁵ *Delgamuukw*, supra, note 61 at para. 80, per Lamer, quoting *R. v. Vanderpeet*, [1996] 4 C.N.L.R. page 177 at para. 68. It should also be noted that the Supreme Court, 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 *Quebec Succession Reference Case* [1998] 2 S.C.R. at paras. 32, 49, 53.

⁶⁶ *Delgamuukw*, supra, note 61 at para. 82, per Lamer. For commentary on the *sui generis* nature of Aboriginal rights see John Borrows and Len Rotman, *The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?* (1997) 36 *Alberta Law Review* 9.

⁶⁷ *Delgamuukw*, *Ibid.*

traditions and on their relationship with the land, are given due weight”.⁶⁸ This approach allows a judicial decision-maker to give oral histories “independent weight” and place them “on an equal footing with the types of historical evidence that courts are familiar with”.⁶⁹ The Court noted that these modifications to the rules of evidence were necessary to the litigation of Aboriginal rights when 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”.⁷⁰ 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.⁷¹

While the Court’s new approach to oral history might have solved their old problems in not giving credence to these histories, in the process they may have created new challenges for themselves. It is not yet clear how the courts will sort through and

⁶⁸ *Delgamuukw*, Ibid. at para. 84, per Lamer. In this regard the Chief Justice also wrote that “courts must not undervalue the evidence presented by Aboriginal communities...simply because that evidence does not conform precisely with evidentiary standards” in private law cases, at para. 80.

⁶⁹ Ibid. at para. 87. 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 to business 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 incorporated it into the common or judge made law at the same time.

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

⁷⁰ Ibid., quoting from *R. v. Simon* [1985] 2 S.C.R. 387 at 408.

⁷¹ *Delgamuukw*, supra, note 61 at para. 81.

discern the shifting purposes of oral history explored in this paper. As we have seen, 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. One has to ask 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”. 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 their knowledge of what they have gotten themselves in to, which deserves 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 which “strains the Canadian legal and constitutional structure”.⁷² 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 sometime different purposes. It may one-day represent the fulcrum on which the courts once again privilege 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 break⁷³) Canada's legal and constitutional structure. Any failure to recognize this difficulty misapprehends the nature and purposes of Aboriginal oral history.

⁷² Ibid. at para. 82.

⁷³ For my comments on the durability of Canada's legal structure in the face of injustice to Aboriginal peoples see John Borrows, *Sovereignty's Alchemy: A Comment on Delgamuukw v. The Queen* (1999) 36 *Osgoode Hall Law Journal*.

The mere presentation of Aboriginal oral evidence often questions the very core of the Canadian legal and constitutional structure.⁷⁴ 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.⁷⁵ These traditions include memories⁷⁶ of the government’s: deception,⁷⁷ lies,⁷⁸ theft,⁷⁹ broken promises,⁸⁰ unequal and inhumane treatment,⁸¹ suppression of language,⁸²

⁷⁴Ibid.

⁷⁵ There are many accounts of the mistreatment endured by Aboriginal peoples at the hands of colonial governments. A good overview is found in The Royal Commission, *Looking Forward, Looking Back*, supra, note 11 at 245-591.

⁷⁶ The footnotes that follow in this sentence record Aboriginal historical experiences that can also be verified through written sources.

⁷⁷ 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 *R. v. Guerin* (1984) 13 D.L.R. (4th) 321. For an excellent study about deception in Canadian/Aboriginal relations see Sally Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981).

⁷⁸ Harold Cardinal, *The Unjust Society: The Tragedy of Canada’s Indians* (Edmonton: Hurtig, 1969) at 27-50.

⁷⁹ Many Aboriginal people remember the theft of their masks, totem poles, button blankets, carvings, medicine bundles, land, and their ancestor’s bones. For a non-Aboriginal account that cites many Aboriginal sources see, generally, Ronald Wright, *Stolen Continents: The New World Through Indian Eyes* (Toronto: Penguin Books, 1992).

⁸⁰ See Paul Chartrand, *Aboriginal Rights: The Dispossession of the Metis* (1991) 29 Osgoode Hall Law Journal 457; almost every major Indian treaty also has unfulfilled promises, see Royal Commission on Aboriginal People, *Restructuring the Relationship, Vol. II* (Ottawa: Supply and Services, 1996), especially chapter 2. Specific examples of the court’s permitting the Crown to break its promises are found in *Attorney General of Ontario v. Attorney General of Canada: Re Indian Claims* [1897] A.C. 199 at 213, *R. v. Sikyee*, (1964) 43 D.L.R. (2d) 150.

⁸¹ Aboriginal people who fought in the wars received disturbingly unequal treatment when they returned home, see Fred Gaffen, *Forgotten Soldiers* (Penticton, B.C.: Theytus Books, 1985). Aboriginal peoples have also been treated unequally and inhumanely in Canada’s criminal law system, see Royal Commission on Aboriginal People, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services, 1996). The Supreme Court of Canada has commented about the current “crisis” this treatment has spawned, *R. v. Gladue* [1999] 1 S.C.R.

⁸² David A. Nock, *A Victorian Missionary and Canadian Indian Policy: Cultural Synthesis vs. Cultural Replacement* (Waterloo: Wilfrid Laurier University Press, 1988) at 40, 78; George Manuel and Michael Posluns, *The Fourth World* (Don Mills: Collier-Macmillan, 1974) at 67. For personal anecdotes that keep

repression of religious freedoms,⁸³ restraint of trade and economic sanctions,⁸⁴ denial of legal rights,⁸⁵ suppression of political rights,⁸⁶ forced physical relocation,⁸⁷ plunder and despoilation of traditional territories⁸⁸. As such, oral tradition is controversial because it potentially undermines the law's claim to legitimacy throughout the country because of the illegality and/or unconstitutionality of Canadian 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 either, when commenting on it in *Delgamuukw*. In many places Aboriginal

alive the effect of this treatment see Celia Haig-Brown, *Resistance and Renewal: Surviving the Indian Residential School* (Vancouver: Tillicum Library, 1988) at 1-2.

⁸³ See Katherine Pettipas, *Severing the Ties That Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg: University of Manitoba Press, 1994).

⁸⁴ For a history of restraint on trade encountered on the prairies see Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal: McGill-Queen's Press, 1990); for a history of the sanctions Aboriginal peoples suffered in the west coast fishing trade see Diane Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993).

⁸⁵ 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, ch. 98) s. 149; for commentary see Paul Tennant, *Aboriginal People and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: U.B.C. Press, 1990) at 111-113.

⁸⁶ 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 Douglas Cole and Ira Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas and McIntyre, 1990).

⁸⁷ Whole communities suffered resettlement. For example, see Royal Commission on Aboriginal Peoples, *The High Arctic Relocation: A Report on the 1953-1955 Relocation* (Ottawa: Supply and Services, 1994). For information about further relocations see Royal Commission Final Report, Vol. 1, *supra*, note 51, chapter 11 at 411-543. Individuals were also forcedly relocated through residential schools and provincial child welfare regimes, see A.C. Hamilton and 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.

⁸⁸ Irene Spry, *The Tragedy of the Loss of the Commons in Western Canada*, in A.L. Getty and A.S. Lussier, *As Long as the Sun Shine and the Water Flows* (Vancouver: U.B.C. Press, 1983) at 203; John Goddard, *Last Stand of the Lubicon Cree* (Vancouver: Douglas and McIntyre, 1991).

law continues to exist as an important source of legal authority,⁸⁹ even if it has been weakened in some cases through the unjust imposition of alien structures.⁹⁰ 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.⁹¹ 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.⁹² 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.⁹³

For example, much of the evidence recited in the *Delgamuukw* case not only provided information that supported the Gitksan and Wet'suwet'en's historic use and occupation of their territories, but this information itself contained a competing jurisprudential narrative that potentially strained Canada's claim to legal exclusivity in the

⁸⁹ 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, 1 C.N.L.C. 70 (Que. S.C.), aff'd. 1 C.N.L.C. 165, 17 R.J.R.Q. 266 (Que. Q.B.); *R v. Nan-e-quis-a Ka* (1889) 1 Terr. L.R. (C.A.); *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.); *Re Kitchoalik* [1972] 5 W.W.R. 203 (N.W.T.C.A.); *Mitchell v. Dennis* [1984] 2 C.N.L.R. 84 (B.C.S.C.); *Casimel v. Insurance Co. of British Columbia* [1992] 1 C.N.L.R. (B.C.C.A.); *Vielle v. Vielle* 1 C.N.L.R. 165 (Alta. Q.B.); *Vanderpeet*, supra note 65, *Delgamuukw*, supra, note 61.

⁹⁰ For a discussion of how the imposition of non-Aboriginal structures have weakened but not destroyed Aboriginal authority, see John Borrows, *A Genealogy of Law: Inherent Sovereignty and First Nations Self Government* (1992) 30 *Osgoode Hall Law Journal* 291.

⁹¹ For a sample of this opinion see Grand Chief Michael Mitchell, *An Unbroken Assertion of Sovereignty* in Boyce Richardson, ed., *Drum Beat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1989) at 105-136; Frank Cassidy, ed., *Aboriginal Self-Determination* (Lantzville, B.C.: Oolichan, 1991) at 33-62; Ovide Mercredi and Mary Ellen Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto: Viking Books, 1993) at 13-36.

⁹² In this they have some support from the Supreme Court of Canada, who termed indigenous laws "pre-existing" which has its source prior to the assertion of British sovereignty, *Delgamuukw*, supra, note 61 at para. 114, 134.

⁹³ Though the Court has accepted a weaker version of Indigenous legal pluralism, see *Vanderpeet*, supra note 65 at paras. 28, 40, 42; *Delgamuukw*, supra, note 61 at paras. 114, 134, 147, 148, 157, 158, . For further commentary see John Borrows, *With or Without You: First Nations Law (in Canada)* (1996) 41 *McGill Law Journal* 629.

area.⁹⁴ The Court did not strongly acknowledge the binary nature of this testimony, comprising both a “subjective and evaluative” aspect and a “scientific and objective aspect”.⁹⁵ Some of the most striking evidence in this regard 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 both 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 them 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 illustrates one large difficulty with the Supreme Court’s notion that Aboriginal evidence must accede to Canadian legal and constitutional standards because, in their fullness, Aboriginal traditions will often necessarily strain Canada’s legal system. They can themselves be part of another cultures 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 in

⁹⁴ Antonia Mills, *Eagle Down is Our Law: Witsuwit’en Feasts and Land Claims* (Vancouver: U.B.C. Press, 1994).

⁹⁵ 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.* No. 0843 Smithers Registry, Part 8 (B.C.S.C.), per McEachern at pp. 61-66.

relation to other historical and legal methodologies. Aboriginal peoples, generally, will likewise be subordinated in the process.

Unless the Court is willing to change its whole approach to the reception, interpretation and use of evidence, they thus may not be able to effectively implement their call to "accommodate" Aboriginal oral history on an "equal footing". Aside from the fact that this evidence might sometimes be properly regarded as law, there are still other problems afoot. 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 creates problems for the courts in evaluating what is factual across cultures, and raises the host of issues around oral history's sometimes shifting purposes identified earlier in this paper. The leading historiographer of oral tradition, Jan Vansina, has observed that "all messages are a part of a culture".⁹⁶ 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".⁹⁷ He therefore concluded that since culture shapes all messages, we must take culture into account when interpreting these messages. This is a challenging proposition. Since what constitutes a fact is largely contingent on the language

⁹⁶ Jan Vansina, *supra*, note 20 at 124.

⁹⁷ *Ibid.* Julie Cruikshank, *Oral Tradition and Oral History: Reviewing Some Issues*, (1994) 75 *Canadian Historical Review* 410.

and culture out of which that information arises,⁹⁸ the person who decides what is a “fact” inexorably defines it from within the matrix of relationships they share with others.⁹⁹

There are enormous risks for non-apprehension and misinterpretation when Aboriginal peoples submit their “facts” to the judiciary for interpretation.¹⁰⁰ This problem is especially poignant in litigation as factual determinations are presented in an adversarial environment,¹⁰¹ and interpretations made by judges with a different language, cultural orientation and experiential background.¹⁰² The potential for misunderstanding exists because each culture has somewhat different perceptions of space, time, historical truth, and causality.¹⁰³ The cultural specificity of what constitutes a fact in one culture may make it difficult for a person from a different culture to accept the same information as a fact in their culture.¹⁰⁴ Since variations between groups help to encode “facts” with different

⁹⁸ Ludwig Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe trans.) 3rd ed., Philosophical Investigations (New York: Macmillan Publishing Co., 1958) 154, 155. 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.

⁹⁹ Martin Heidegger, *Being and Time*, trans John Macquarrie and Edward Robinson (New York: Harper & Row, 1962) at 157.

¹⁰⁰ Richard Rorty, On Ethnocentrism: A Reply to Clifford Geertz, (1986) 25 *Michigan Quarterly Review* 115; Abdullahi Ahmed An-Na’im, Problems of Universal Cultural Legitimacy for Human Rights in A. An-Na’im and Francis Deng, eds, *Human Rights in Africa* (Washington: Brookings Institute, 1990).

¹⁰¹ For the special challenges of presenting history in an adversarial court-room environment, see Donald J. Bourgeois, The Role of the Historian in the Litigation Process (1986) 67 *Canadian Historical Review* 2; G.M. Dickinson and R.D. Gidney, History and Advocacy: Some Reflections on the Historian’s Role in Litigation, (1987) 68 *Canadian Historical Review* 576; Vansina, supra, note 20 at 102-103.

¹⁰² Richard Devlin, Justice or Just Us? (1996) 20 *Provincial Court Judges Journal* 4.

¹⁰³ 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. On the other hand, many Ojibway people trace their origin to Michilimackinac Island in the Great Lakes and reference their migrations from this place. Temporally speaking, Christianity, Islam and Judaism have tended to view time as being linear, progressing, and “marching on”. Other cultures such as the Maya, Ainu or Cree have thought of time as being cyclical and repetitive. Causality or change can also differ between groups. See Vansina, supra, note 20 at 125-133.

¹⁰⁴ Vansina has written “Historical truth is also a notion that is culture specific”. Ibid at 129.

meanings within each culture,¹⁰⁵ 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.¹⁰⁶ 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 both meaning and emotion (impact), as found in metaphors, stock phrases, stereotypes and other clichés.¹⁰⁷ 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.¹⁰⁸ Without this deeper knowledge, Canadian judges will have an especially difficult time understanding and acknowledging the meanings Aboriginal people give to

¹⁰⁵ Charles Taylor, *Understanding and Ethnocentricity*, in *Philosophy and the Human Science, Col. 2, Philosophical Papers* (Cambridge: Cambridge University Press, 1985 at 119, 121. Vansina states that since “culture can be defined by what is common in the minds of a given group of people;...people in a community share many ideas, values and images...which are collective to them and differ from others”, Vansina, *supra* note 20 at 124.

¹⁰⁶ 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.

Bruce Trigger, *Natives and Newcomers: Canada's Heroic Age Reconsidered* (Montreal: McGill-Queen's Press, 1985) at 168.

¹⁰⁷ Vansina, *supra*, note 20 at 124.

¹⁰⁸ *Ibid.* at 137.

the facts they present.¹⁰⁹ This evaluation will be especially fraught with danger if the interpreter does not recognize the cultural foundation of knowledge, and acknowledge their own bias.¹¹⁰ 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”.¹¹¹

The difficulty of interpretation perhaps 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.¹¹² Unless this happens, Aboriginal oral history runs the risk of being "undervalued"¹¹³ because the "Aboriginal perspective on their practices, customs and traditions and on their relationship with the land" may not be given "due weight".¹¹⁴ Aboriginal peoples need to continue to be involved in the creation, control and change of their own worlds through the power of language, stories, and songs, as they have done for

¹⁰⁹ Louise Mandell, Native Culture on Trial, in Sheilah Martin and Kathleen Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 358; Joan Ryan and Bernard Ominayak, The Cultural Effects of Judicial Bias, *Ibid.* at 346; Robin Ridington, Cultures in Conflict: The Problem of Discourse in W.H. New, ed., *Native Writers and Canadian Writing* (Vancouver: UBC Press, 1990) 273.

¹¹⁰ Anthropologist Robin Ridington observed these problems in the factual underpinnings of the trial judge's decision in *Delgamuukw*, see Robin Ridington, Fieldwork in Courtroom 53: A Witness to *Delgamuukw*, Frank Cassidy, *supra*, note 3, 206 at 211-212. For further commentary on the historical and cultural assumptions of Chief Justice McEachern's decision in *Delgamuukw*, see: Joel Fortune, Contruing *Delgamuukw*: Legal Arguments, Historical Argumentation, and the Philosophy of History (1993) 51 *U.T. Fac. Law Review* 80; Michael Asch and Catherine Bell, Definition and Interpretation of Fact in Canadian Aboriginal Title Legislation: An Analysis of *Delgamuukw* (1994) 10 *Queen's Law Journal* 503; Robin Fisher, Judging History: Reflections on the Reasons for Judgment on *Delgamuukw v. B.C.* (1992) 95 *B.C. Studies* 43; Geoff Sherrott, The Court's Treatment of the Evidence in *Delgamuukw v. B.C.* (1992) 56 *Saskatchewan Law Review* 441.

¹¹¹ *R.D.S. v. The Queen* (1997) 10 C.R. (5th) 1 (S.C.C.), per L'Heureux-Dube and McLachlin at para. 35. Madame Justice L'heureux Dube and McLachlin similarly wrote “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 para. 38.

¹¹² John Borrows, With or Without You: First Nations Law (in Canada) (1996) *McGill Law Journal* 630.

¹¹³ *Delgamuukw*, *supra*, note 61 at para. 80.

millennia. 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 their legal, economic, political, and socio-cultural relationships.¹¹⁵ Unless Aboriginal peoples more strongly participate in the future interpretation of these narratives in the Canadian judicial system, the process and purpose of Aboriginal oral history may not be appropriately accommodated, despite the best efforts of the judiciary. This loss might occur for Indigenous peoples because the language and culture of law will not really be their own,¹¹⁶ as the legal interpretation of their traditions and history is centralized and administered by non-Aboriginal people.¹¹⁷ Aboriginal peoples need to more fully participate in the administration of this system, and at times find themselves in positions of control, to overcome this danger. The Court's progressive instruction to adapt the laws of evidence to incorporate Aboriginal factual perspectives may not be realized unless this occurs.

¹¹⁴ *Delgamuukw*, Ibid. at para. 84, per Lamer.

¹¹⁵ Penny Petrone, *Native Literature in Canada: From Oral Tradition to the Present* (Toronto: University of Toronto Press, 1990) at 9-12.

¹¹⁶ 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.

Leslie Hall Pinder, *The Carriers of No: After the Land Claims Trial* (Vancouver: Lazara Press, 1991) at 10.

¹¹⁷ There are only 16 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 Gordon Christie, "Aboriginal Rights, Aboriginal Culture and Protection" (1998) 36 *Osgoode Hall Law Journal* 447.

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 presenting their traditions, and may also raise problems for the community. On the personal side, 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 honor and deepest respect. While there is no doubt that presenting evidence in an adversarial setting is a harrowing experience for most people,¹¹⁸ this can be especially troubling for elders from certain groups where such treatment would be tantamount to discrediting their reputation and standing in the community. No one likes to be aggressively cross-examined, but the results are not the same for every person who experiences this procedure. Elders who are put in this position on the witness stand subject themselves to the highest form of ridicule and humiliation that they could suffer from within their worldview. While this 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 a judge to comment on their decision after it is written. To subject elders to intensive questioning can come across as ignorance and contempt for the

¹¹⁸ For one historian’s description of his “ordeal” in court see Arthur J. Ray, *Creating the Image of 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 courts are familiar. Steps could be taken to create alternatives to probing the veracity and weight to be assigned this testimony that respect the place of elders in Aboriginal communities, and thereby generate better interpretations of Aboriginal oral history in the courts. Greater innovation through Aboriginal participation could represent one such step.

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.¹¹⁹ 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".¹²⁰ In deciding to review the treatment of Aboriginal oral tradition on

Savage in Defence of the Crown, (1990) 6 *Native Studies Review* 13.

¹¹⁹ "The trial judge's treatment of the various kinds of oral histories did not satisfy the principles I laid down in *Vanderpeet*. These errors are particularly worrisome...", *Delgamuukw*, supra, note 61 at para. 107.

¹²⁰ *Delgamuukw*, supra, note 61 at para. 80, per Lamer. The challenges of receiving Aboriginal evidence were described as follows:

Many features of oral histories would count against 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":

new grounds the Supreme Court may have created a larger task that it realized. As this paper has tried to identify, the interpretation of oral history presents numerous interpretive difficulties that go beyond those yet 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 them 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. One always has to be on the 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".

Ibid. at para. 86. For further discussion see Clay 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 Alberta Law Review* 1276 at 1279.

Aunt Irene's old blue bungalow now sits empty atop the escarpment. She died a few years ago but her memories live on. Aunt Irene's house holds meaning for me in my reflections about oral history's variegated nature. The weeds have gathered, paint has cracked and her windows have dulled. But much about the place still remains vibrant. I know more about past events on the reserve as a result of our conversations. I also know more about what these past events meant to the people who experienced them. When I drive down the road in front of her house I remember these stories, and think of their significance for the people of Cape Croker today. Neyaashingaming struggles in many ways because of its past. Colonialism is not an easy thing to live with. Yet, Neyaashingaming is also stronger because of these experiences. The same history that produced adversity can also become a deep reservoir holding ideas for change and renewal. I hope this potential for change can be harnessed. The appropriate use of oral history's multifaceted methodologies may one day help activate this power.