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December 2010

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# Doubting what the Elders have to say: A critical examination of Canadian judicial treatment of Aboriginal oral history evidence

*By David Milward\**

*Assistant Professor of Law, Faculty of Law, University of Manitoba*

*Abstract* The Supreme Court of Canada has articulated several legal principles that mandate the flexible and generous treatment of Aboriginal oral history evidence in support of Aboriginal rights claims. Lower courts, however, continue to devalue such evidence, often displaying explicit disregard for the legal principles, in order to defeat rights claims and subordinate Aboriginal interests to state sovereignty. This has no rational basis, since it is now clearly established that documentary historical evidence does not have any innate superiority over oral history evidence when it comes to ascertaining what happened in the past. This article proposes several solutions. These include educating judges on the potential value and accuracy of oral history evidence, enhancing oral history evidence through flexible use of the doctrines of inference and judicial notice, and using court-appointed experts to assure greater objectivity.

*Keywords* Aboriginal oral history; Aboriginal rights litigation; Historical reconstruction; Judicial impartiality; Canadian evidence law

**A**n ongoing and contentious issue in Canada is the struggle of its Aboriginal peoples to gain legal protection of their rights under the Canadian constitution, which includes rights to practices that are

\* Email: milward@cc.umanitoba.ca.

integral to their cultures, and treaty rights. A potentially valuable source of evidence that can be used in support of Aboriginal rights claims is the oral histories of Aboriginal societies. Canadian rules of evidence have evolved to recognise that Aboriginal oral histories may provide proof of past events as a principled hearsay exception, so long as it meets the requirements of necessity and reliability. Aboriginal oral histories also do not need to be corroborated by other evidence. Evidence in support of Aboriginal rights claims is also not to be set to the near impossible task of providing conclusive proof of facts alleged.

Since the enunciation of these principles, however, Canadian courts have consistently demonstrated hostile treatment of oral history evidence with the consequence of dismissing Aboriginal rights claims. One method is to draw on a principle that Aboriginal oral history should not be given more weight than it can reasonably support. Another is to habitually characterise written historical and documentary evidence as more reliable and persuasive than oral history evidence. Another is to downplay what is described by oral history evidence so as to sever any link of relevancy between the evidence and the facts sought to be proved. These developments may on the surface reflect legitimate judicial concerns about requiring cogent proof of facts. The article will suggest, however, that these tendencies reflect a more deep-seated agenda to devalue oral history evidence with the natural consequence of suppressing Aboriginal rights claims. Canadian sovereignty is thereby sustained at the expense of Aboriginal interests. The focus then turns to how to address this.

One set of possibilities is to direct some needed reminders to the Canadian judiciary. Written methods of conveying the historical past are themselves not immune to methodological constraints and difficulties, and to conveying inaccurate or mistaken depictions of the past. It is a legal principle that written history and documentary evidence be subjected to the same degree of scrutiny as other kinds of evidence, yet this does not seem to manifest in practice. At the same time, Aboriginal societies often had strict protocols to preserve the integrity of their oral histories, and their transmission from generation to generation. Studies have continued to confirm that Aboriginal oral histories have provided reliable accounts of the past, sometimes displaying only negligible divergences from anthropological, archaeological, or historical conclusions. There is perhaps a real need to make judges aware of the realities behind the various kinds of evidence by incorporating appropriate seminars or courses into judicial education.

Other possibilities explore potential uses of other rules of evidence. The principle of inference allows a finding of one fact if it flows logically from another proven fact. This principle could, where appropriate, be utilised to enhance the probative

value of oral history evidence. For example, the fact that oral history contains references to treaty terms that are not in the text of the treaty or had any reference in the documentary evidence does not necessarily mean that it amounts to mere belief on the part of the Aboriginal signatories. A logical and appropriate influence is that the oral history contains references to those treaty terms because of representations by Crown officials during negotiations. This becomes material to issues such as the honour of the Crown being at stake during treaty negotiations, and avoiding the appearance of sharp dealing.

Another possibility is the doctrine of judicial notice, which allows a judge to make a finding of fact without evidentiary proof provided by the parties. Canadian jurisprudence recognises that judicial notice can operate to find facts that are distinctive to specific communities. This can include, for example, notice of local geography and historical facts. If the Aboriginal oral historians make credible and reliable representations that certain understandings of the oral histories, and related facts, were not subject to significant challenge among members of the local Aboriginal community, this may be an appropriate context for applying judicial notice.

Another possibility represents an attempt to solve problems associated with partisan expert testimony during adversarial proceedings. The suggestion is that, where this is a problem, judges should seriously consider recourse to court-appointed expert witnesses. An independent expert witness can then work in an environment that stresses open and cooperative dialogue with the Aboriginal oral historians in order to present a reasonably ascertainable truth to the court. The article first begins with briefly explaining what Aboriginal oral history evidence is, and its relevance to Aboriginal rights claims.

### **Aboriginal oral histories and Aboriginal rights**

Aboriginal oral histories are histories that have not been written down, but have been passed orally from generation to generation. They are more than a description of past events, but are also suffused with an Aboriginal society's spiritual beliefs, worldviews, and cultural values. The Royal Commission on Aboriginal peoples states:

Oral accounts of the past include a good deal of subjective experience. They are not simply a detached recounting of factual events but, rather, are 'facts enmeshed in the stories of a lifetime'. They are also likely to be rooted in particular locations, making reference to particular families and communities. This contributes to a sense that there are many histories, each characterized in part by how a people

see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people.<sup>1</sup>

While oral histories may be an important part of Aboriginal cultures, they are also taking on increasing contemporary relevance as evidence used to prove Aboriginal rights claims before the Canadian legal system.

The basis for constitutional Aboriginal rights is s. 35(1) of the Constitution Act 1982, which reads: ‘The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed’.<sup>2</sup> Within this provision is more than one category of rights. Inherent Aboriginal rights are rights based on practices that were integral to a distinctive Aboriginal culture prior to contact with Europeans.<sup>3</sup> For the Métis, a distinctive group of Aboriginal peoples with ancestral ties to both First Nations and European settlers, the temporal threshold is when Canada assumed legal control over their territories, as opposed to first contact with Europeans.<sup>4</sup> Another category is Aboriginal land title, rights to use a claimed parcel of land when all three of the following questions are answered in the affirmative: (1) Did the Aboriginal society occupy the land prior to the assertion of Crown sovereignty? (2) Is there continuity between present occupation and pre-sovereignty occupation? (3) Was the Aboriginal society in exclusive occupation of the land at sovereignty?<sup>5</sup> Another category is treaty rights, rights stemming from a solemn agreement between the Crown and an Aboriginal society.<sup>6</sup>

Aboriginal rights claims that are asserted but not yet proven in court can also trigger Crown duties, if the Crown has real or constructive notice that its actions can potentially have an adverse effect on Aboriginal interests, until the claims are finally resolved. Claims that have a weak evidentiary basis may attract at a minimum a Crown duty to give notice to the concerned Aboriginal group of the adverse actions contemplated. Claims with a stronger evidentiary basis will attract more stringent duties, and can require interim accommodation of Aboriginal interests on the part of the Crown until final resolution.<sup>7</sup>

1 Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back* (Royal Commission on Aboriginal Peoples: Ottawa, 1996) 33.

2 Constitution Act 1982, s. 35(1).

3 *R v Van der peet* [1996] 2 SCR 507.

4 *R v Powley* [2003] 2 SCR 207.

5 *R v Delgamuukw* [1997] 3 SCR 1010.

6 *R v Sioui* [1990] 3 CNLR 127 at 152.

7 *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 at [25].

As one can see, Aboriginal oral histories can potentially provide evidentiary proof of facts such as to satisfy the legal tests for Aboriginal rights claims. For example, oral history descriptions of past cultural activities can be used to satisfy the integral to a distinctive culture test. Oral history descriptions of past sites of settlement and land use activities can be used to satisfy the tests for land title. Oral histories concerning negotiations with Canadian officials may be relevant to establishing the parameters of treaty rights. Oral history evidence can also affect the strength of an Aboriginal rights case for purposes of interim remedies under *Haida*. It has therefore fallen upon Canadian courts, the Supreme Court in particular, to develop legal principles that address the admission and weighing of oral histories as evidence in support of rights claims.

### Legal principles on oral history evidence

Canadian courts had historically treated Aboriginal oral history evidence with very little sympathy. An example of this is *Ontario Island v Bear Island*, which represents a past application of the well-known ‘best evidence’ rule to oral histories.<sup>8</sup> Justice Steele’s comments in this case included: ‘oral history is admissible ... where their history was never recorded in writing. However, this does not detract from the basic principle that the court should always be given the best evidence.’<sup>9</sup> He also stated a preference for corroboration as follows: ‘the findings of fact must be based on weighty evidence from a number of Indians ... [and] should be supported by historical, anthropological or other expert evidence’.<sup>10</sup>

The Supreme Court has more recently recognised that Aboriginal oral histories may be vital for Aboriginal rights claimants to establish an evidentiary foundation for their claims.<sup>11</sup> The court therefore mandates that:

... a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the

8 *Ontario v Bear Island* (1984) 49 OR (2d) 353.

9 *Ibid.* at 368.

10 *Ibid.*

11 *R v Van der peet* [1996] 2 SCR 507 at [64]; *R v Delgamuukw* [1997] 3 SCR 1010 at [87].

evidentiary standards that would be applied in, for example, a private law torts case.<sup>12</sup>

Oral history evidence may assist Aboriginal litigants in establishing facts that help satisfy legal tests for s. 35(1) rights, such as the integral to a distinctive culture prior to contact test, and the *Delgamuukw* tests for land title.<sup>13</sup> The court also notes in *Van der peet*, with specific reference to inherent rights, that Aboriginal litigants need not ‘accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community’.<sup>14</sup>

Where past events are relevant to Aboriginal rights claims, oral history evidence must be placed on an equal footing with conventional documentary and historical evidence that Canadian courts are familiar with.<sup>15</sup> Oral history evidence does not need to be corroborated by documentary or historical evidence, nor is its role merely one of additional confirmation of other evidence. The Supreme Court has made it clear that oral history evidence can provide independent proof of facts alleged by Aboriginal claimants. Corroboration is not required.<sup>16</sup>

Aboriginal oral histories by their very nature involve a presentation of out-of-court statements as proof of the truth of their contents. Their admission as evidence is therefore governed by Canadian legal principles on hearsay evidence. The general rule used to be that hearsay evidence could not be admitted unless it fell within recognised exceptions, such as dying declarations<sup>17</sup> or declarations in the course of a duty.<sup>18</sup> These exceptions were criticised as highly rigid and technical, so much so that they could impair the search for truth either by the admission of evidence that was not particularly helpful, or by the exclusion of evidence that could reliably assist in determining what happened.<sup>19</sup> The Supreme Court of Canada has now set out a different framework for the admission of hearsay evidence, the principled approach. There are two key determinants—necessity and reliability. Necessity speaks to the inability to obtain the evidence from a witness directly. This includes circumstances such as the witness recanting on the stand, or the witness has died, or fled jurisdiction, or becoming insane, or becoming too

12 *R v Van der peet* [1996] 2 SCR 507 at [68].

13 *Mitchell v Canada* [2001] 1 SCR 911 at [32].

14 *R v Van der peet* [1996] 2 SCR 507 at [62].

15 *R v Delgamuukw* [1997] 3 SCR 1010 at [87].

16 *Ibid.* at [98].

17 *R v Aziga* [2006] 42 CR (6th) 42.

18 *Ares v Venner* [1970] SCR 680.

19 *Wigmore on Evidence*, 7th edn, vol. 5 (Little, Brown: Boston, 1940) para. 1427.

traumatised to take the stand. In circumstances like these, it may be necessary to obtain hearsay evidence from somebody who heard what the witness said out of court.<sup>20</sup> The other key determinant is reliability, whether the circumstances surrounding the making of the out-of-court statement are such as to give the statement sufficient indicia of reliability.<sup>21</sup> The Supreme Court has made a further distinction between threshold reliability and ultimate reliability. Threshold reliability speaks to whether the trier of law, a judge, decides on a *voir dire* that the out-of-court statement satisfies the reliability requirement of the principled approach so as to allow its admission as hearsay evidence. Ultimate reliability speaks to whether the trier of fact (for example, judge or jury) will ultimately rely on the hearsay evidence in deciding the issues of a case.<sup>22</sup> The Supreme Court also set out additional tenets of the principled approach as follows:

- (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
- (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
- (c) In rare cases, evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
- (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of necessity and reliability are established on a *voir dire*.<sup>23</sup>

Aboriginal oral history evidence is not a new categorical exception to the hearsay rule. Aboriginal oral history evidence must instead be admitted on a case-by-case basis under the principled approach. Necessity can arise because there is no other way to prove the prior histories of Aboriginal peoples,<sup>24</sup> or to avoid placing an impossible burden of proof on the Aboriginal claimants.<sup>25</sup> Due to its nature as hearsay, the admission and the weight given to oral history evidence are governed by general principles concerning evidentiary reliability. First, the evidence must be relevant and probative to the facts alleged by the Aboriginal claimants.

20 *R v Smith* [1992] 2 SCR 219 at [32]–[36].

21 *R v Starr* [2000] 2 SCR 144 at [215]–[217].

22 *R v Hawkins* [1996] 3 SCR 1043.

23 *R v Mapara* [2005] 1 SCR 358 at [15].

24 *Mitchell v Canada* [2001] 1 SCR 911 at [33].

25 *R v Simon* [1985] 2 SCR 309 at 407.

Secondly, oral histories as evidence must still be reliable. Unreliable oral history evidence may be excluded or given no weight if it hinders rather than helps the search for truth. Thirdly, even reasonably reliable oral history evidence may be excluded if its probative value is exceeded by its prejudicial effect.<sup>26</sup>

Another threshold has to do with the witness who presents the oral history evidence. In *Mitchell*, the Supreme Court stated:

The second factor that must be considered in determining the admissibility of evidence in aboriginal cases is reliability: does the witness represent a reasonably reliable source of the particular people's history? The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness's ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.<sup>27</sup>

Whatever principles the Supreme Court may have articulated, it is another matter whether those principles will in practice have a meaningful impact on Aboriginal rights claims. Val Napoleon contends that while the Supreme Court canon mandates meaningful treatment of oral history evidence, its statements on reliability have all but provided the courts with a licence to continue to treat oral history evidence with a Eurocentric dismissiveness.<sup>28</sup> This will be confirmed in the next section, which proceeds to examine how lower courts have treated oral history evidence since the Supreme Court articulated the appropriate legal principles in *Van der peet*, *Delgamuukw* and *Mitchell*.

## Interpretation of the principles: judicial treatment of oral history evidence

### Accepted as reliable proof of rights

In *R v Jacobs*, Justice McAulay found the oral evidence of the St:olo persuasive as to pre-contact use of tobacco despite the insistence of the Crown expert witness that there was a lack of support in historical and documentary evidence for such a conclusion.<sup>29</sup> Cases where oral evidence has been persuasive and helped prove

<sup>26</sup> *Mitchell v Canada* [2001] 1 SCR 911 at [30].

<sup>27</sup> *Ibid.* at [33].

<sup>28</sup> Val Napoleon, 'Delgamuukw: A Legal Straightjacket for Oral Histories?' (2005) 20 *Canadian Journal of Law and Society* 123.

<sup>29</sup> 1998 BCSC 3988.

Aboriginal rights claims include *R v Gregory Willison*,<sup>30</sup> *R v Morris and Olsen*,<sup>31</sup> *R v Breaker*,<sup>32</sup> *Klahoose First Nation v Sunshine Coast Forest District (District Manager)*,<sup>33</sup> *R v Goodon*,<sup>34</sup> and *R v Catarat*.<sup>35</sup>

Another recent and encouraging case is *Tsilqhot'in v British Columbia*, where Justice Vickers of the British Columbia Supreme Court found that the Xenil Tsilqhot'in nation had provided persuasive proof such as to satisfy the tests for land title.<sup>36</sup> Justice Vickers specifically commented that it was his judicial duty to consider, on the merits, whether the oral history evidence provided reliable and independent proof of facts alleged, even where uncorroborated by other evidence. To do otherwise would have been to treat the evidence in ethnocentric fashion.<sup>37</sup>

There have also been decisions where oral history evidence has been accepted as *prima facie* proof of Aboriginal claims, for purposes of interim applications under *Haida*. These include *Gitksan and other First Nations v British Columbia (Minister of Forests)*,<sup>38</sup> *Klahoose First Nation v Sunshine Coast Forest District (District Manager)*,<sup>39</sup> *Wii'litswx v British Columbia (Minister of Forests)*,<sup>40</sup> and *Heiltsuk Tribal Council v British Columbia (Minister of Sustainable Resource Management)*.<sup>41</sup>

These cases may seem encouraging. However, many other cases hint at a systemic devaluation of oral history evidence. To be fair, judges have to be impartial as between Aboriginal litigants and the Crown. This can mean that an individual case can on the merits require a decision against the Aboriginal litigants. That in itself is not a source of criticism. What is cause for concern though is that courts seem to treat oral history evidence in ways that suggest either a lack of objectivity in the assessment of oral history evidence, or even explicit disregard for some of the applicable legal principles.

30 2005 BCPC 131.

31 2004 BCCA 121. Upheld on appeal to the Supreme Court in *R v Morris* [2006] 2 SCR 915.

32 [2001] 3 CNLR 213.

33 [2009] 1 CNLR 110.

34 2008 MBPC 59.

35 1998 SKPC 13338.

36 2007 BCSC 1700.

37 *Ibid.* at [196].

38 2002 BCSC 1701.

39 2008 BCSC 1642.

40 [2008] 4 CNLR 315.

41 2003 BCSC 1422.

### The still lingering preference for written history

Experts in disciplines such as anthropology, archaeology, and history have often exhibited a depreciative view towards Aboriginal oral histories. For example, Alexander von Gernet has always maintained that oral histories must be subjected to intense and critical scrutiny before they can be accepted as persuasive proof of facts before a court of law. The basis for his position is a conviction that oral histories, by their very nature, are prone to altering their content and narrative over time. He describes three reasons why this can occur. First, human memory is unreliable and subject to change over time. Secondly, passing oral history from one generation to the next increases the chances of error as the repetitions of oral history increase in number and over time. Thirdly, circumstances and contexts within which oral histories are passed change over time. The current holders of an oral tradition speak under the influences of contemporary circumstances, and this increases the chances that the oral tradition will no longer bear a reliable account of the original events.<sup>42</sup>

Some methods of transmitting oral histories may, however, commend themselves as designed to ensure reliable transmission from generation to generation. Canadian courts, for example, have demonstrated a willingness to deem oral histories from certain Aboriginal societies in British Columbia as reliable because of formal methods of intergenerational transmission, such as formal recitation during ceremonies (i.e. *adaawx*), or performance of oral histories during ceremonial dances.<sup>43</sup>

While this may be an encouraging development, it may also have the unfortunate consequence of inviting hostile comparisons to those oral history traditions that did not utilise such formalised methods of transmission. Anthropologist James McDonald, for example, states: 'Oral histories have a way of changing over time, especially when they are important and not subject to the scrutiny of public recitation provided by the context of the feast'.<sup>44</sup> Justice Satanove expressed concerns about the reliability of other methods of transmitting oral histories that do not utilise ceremonies to confirm accurate recounting, as follows:

42 Alexander von Gernet, *Oral Narratives and Aboriginal Pasts: An Interdisciplinary Review of the Literature on Oral Traditions and Oral Histories* (Indian and Northern Affairs: Ottawa, 1996).

43 *Gitxsan and other First Nations v British Columbia (Minister of Forests)* 2002 BCSC 1701; *Lax Kw'alaams Indian Band v Canada* 2008 BCSC 447; *R v Delgamuukw* [1997] 3 SCR 1010 at [93]–[98].

44 James A. McDonald, 'An Historic Event in the Political Economy of the Tsimshian: Information on the Ownership of the Zimacord District' (1983) 57 *British Columbia Studies* 24 at 37.

Other forms of oral history are the *malsk* (folktales that drift from tribe to tribe), hero myths (myths of origin of a clan, crest or chief), stories of war, battles or migrations and remembrances of individuals (life histories as opposed to oral traditions). These other forms of oral history do not have the same safeguards of accuracy because they are not recounted in a formal ceremony with witnesses who contradict or confirm the accuracy of the recitation.<sup>45</sup>

Even those oral histories that utilise formal rituals as recitations are apparently not above criticism. For example, anthropologist Wilson Duff identified these failings with Coast Tsimshian oral histories:

- a) Chiefs' names, places and locales changed over time.
- b) House Groups borrowed each other's histories.
- c) Imperfections of memory arise after generations.
- d) Traditions were consciously counterfeited.
- e) The *adaawx* of higher rank and larger potlatches have survived over smaller, less important ones (i.e. the ones that survived belonged to the most prestigious, richest Houses).<sup>46</sup>

With a number of experts minimising the value of oral histories, it is not surprising that Canadian courts have routinely followed suit, with the frequent consequence that oral history evidence is unable to provide satisfactory proof of Aboriginal rights claims. In *Mathias v Canada*, we have an example of where a Federal Court justice buys into certain stereotypes about oral history evidence as follows:

Because in this case specific historical accuracy is important, it is useful to consider the reasons why oral history evidence may be imprecise. It is well known that, simply by repetition, stories and information are distorted to some degree. In addition, oral history, in the context of this case, may have been distorted or indeed lost because of changes and events, such as massive depopulation due to disease or natural disasters, the suppression of the potlatch ceremony where traditional stories were told, the end of the longhouse style of living which had facilitated the oral history tradition, the imposition of the residential school system which removed children from access to the stories of their parents and grandparents, the disappearance or

<sup>45</sup> *Lax Kw'alaams Indian Band v Canada* 2008 BCSC 447 at [23].

<sup>46</sup> *Ibid.* at [27].

near disappearance of traditional Indian languages, and the publication of historical accounts and opinions about historical matters. As well, in common with all types of evidence, there is the possibility that self-interest distorted oral history evidence.<sup>47</sup>

This judicial tendency has frequently displayed an explicit preference for written and documentary evidence over oral history evidence, sometimes to the point of explicitly insisting on corroboration in contravention of the principle that corroboration is not required. An interesting example is in *Benoit v Canada*, where Justice Campbell of the Federal Court accepted oral histories as proof that the Aboriginal signatories honestly believed that a promise of a tax exemption would form part of the terms of Treaty 8, despite an almost complete absence of reference to a tax exemption in the considerable documentary and historical evidence surrounding the Treaty 8 negotiations. The court did not suggest that Aboriginal oral histories were better than or more reliable than the other available evidence. Rather, the oral histories proved an Aboriginal understanding of a tax assurance, and therefore certain principles of treaty interpretation, such as the honour of the Crown being at stake in its observance of treaty terms, required that the oral understanding form part of the terms of Treaty 8.<sup>48</sup> This decision, however, was overturned on appeal to the Federal Court of Appeal, on the basis that Justice Campbell placed undue reliance on the oral history evidence, while not giving sufficient weight to other material evidence.<sup>49</sup> In its reasons, the Court of Appeal commented:

I agree with Dr. von Gernet that oral history evidence cannot be accepted, per se, as factual, unless it has undergone the critical scrutiny that courts and experts, whether they be historians, archaeologists, social scientists, apply to the various types of evidence which they have to deal with. My specific purpose in referring to Dr. von Gernet's Report is to emphasize the fact that the Trial Judge ought to have approached the oral history evidence with caution. In *Mitchell*, supra, for example, the Trial Judge and the Supreme Court of Canada accepted the oral history evidence of Grand Chief Mitchell which, McLachlin C.J. points out at paragraph 35 of her Reasons, was confirmed by archaeological and historical evidence. In other words, depending on the nature of the oral history at issue, corroboration may well be necessary to render it reliable.<sup>50</sup>

47 2000 CANLII 16282 at [231].

48 2002 FCTD 243.

49 *Benoit v Canada* [2003] 228 DLR (4th) 1.

50 *Ibid.* at [113].

In *Canada v Anishnabe of Onigum Band et al.*, Justice G. P. Smith stated: 'Oral evidence is of great assistance however, it must not be blindly accepted nor should it be preferred over documentary evidence if the accuracy of the documentary evidence is established'.<sup>51</sup> In *Mathias v Canada*, Justice Simpson of the Federal Court assessed the Squamish oral history as being more reliable than the Musqueam oral history in part because the former had greater corroboration with available documentary evidence.<sup>52</sup>

Other cases where courts have found documentary and historical evidence more persuasive than oral history evidence include *Buffalo v Canada*,<sup>53</sup> *R v Jeddore*,<sup>54</sup> and *R v Marshall*.<sup>55</sup> *Jeddore* displays a particular shade of hostile comparison, whereby oral history evidence is depicted as demonstrating mere belief on the part of the oral historians (that the territory in question was to be given to them as a Reserve) but not providing reliable evidence of alleged facts, while the available documentary evidence provided contradictory and reliable proof.<sup>56</sup> There is also another concern.

### **Insistence on conclusive proof?**

Canadian courts may also be setting oral history evidence to an impossible task that the Supreme Court has disavowed, to provide conclusive proof of every fact alleged. Cases where oral history evidence has been accepted but the courts found that it did not establish that activities were integral to a distinctive culture prior to contact with Europeans include *R v Deneault*<sup>57</sup> and *R v Francis*.<sup>58</sup> Another instance is *R v Peter Charlie*, where the court suggests that other expert evidence may have assisted in establishing whether practices were central and integral to a distinctive culture, and whether they occurred prior to contact, which the oral history evidence failed to establish.<sup>59</sup>

Also, in *Tzeachten First Nation v Canada*, Justice Tremblay-Lamer of the Federal Court found that the Aboriginal applicants had a case of moderate strength for Aboriginal land title, and therefore did not necessarily require interim

51 *Canada v Anishnabe of Wauzsh Onigum Band et al.* 2002 ONSC 15761.

52 2000 CANLII 16282 at [231].

53 *Buffalo v Canada* 2005 FC 1622.

54 *R v Jeddore* (2003) 231 DLR 224.

55 *R v Marshall* 2001 NSPC 2.

56 *R v Jeddore* (2003) 231 DLR 224 at [234]. See also *R v Quinney* 2003 ABPC 47.

57 *R v Deneault* 2007 BCPC 307.

58 *R v Francis* 2003 NSPC 20.

59 *R v Peter Charlie* 2005 BCPC 57.

accommodation or the most significant remedies available under *Haida*.<sup>60</sup> Her Honour's decision includes this comment on the oral history evidence:

The evidence of the applicants' claim is inconclusive. That the applicants historically used the lands in question, I believe, is strongly established by the material before the Court; however, that they occupied these lands with sufficient regularity and exclusivity is not clear. Accordingly, upon a preliminary assessment, I would qualify the strength of the applicants' claim of Aboriginal title over the lands in question as one of moderate strength.<sup>61</sup>

What is particularly problematic is where courts find that the oral histories prove certain facts, for example, that certain activities took place in the past, but not such other facts as where those activities took place, sufficiently to satisfy the onus of proof. For example, the New Brunswick Court of Queen's Bench in *R v Peter-Paul* found that Mi'kmaq from a particular reserve did not hunt at a particular geographical location despite an assertion by the Mi'kmaq defendants that the Mi'kmaq were historically one autonomous nation.<sup>62</sup> Other cases have found that oral histories have described past activities by an Aboriginal society, but did not sufficiently describe where those activities took place, such as to prove that the Aboriginal persons had a right to engage in hunting or fishing on the particular geographical location where they were charged.<sup>63</sup>

One has to wonder whether this asks a little too much. If Aboriginal oral histories did not go through the trouble of setting out every minute detail, it is hardly unique in that regard. 'Read between the lines' has become a widely understood catchphrase in Western cultures because it captures a certain reality of human communication. Sometimes the reader, audience, or recipient of a communication can discern meanings that are not explicitly articulated in the words themselves. Sometimes the communicator and a recipient share the understanding that not every detail needs to be expressly stated at all times. Frequently there are implicit understandings between the participants in a communication. This can manifest in English literature as well. English novels often describe in some detail the geography of the setting in order to convey realism, but not always. Mark Twain's *The Adventures of Huckleberry Finn*, for example, is content to describe the characters' journey along 'the river'. He never comes out and says that it is the Mississippi River. He assumes a shared understanding between himself

60 *Tzeachten First Nation v Canada* 2008 FC 928.

61 *Ibid.* at [40].

62 *Peter-Paul v R* 2007 NBQB 65.

63 *R v Decaire* [1998] OJ 4970; *R v Sarazin* [2007] OJ 5282.

and the reader that they are journeying along that river.<sup>64</sup> Sometimes the general location of the narrative is known by a fleeting reference, but many of the details are not articulated. In Virginia Woolf's *To the Lighthouse*, the reader knows that the holiday home and the lighthouse across the bay are located in the Scottish Isle of Skye. But this is because 'Skye' is mentioned only once in the entire text, while 'Hebrides' (the island group of which Skye is a member) appears only twice. Where within this 1,656 square mile Isle of Skye the bay and the lighthouse were located is not at all clear in the text, and indeed the focus of the narrative is on the human consciousness of the characters.<sup>65</sup>

It should not be surprising to see that Aboriginal oral histories did not always go through the trouble of spelling out all of the geographical details, such as 'our ancestors did this, and they did it in this spot which is this number of kilometres from this spot, and this number of kilometres from this spot'. Such details were part of their shared daily existence. There may often have been implicit understandings between the oral historian and the audience. They knew where the narratives were unfolding, even if the narratives did not come out and say it explicitly. To insist on this kind of explicit detail is perhaps asking a little too much of oral histories, which is as much a form of literature as it is a recording of the past. Nonetheless, Canadian courts are requiring oral histories to provide conclusive proof of every fact alleged, despite jurisprudence to the contrary.

### The fundamental problem

The Supreme Court has articulated a number of legal principles governing the admission and weighing of oral history evidence. Some of them mandate a generous treatment of oral history evidence, while others mandate critical inquiry and exclusion subject to reliability thresholds. This pulls the judicial inquiry into two opposite directions, and with very little guidance for reconciling the competing concerns. It is therefore not surprising to observe that while generous treatment has occurred in some cases, the majority of Canadian reported cases have witnessed judges minimising the value of the oral history evidence. It is difficult to ignore that this has frequent and particular consequences for Aboriginal rights claimants. Dwight Newman argues that the law of evidence and substantive law are in constant dialogue with each other. In this context, this means that the rules of evidence must be developed dynamically and flexibly in order to realise fair and substantive justice for Aboriginal rights

64 Mark Twain, *The Adventures of Huckleberry Finn* (Oxford Paperbacks: Oxford, 2008). See also Michael G. Miller, 'Geography and Structure in Huckleberry Finn' (1980) 12(3) *Studies in the Novel* 192.

65 Virginia Woolf, *To the Lighthouse* (Hogarth: London, 1927).

claims.<sup>66</sup> When courts routinely show a preference for documentary evidence over oral history evidence, the consequence is twofold. It not only minimises the value of oral history evidence, in contravention of Supreme Court principles, but it also denies substantive justice to Aboriginal peoples when they pursue their rights claims before the courts.

Given that Aboriginal rights claims have frequently asserted title over lands that potentially hold valuable resources like lumber and minerals,<sup>67</sup> and increased access to wildlife resources subject to Canadian regulation,<sup>68</sup> and powers of governance against Canadian state sovereignty,<sup>69</sup> it is fair to ask whether there is something far more fundamental at work here than mere concern over evidentiary reliability. A legal realist appraisal may well conclude that the real objective is to keep Aboriginal interests subordinated to Canadian state sovereignty and policies. John Borrows writes:

The mere presentation of Aboriginal oral evidence often questions the very core of the Canadian legal and constitutional structure. 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. These traditions include memories of the government’s deception, lies, theft, broken promises, unequal and inhumane treatment, suppression of language, repression of religious freedoms, restraint of trade and economic sanctions, denial of legal rights, suppression of political rights, forced physical relocation, and plunder and despoliation of traditional territories. As such, oral tradition is controversial because it potentially undermines the law’s claim to legitimacy throughout the country due to the illegality and/or unconstitutionality of past actions.

However, oral tradition may also be contentious on other grounds. Besides challenging the law’s underlying legitimacy, it can simulta-

66 Dwight Newman, ‘*Tsilqhot’in v. British Columbia* and Civil Justice: Analyzing the Procedural Interaction of Evidentiary Principles and Aboriginal Oral History’ (2005) 43 *Alberta Law Review* 433.

67 See, e.g., *R v Bernard*; *R v Marshall* [2005] 2 SCR 220; and *Tsilqhot’in v British Columbia* 2007 BCSC 1700.

68 *R v Marshall* [1999] 3 SCR 456; *R v Badger* [1996] 1 SCR 771.

69 *R v Pamajewon* [1996] 2 SCR 821.

neously assert an alternative structure of legitimate normative order. The Court may not have contemplated this aspect of oral tradition when commenting on it in *Delgamuukw*. In many places Aboriginal law continues to exist as an important source of legal authority, even if it has been weakened in some cases through the unjust imposition of alien structures. 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. 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. To the extent that oral tradition encompasses these views, it presents a strong vision of legal pluralism that the Supreme Court has not yet fully embraced.<sup>70</sup>

What makes this troubling is that Western methods of representing and reconstructing the past are not immune from suggestions of bias, subjectivity, and methodological difficulty such that they will not necessarily provide more reliable proof than oral histories. Michael Coyle argues that reconstructing Aboriginal history can be a difficult enterprise from the start since the source material may itself present problems:

... two warnings should be given. First, this paper speaks only of what we know about the traditional justice ways of Ontario Indians on the basis of *written* records. Usually, therefore, the historical source is non-Indian. Often the writer is someone, such as a trading post manager or a missionary, who may not have been particularly interested either in investigating the intricacies of the social organization of the Indians or in discovering that their social organization was a complex or effective one. Occasionally, on the other hand, a historical writer is biased in the opposite direction, inventing or glorifying aspects of traditional Indian society for ulterior purposes. Critical judgment of such historical testimony is especially important given the scarcity of the records available.<sup>71</sup>

Miranda Johnson adds:

70 John Borrows, 'Listening for a Change: The Courts and Oral Tradition' (2001) 39 *Osgoode Hall Law Journal* 1 at 26-7.

71 Michael Coyle, 'Traditional Indian Justice in Ontario: A Role for the Present?' (1986) 24 *Osgoode Hall Law Journal* 605 at 613.

This practice of listening to documents, or interpreting what I called above the written-oral, *as oral* illustrates what I described earlier as reading treaty documents at face value. ... To read at face value is, quite literally, to embody a document, to re-enliven it within a network that projects and is presupposed by a collectivity. This practice, of course, also presumes a *faith* in communicating and receiving messages that have not been distorted by, for instance, missionary translators or a nonindigenous legal tradition.<sup>72</sup>

Even if these problems have been identified, it has not stopped the Canadian legal system from routinely preferring such evidence over oral histories with the result of defeating Aboriginal claims. Chris Preston writes:

The manifestations of how Aboriginal oral histories are devalued through this system where positivistic ideals hold trump are many, and take place on a range of societal levels. In academic and scholarly circles, where the values of written traditions are perhaps stronger than anywhere, oral histories have been given scant attention. The reliance on documentary and literary evidence by academics and historians inevitably marginalizes and silences many Aboriginal histories due to their oral nature. By limiting the evidence available for historical analysis to written documents, historians immediately jaundice their supposed objectivity by directing their analyses to certain areas. The reality is that not all historical evidence is in the written format, and the reasons for this are largely cultural and social. By failing to recognize the factors involved in how history is recorded in different cultural situations, historians within the written tradition fail to see how the narratives they produce are culturally limited, and informed by a narrow knowledge base. The result is that, in Canada, many Aboriginal narratives are ignored or degraded in the scholarly and academic historical discourse.<sup>73</sup>

Given that this outcome flows from a particular legal reasoning that privileges one kind of evidence over another, one has to wonder if the reasoning is only on

72 Miranda Johnson, 'Making History Public: Indigenous Claims to Settle States' (2008) 20:1 *Public Culture* 97 at 116-17.

73 Chris Preston, 'A Past of Tragic Stories: The (Non)-Treatment of Native Peoples' Oral Histories in Canada' (2005) 2(1) *Undercurrent* 54 at 68. For a similar argument, see Penny Van Toom, 'Stories to Live In: Discursive Regimes and Indigenous Canadian and Australian Historiography' (1998) 158 *Canadian Literature* 42.

the surface about evidentiary reliability, whereas the deeper objectives are those identified by Borrows.

Judy Iseke-Barnes argues that this is certainly the case, and on a scale that goes well beyond litigation. Her position is that Western states have a stake in promoting certain representations of history as unquestioned fact, with a corresponding devaluation of Aboriginal oral histories. Her specific example is the theory that Aboriginal peoples arrived in the Americas via the Bering Strait 12,000 years ago, and spread across to South America 1,000 years later; broadcasts of the Canadian Broadcasting Corporation and an educational website of the United States government represent this as historical truth. Nevertheless, archaeological evidence reveals that migration and settlement patterns were such that it would have taken longer than 1,000 years for Aboriginal peoples to spread across South America, and that there was human settlement in Monte Verde, in Chile, at least 1,000 years prior to the period postulated by the Bering Strait theory. Meanwhile, Aboriginal oral histories are marginalised. Iseke-Barnes contends that this reflects an agenda to weaken Aboriginal peoples' claims to their lands, and legitimate Western exploitation of those lands.<sup>74</sup> The question now becomes how to address this deep-seated problem. A number of avenues will be explored.

### **Reminder: the fallacies of written history**

Some Canadian judges have recognised the fallacies involved with documented historical evidence. Justice Barry of the Newfoundland Supreme Court identifies the weaknesses of Western methods of written history in reconstructing the past as follows:

Several expert witnesses tempered their conclusions with a caveat about the difficulties involved in reconstructing the early history of North American native peoples from European documents. Some of the difficulties in interpretation that were raised, both in experts' reports and in evidence, include: ethnocentric bias, imprecision in indicators of geographic location, temporal variation in nomenclature, and a general dearth of surviving records that is most pronounced in the earliest periods—precisely when Mi'kmaq presence in Newfoundland is most contentious in the present case.<sup>75</sup>

74 Judy Iseke-Barnes, 'Misrepresentations of Indigenous History and Science: Public Broadcasting, the Internet, and Education' (2005) 26(2) *Discourse: Studies in the Cultural Politics of Education* 149.

75 *The Queen v Drew* 2003 NLSCD 105 at [85].

Justice Vickers of the British Columbia Supreme Court stressed the need to subject historical evidence to critical scrutiny as follows:

One of the difficulties in this case is that no living person can be called to give eyewitness evidence of what was happening in the claim area before, at the time of, and for many decades after first contact with European settlers. It is abundantly apparent the parties must rely on historical documents, oral history and traditions, ethnography and archaeology in the proof of their cases. The meaning of documents is not always self evident and can only be understood in context. That is particularly true of historical documents where, as stated by historian Robin Fisher '[a] document cannot be properly evaluated until we know who wrote it, for whom it was written, and, most importantly, why it was written.' 'Judging History: Reflections on the Reasons for Judgment in *Delgamuukw v. B.C.*'

I am satisfied after a limited reading of the historical documents relied upon by Dr. Hudson that his report and evidence is necessary because it is not possible to understand and evaluate the historical documents without expert assistance. In short, I accept what was said by Robin Fisher. Historical documents need to be read and evaluated for internal consistency as well as established in the context in which they were written. I require explanations of the historical documents and I need to know if the historical documents can be relied upon in making findings of fact. All of the evidence relied upon to prove or understand past events must be critically evaluated. In my view, that evaluation requires professional assistance.<sup>76</sup>

This was also confirmed as the proper approach to assessing the admission of historical documents as reliable evidence in *Ahousaht v Canada*.<sup>77</sup>

There is a real need for Canadian judges to make an earnest effort in applying this recognition so that conventional historical evidence does not automatically receive preferential treatment over oral history evidence, with the potential consequence of perpetuating injustices against Aboriginal rights claimants. It is somewhat ironic that within the discipline of history, for example, the ongoing search for an objective truth means that current or prevailing representations of the past are always subject to being discarded, discredited, corrected, or revised.

<sup>76</sup> *Tsilqhot'in v British Columbia* 2004 BCSC 1237.

<sup>77</sup> 2008 BCSC 768.

History professors often get published precisely by calling into question established representations of the past. This includes Aboriginal history as well. Scholars such as Dee Brown<sup>78</sup> and Ronald Wright<sup>79</sup> published highly regarded monographs by challenging prevailing views of how primitive or cultured prior to European contact Aboriginal societies were, and of how civilised or barbaric their colonisers were. Sarah Carter challenged the prevailing view that Aboriginal peoples in the Canadian west, and in the years following the numbered treaties, were incapable of or disinclined towards agriculture. Instead, Aboriginal farmers were relatively successful until provincial governments capitulated to political pressure from white settlers to place the Aboriginal farmers at a disadvantage deliberately through a variety of measures, such as furnishing them with inferior implements.<sup>80</sup>

In a sense, holding out the products of historical or anthropological studies as an objective truth, even as we continue searching for something better the next day, can come across as a bad joke. Unfortunately, the consequences for Aboriginal rights claimants are very real. Even as experts lead evidence that is preferred by a judge over oral history evidence, simply because it is taken for granted that it must be better, we know that the representations in that evidence will be fair game for challenge by other experts in the field. And yet, conveniently, it is taken in the courtroom as an objective and reliable representation of the past so as to defeat an Aboriginal rights claim. If experts in the following years discredit those representations, the consolation for the Aboriginal rights claimants is all but nothing. Matters have become *res judicata*. It is imperative that judges subject documentary historical evidence to the same degree of scrutiny and, dare I say, scepticism that Aboriginal oral history has received in the past. This ties in with another issue as well.

### **Reminder: the potential value of oral history evidence**

Aboriginal oral histories have safeguards to ensure reliable transmission from generation to generation, and to prevent editorial falsification in the process. This includes, for example, the ceremonial feasts and dances that were common in British Columbia Aboriginal cultures. Justice MacAulay's comments on St:olo oral history also suggest that strict protocol often accompanied such ceremonies, as follows:

78 Dee Brown, *Bury My Heart at Wounded Knee* (Rinehart & Winston: New York, 1970).

79 Ronald Wright, *Stolen Continents: The 'New World' through Indian Eyes* (Penguin Books: Toronto, 1992).

80 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (McGill-Queen's University Press: Montreal, 1990); and "Two Acres and a Cow: "Peasant" Farming for Indians of the Northwest, 1889-97" (1989) 70(1) *Canadian Historical Review* 27.

When told by a member of the Sto:lo community, this type of oral history is called Sqwelqwel or ‘true news.’ Its cultural legitimacy is established by ‘oral footnoting’, a process involving consideration of the respect accorded by the community to both the speaker and his or her lineage through which the story has been passed back to its source. The importance of Sqwelqwel in a community needing an accurate means of passing on its history and lineage cannot be overstated. Only those speakers providing appropriate footnotes were considered reliable. Controls by the community were exercised in a subtle fashion; those who did not provide proper footnoting were not invited to speak at future public gatherings.<sup>81</sup>

The insistence on truthful representation and integrity is also found in other Aboriginal cultures as well, even if they did not take on such formalised expressions as ceremonies. The Federal Court in *Buffalo v Canada* noted:

Dr. Wheeler also discussed verification. She believed that verification must occur within the context of the oral tradition histories; one must be aware of the internal checks and balances within the cultural context. Foremost, however, is the storyteller’s reputation. Elders are held in high esteem and are expected to be truthful. Elders may assist each other in ensuring that a proper rendition of a story is given. Repercussions result also from any break in protocol.<sup>82</sup>

John Borrows argues that oral history can provide proof of past events that can be just as reliable as Western methods of reconstructing the past. The example he gives is that of the Lemba people in South Africa, whose oral histories have continuously claimed that the Jewish people of Judea were their ancestors, and that the Lemba gradually migrated to their present location. This oral tradition may have been validated by DNA evidence that suggests that many Lemba men carry DNA sequences that were distinctive to Jewish priests who descended from Aaron.<sup>83</sup> Several other studies have continued to demonstrate the accuracy and reliability of oral history traditions, and that they often share remarkable consistency with anthropological or historical findings. Take, for example, the Camp Grant Massacre on 30 April 1871, where a large group of Mexican and Papago fighters, along with six Americans, massacred 144 Apache, mostly women and children, along the San Pedro river. Several oral histories generated by survivors share

81 *HMTQ v Jacobs et al.* 1998 BCSC 3988.

82 *Buffalo v Canada* 2005 FC 1622 at [301].

83 Borrows, above n. 70 at 12–13.

consistency with both each other and written history on the massacre. They not only demonstrate consistency, but also provide context and information that was not available to the historians, such as the festivities that took place before the massacre, the foods that the Apache were trading for prior to the massacre, the identities of particular victims and survivors, and the geographical locations that survivors fled to.<sup>84</sup> Another example is the St Lawrence Island Famine and Epidemic of 1878 to 1880, in Alaska, where at least 1,000 Yupik died of starvation. Besides sharing consistency with historical accounts, Yupik oral histories provide additional context to the history, such as what they perceived to be the deeper spiritual reasons for the famine, that they failed to observe their own ethos of treating animals with respect and hunting them only out of necessity.<sup>85</sup>

Andrew Martindale and Susan Marsden performed a study that concluded that there was considerable consistency between physical evidence studies by archaeologists and oral histories regarding the migration and settlement patterns of the Tsimshian of British Columbia.<sup>86</sup> Aboriginal oral traditions have also confirmed geological conclusions that major earthquakes were frequent along the west coast of North America during the Holocene era. Although oral traditions and geological evidence may disagree on certain points, such as precisely when the earthquakes occurred, the oral histories validate that they occurred and provide additional information such as their effects on human populations.<sup>87</sup> There are also other studies where oral histories were not only consistent with archaeological examinations of sites, but also provided archaeologists with a fuller picture, like, for example, by providing information on land use activities.<sup>88</sup>

A recent study by Evan Hafaëli demonstrates that there are considerable congruences between written history on Henry Hudson's exploration of the Hudson River in 1609 and the oral histories of the Aboriginal peoples his crew came into contact with. Hafaëli goes so far as to clear up what may possibly be the

84 Chip Colwell-Chanthaphonh, 'Western Apache Oral Histories and Traditions of the Camp Grant Massacre' (2003) 27(3) and 4 *American Indian Quarterly* 639.

85 Aron L. Crowell and Estelle Ozeevaseuk, 'The St. Lawrence Island Famine and Epidemic, 1878-1880: A Yupik Narrative in Cultural and Historical Context' (2006) 43(1) *Arctic Anthropology* 1.

86 Andrew R. C. Martindale and Susan Marsden, 'Defining the Middle Period: (3500 BP to 1500 BP) in Tsimshian History through a Comparison of Archaeological and Oral History Records' (2003) 138 *British Columbia Studies* 13.

87 Alan D. McMillan and Ian Hutchinson, 'Aboriginal Traditions of Paleoseismic Events along the Cascadia Subduction Zone of Western North America' (2002) 49(1) *Ethnohistory* 41.

88 Gerald A. Oetelaar and D. Joy Oetelaar, 'People, Places and Paths: The Cypress Hills and the Niitsitapi Landscape of Southern Alberta' (2006) 51(199) *Plains Anthropologist* 375; Andrew Stewart *et al.*, 'Archaeology and Oral History of Inuit Land Use on the Kazan River, Nunavut: A Feature-based Approach' (2000) 53(3) *Arctic* 260.

greatest source of disagreement between the two histories. A fuller understanding of the languages used by the Aboriginal locals makes it clear that they were not engaged in the act of apotheosis, the act of describing the explorers as deific entities. The words they were using were meant to describe the explorers, who were nonetheless recognised as earthly human beings, as powerful and therefore to be treated with respect during interactions.<sup>89</sup>

The studies described thus far, and to an extent the present argument as well, have striven to validate oral histories by means of demonstrating consistency with Western conclusions regarding the past. This may come across as validating the contention that oral histories should not be accepted as reliable proof unless and until corroborated. That is not the point here. The point is to encourage a different line of reasoning. If oral histories have consistently demonstrated their verifiability on numerous occasions, why can we not accept that they can independently provide reliable proof of alleged facts? It would be interesting indeed to suggest that archaeologists, anthropologists, and historians can try to verify their own conclusions by checking for consistency with oral histories. Peter Whitely notes that Hopi oral traditions regarding migration patterns, sites of settlement, and family structures have proven consistent with available archaeological evidence.<sup>90</sup> He suggests that archaeology as a discipline need not restrict itself to being a 'hard science' that examines only the material and environmental evidence. Aboriginal oral histories can provide additional sources of evidence, of information, and avenues of study that can enhance and further archaeological studies.<sup>91</sup>

### On the subject of corroboration

Some additional comments on corroboration are in order. There is often practical value for an adversarial party to try to have evidence it leads corroborated by other available evidence, even if the law does not formally require corroboration. For example, the Canadian Criminal Code used to insist on corroboration for a complainant's evidence in sexual assault cases, but no longer does so.<sup>92</sup> In sexual assault cases, the Crown may still consider it practical to obtain forensic evidence that will corroborate the complainant's testimony, like, for example, the test

89 Evan Hafaeli, 'On First Contact and Apotheosis: Manitou and Men in North America' (2007) 54(3) *Ethnohistory* 407.

90 Peter M. Whitely, 'Archaeology and Oral Tradition: The Scientific Importance of Dialogue' (2002) 67(3) *American Antiquity* 405 at 408–11.

91 *Ibid.* at 405–6. See also Curtis F. Schaafsma, 'Truth Dwells in the Deeps: Southwestern Oral Traditions and Archaeological Traditions' (2004) 46(4) *Journal of the Southwest* 621.

92 Constance Blackhouse, 'The Doctrine of Corroboration in Sexual Assault Trials in Early Twentieth-Century Canada and Australia' (2001) 26 *Queen's Law Journal* 297.

results of a rape kit, or a DNA sample from the victim's clothing that matches the DNA of the alleged rapist. To present such evidence at trial, precisely by virtue of its corroborative value, increases the chances that the complainant's testimony will be able to persuade the trier of fact that the alleged sexual assault occurred. This practical incentive exists, even if the law no longer formally requires corroboration for sexual assault allegations.

One can just as easily argue that Aboriginal rights litigants should act according to a similar practical imperative. Although corroboration may not be required for the admission, or evaluation, of oral history evidence, Aboriginal rights claimants may nonetheless also strive to obtain evidence available from archaeologists, anthropologists, or historians that is consistent with the oral history evidence in order to increase the practical chances of winning the case. Aboriginal rights litigants in fact have often done this in order to improve their chances of having their rights claims succeed. In *Tsilqhot'in*, for example, the rights claimants called no less than Dr Richard Matson, an archaeologist, Dr David Dinwoodie, an anthropologist, Dr Kenneth Brealey, a cartologist, and Dr Nancy Turner, an ethnobotanist.<sup>93</sup> If such a tactical approach succeeds, and a Canadian judge feels all the more confident in recognising a rights claim when the oral history evidence is corroborated, then that is all well and good.

More difficult issues arise when that corroboration is not to be found. The arguments advanced in this article do not constitute a recommendation that judges should not seek consistency between oral history evidence and documentary and historical evidence. Properly discharging the judicial function does after all involve an assessment of all of the available evidence. Where there is no evidence to corroborate otherwise reliable oral history evidence, but also no evidence to contradict it, nothing should stop the judge from accepting the oral history evidence as reliable proof of the rights claim. The Supreme Court has after all emphasised that oral history evidence standing on its own can provide reliable proof of facts alleged.

A more difficult problem arises when documentary and historical evidence contradicts the oral history evidence. The Supreme Court has emphasised that oral history evidence must still be reliable, both to meet the threshold standard for admission into evidence, and for ultimate reliability such as to satisfy the burden of proof. If Canadian judges want to subject oral history evidence to a critical and searching inquiry in order to satisfy themselves as to ultimate reliability, it is only fair that the documentary and historical evidence get

93 *Tsilqhot'in v British Columbia* 2004 BCSC 1237.

subjected to the same inquiry as well. Justice Barry<sup>94</sup> and Justice Vickers<sup>95</sup> have both pointed out that there are numerous factors that can render the reliability of documentary and historical evidence questionable. Justice Vickers has also pointed out that experts, perhaps called by the Aboriginal litigants, or perhaps called as court-appointed experts (more on this later), can assist the court with identifying those concerns.

The Supreme Court has emphasised that oral history evidence is to enjoy an equal footing with other kinds of evidence that may be preferred by the courts. This means that it is to be given a real and fair chance to prove an Aboriginal rights claim. It should also mean that if the oral history evidence is to be subjected to a critical inquiry as to its ultimate reliability, then the documentary and historical evidence should be subjected to that kind of inquiry as well. A court can then engage in a fair and complete assessment of the evidence once any potential concerns with any of the evidence have been identified. The problem with practice in the lower courts is that it has frequently manifested reasoning along the lines of, 'There is no documentary or historical evidence to confirm the oral history evidence, so I cannot accept the oral history evidence as reliable proof of the claim' or 'I cannot accept the oral history evidence as reliable proof because it has been contradicted by the documentary and historical evidence'. When judges frequently adopt reasoning that automatically privileges one kind of evidence over another, it raises serious concerns about judicial impartiality and the appearance of bias in favour of the Crown. This is all the more marked when judicial practice fails to conform with explicit guidelines set down by the highest court, and when the courts are being called upon to protect the constitutionally guaranteed Aboriginal rights against their encroachment by the Canadian state.

As with the potential fallacies of documentary and historical evidence, judges must recognise the potential value of oral history evidence as reliable proof of material facts. The question then becomes how to convince judges of this. One possible avenue is through the ongoing process of judicial education.

## Judicial education

Even after judges are called to the bench, their education never truly ends. The mandate of the National Judicial Institute of Canada is to develop and deliver educational programmes for judges of all jurisdictions within Canada. These can include substantive law courses that cover the latest developments in fields such

<sup>94</sup> *The Queen v Drew* 2003 NLSCD 105.

<sup>95</sup> *Tsilqhot'in v British Columbia* 2004 BCSC 1237.

as criminal law and expert evidence.<sup>96</sup> The Institute does offer seminars on Aboriginal oral history evidence, but thus far these seminars have only covered the basic legal principles. For example, Kent McNeil and Mary-Ellen Turpel offered a seminar titled 'The Courts and Oral Tradition'. This was a small part of a three-day course on Aboriginal law offered by the Institute in Calgary, from 23–25 January 2003.<sup>97</sup> The Institute also offered a three-day course on Aboriginal law in St Johns, Newfoundland, on 20–22 April 2005, of which Aboriginal oral history evidence was again a small part of the course content,<sup>98</sup> and offered Federal Court justices a one-day seminar titled 'Aboriginal Law: Evidentiary Issues' in Ottawa on 1 June 2007.<sup>99</sup>

On 8 March 2007, members of the Federal Court of Canada met with members of the Indigenous Bar Association in a liaison meeting in Winnipeg, Manitoba, in order to have a detailed discussion on the subject of Aboriginal oral history evidence in the litigation process. At this meeting, at least two justices of the Federal Court perceived that the basic level of education offered to judges on oral history evidence was inadequate. Justice Yves de Montigny added that 'there needs to be more education for judges'. Justice Anne MacTavish was of the opinion that 'for large scale cases, one needs very specialized education tailored to the case'.<sup>100</sup>

There is a recent development by the Institute to develop what it refers to as social context education. The programme is designed to include seminars and courses for Canadian judges that explore the importance of various social context issues to judicial decision-making, including gender, Aboriginal peoples, race, age and disability. The project also stresses that a 'conscious contextual inquiry has become an accepted step towards judicial impartiality'.<sup>101</sup>

Perhaps there is a need to make judicial education on Aboriginal oral history evidence more robust so that it truly meets the mandate of social context education. Perhaps the National Judicial Institute should not remain content with brief seminars covering the basic principles. What may be needed is to integrate a far greater amount of detail and material into the educational process, including the potential evidentiary value of oral histories, and the potential fallacies of

96 <<http://www.nji-inm.ca/nji/inm/accueil-home.cfm>>

97 <[http://www.osgoode.yorku.ca/faculty/cv/McNeil\\_Kent.pdf](http://www.osgoode.yorku.ca/faculty/cv/McNeil_Kent.pdf)>

98 National Judicial Institute of Canada, *Judicial Education in Canada 2005: Course Calendar and Education Resources* (National Judicial Institute of Canada: Ottawa, 2005).

99 National Judicial Institute of Canada, *Schedule of Judicial Education*, Vol. 20, No. 2 (National Judicial Institute of Canada: Ottawa, 2007).

100 <[http://cas-ncr-nter03.cas-satj.gc.ca/fct-cf/pdf/Aboriginal%20Law%20Bar%2008\\_03\\_2007\\_ENG.pdf](http://cas-ncr-nter03.cas-satj.gc.ca/fct-cf/pdf/Aboriginal%20Law%20Bar%2008_03_2007_ENG.pdf)>

101 <[http://www.nji.ca/nji/internationalforum/SCEP\\_summary.pdf](http://www.nji.ca/nji/internationalforum/SCEP_summary.pdf)>

documentary and historical evidence, Aboriginal perspectives on the reliability of oral history evidence, and the importance of oral history evidence in realising substantive justice for Aboriginal peoples. Including such details and information can provide a 'pervasive treatment of the relevant social context issues' involved with Aboriginal oral history evidence. It can facilitate a 'conscious contextual inquiry' on the part of Canadian judges as 'an accepted step towards judicial impartiality'. There are, however, other avenues that can be explored, involving the rules of evidence themselves.

## Inferences

Sometimes the law of evidence allows facts to be established through inference. Where it is permitted, the trier of fact may deduce other facts, even if not proven explicitly by direct evidence, from those facts that are established by direct evidence. There is the well-known doctrine of recent possession. If a person is found in possession of recently stolen goods, and is unable to provide an explanation of how he or she came to that possession, the trier of fact may infer that the person knew the goods were stolen.<sup>102</sup> There is also the inference that a person intends the natural and probable consequences of his or her actions.<sup>103</sup> If a criminal accused flees from authorities, it can lead to an inference of consciousness of guilt, which in turn can lead to an inference of guilt of the offence.<sup>104</sup> Circumstantial evidence by its very nature involves an inference whereby proof of a fact (for example, fingerprints on the gun) can lead to a finding of another fact (for example, the accused held the gun in the firing position).

Perhaps there is room to adapt the principle of permissible influence to assist in the evaluation of oral history evidence. This is definitely an avenue worth exploring. For example, in the context of treaty rights claims, judges should seriously consider the very real possibility that Aboriginal understandings of treaty terms, even if uncorroborated by the documentary record, became an enduring part of their oral histories precisely because of representations made by Crown delegates during negotiations.<sup>105</sup> Leaving aside exactly what terms were agreed to, the beliefs of the Aboriginal signatories do indeed have legal relevance to certain principles of treaty interpretation such as the courts mandating that there not be the appearance of sharp dealing, and the honour of the Crown being at stake. The proven fact of beliefs on the part of the Aboriginal signatories leads to

102 *R v Kowlyk* [1988] 2 SCR 59.

103 *R v Seymour* [1996] 2 SCR 252.

104 *R v Arcangioli* [1994] 1 SCR 129.

105 For an example of this, see John S. Long, 'How the Commissioners Explained Treaty Number 9 to the Ojibway and Cree in 1905' (2006) 98(1) *Ontario History* 1.

an inference of another fact, representations by Crown officials, that flows logically from the proven facts. In this light, perhaps *Benoit* represents a flawed approach that needs to be discarded.

Note, however, that such inferences are permissible. The trier of fact *may*, but is not required to, infer a fact upon proof of another fact. There are reasons why many inferences recognised at law are permissive instead of mandatory. Even if the precedent fact is proven, it may still not be sufficient in terms of ultimate reliability to persuade the trier of fact as to the fact that was to be inferred. The trier of fact is therefore allowed discretion in deciding whether the fact to be inferred is established, particularly when any logical or rational nexus between the proven fact and the fact to be inferred may be tenuous at best. Alex Stein, for example, writes:

Third, judges have to make their decisions within reasonable time-limits, acting under conditions of scarce informational resources. Facts contested in judicial trials have thus to be reconstructed on the basis of deficient evidence, e.g., by relying upon accounts of fallible and biased witnesses, by invoking inferences which amount to mere approximation, and by subjecting the evidence to credibility tests which are never carried through to perfection.<sup>106</sup>

Denis R. Klinck also asserts that the ability to infer facts from circumstantial evidence in criminal cases depends in large measure on whether there is a 'real nexus' between the proven fact and the fact to be inferred.<sup>107</sup>

If inferences are to play a role in enhancing the value of Aboriginal oral history evidence, then the inferences must be permissible as opposed to mandatory. Rather than set out specific guidelines for when inferences should be made and when they should not, I will argue that, notwithstanding the inevitable discretion surrounding inferences, the nature of Aboriginal oral histories combined with human good sense can provide sound impetus for such inferences. They may be very persuasive. Stein contends that no form of evidence has any innately superior persuasive value relative to another form of evidence. What gives evidence its persuasive value, its weight, is a function of the meanings that the trier of fact is

106 Alex Stein, 'The Refoundation of Evidence Law' (1996) 9(2) *Canadian Journal of Law and Jurisprudence* 279 at 310.

107 Denis R. Klinck, 'Evidence as Rhetoric: A Semiotic Perspective' (1994) 26 *Ottawa Law Review* 125 at 134.

willing to ascribe to the evidence, and the ‘transformative arguments’ that can be put forward as to why the evidence should be relied on.<sup>108</sup>

On this note, there are plenty of transformative arguments that Aboriginal litigants and their lawyers can put forward as to why oral histories should be relied on, either as direct proof of facts or as a content source from which other facts can be inferred. Oral histories were of cultural and spiritual significance to Aboriginal peoples. As has been shown, the transmission of oral histories from generation to generation was often governed by strict protocols, such as ceremonies or standards of conduct. The reputation of the holders of oral histories depended on their remaining true to the oral histories and their methods of transmission. Certain descriptions of events would not have become enduring features of an oral history unless the ancestors had either observed or participated in them. Appropriate judicial education, in conjunction with the transformative arguments, could lead judges to become more willing to ascribe certain meanings to the oral history evidence. This ideally can also mean that oral history provides a foundation from which to infer other facts. There is also another possibility.

### Judicial notice

The doctrine of judicial notice allows a judge to reach a factual conclusion pertinent to a case without requiring presentation of evidence in support of the conclusion. Judicial notice may be taken of facts that are:

1. so generally accepted or notorious as to not be the subject of debate among reasonable persons.
2. capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.<sup>109</sup>

The application of this doctrine to Aboriginal rights litigation may seem problematic since historical, as well as geographical, facts are often vigorously disputed during such cases.<sup>110</sup> The question then becomes whether the doctrine of judicial notice may be used by judges in good conscience where historical facts are contested between the Crown and Aboriginal litigants.

The answer may be found in an understanding of the first prong of the doctrine. The phrase ‘reasonable persons who would not debate generally accepted and

108 Stein, above n. 106 at 308–9.

109 *R v Find* [2001] 1 SCR 863.

110 Brian Gover and Mary Locke MacAulay point this out in ‘Snow Houses Leave No Ruins: Unique Evidence Issues in Aboriginal and Treaty Rights Cases’ (1996) 60 *Saskatchewan Law Review* 47.

notorious facts' does not necessarily refer to an abstract, monolithic, or universal standard that is somehow detached from the circumstances of a particular locality. Some Supreme Court of Canada justices recognised this in *R v RDS*, a case where a police officer charged a Black youth for interfering with the arrest of the youth's cousin, while the youth claimed he did nothing wrong and that he was racially harassed by the arresting officer. The trial pitted the credibility of the Black youth against the credibility of the arresting officer. The trial judge used her knowledge of racial tensions in a Nova Scotia community to find that the Black youth was a credible witness who was likely telling the truth, and thus his testimony raised a reasonable doubt. The central issue of the case was whether the trial judge, who herself is Black, so conducted herself as to suggest bias against the Crown.<sup>111</sup> A further question was whether her reference to racial tensions in the local community was, in the absence of direct proof, a proper use of judicial notice. Chief Justice McLachlin and three other justices recognised that facts notorious and generally accepted within a local community can properly fall within the scope of judicial notice. For example: 'It follows that one must consider the reasonable person's knowledge and understanding of the judicial process and the nature of judging as well as of the community in which the alleged crime occurred.'<sup>112</sup> And again:

The reasonable person is not only a member of the Canadian community, but also, more specifically, is a member of the local communities in which the case at issue arose (in this case, the Nova Scotian and Halifax communities). Such a person must be taken to possess knowledge of the local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues: ... The reasonable person must thus be deemed to be cognizant of the existence of racism in Halifax, Nova Scotia. It follows that judges may take notice of actual racism known to exist in a particular society.<sup>113</sup>

And again:

While it seems clear that Judge Sparks did not in fact relate the officer's probable overreaction to the race of the appellant R.D.S., it

111 *R v RDS* [1997] 3 SCR 484.

112 *Ibid.* at [32].

113 *Ibid.* at [47].

should be noted that if Judge Sparks had chosen to attribute the behaviour of Constable Stienburg to the racial dynamics of the situation, she would not necessarily have erred. As a member of the community, it was open to her to take into account the well-known presence of racism in that community and to evaluate the evidence as to what occurred against that background.<sup>114</sup>

This emphasis on localised knowledge manifests in other contexts as well. Courts have been willing to take notice of geographical features and locations within their local jurisdictions,<sup>115</sup> as well as judicial notice of historical facts.<sup>116</sup>

Perhaps the doctrine of judicial notice can assist the evaluation of oral history evidence in a similar fashion. Where Aboriginal oral historians relate their oral histories before a court, there is a meaningful evidentiary foundation before the court upon which the judicial notice is based. The Aboriginal oral historians, besides recounting the oral histories in their transmitted form, can help the courts fill in the blanks. They can explain details that exist in between the lines of the oral traditions. They can explain that understandings of those details were so widely known and shared among members of their Aboriginal community, and that those details were not the subject of any reasonable debate within the community itself. So long as the Aboriginal oral historians make credible representations as to the fuller details and understandings underlying the oral histories, this may be an appropriate occasion for judges to utilise a contextualised application of judicial notice. After all, it is not uncommon for judges to look for sincere demeanour and the degree of detail as indicators of credible testimony. This can include the testimony of Aboriginal oral historians as well. In *R v Catarat*, Justice Nightingale grounded reliance on the oral history on the credibility of the oral historians and the quality of their testimony in this fashion:

As with all evidence, some is more trustworthy and compelling than the rest, some more useful in deciding the case. While I accept that all the witnesses strived to give the best testimony they could, I was particularly impressed by the evidence of Elmer Harry Campbell and Isadore Toby Campbell. There was about their testimony a richness of detail, a vividness which left me with the strong impression that the information they had come from a source or sources very close to the

114 *Ibid.* at [56].

115 *R v Zarelli and Newall* [1931] 55 CCC 314; *R v Porter* [1961] 130 CCC 116; *R v Bednarz* [1961] 35 CR 177.

116 *R v Calder* [1973] 34 DLR (3d) 145; *R v Zundel* [1987] 31 CCC (3d) 97; *R v Sioui* [1990] 3 CNLR 127.

events. Put in other words, there was an authenticity about their oral history evidence which allows me to rely upon it, and I have.<sup>117</sup>

Oral histories may describe their ancestors having engaged in certain activities like fishing and hunting, but without actually coming out and saying exactly where. Aboriginal community members generally understood where they occurred. Just as it may be left to Mark Twain to come out and say that ‘the river’ meant the Mississippi River and for Virginia Woolf to tell us where the lighthouse was, we can leave it to Aboriginal oral historians to fill in the blanks by telling us that it was commonly understood that ‘the lake’ meant that the ancestors hunted and fished by *this* particular lake. One can of course anticipate situations where an Aboriginal community had no shared understanding of the geographical details, if, for example, different segments of the community had different understandings of the geography. It is entirely appropriate in this kind of situation to suggest that the tests for judicial notice are not met, and therefore the doctrine cannot operate so as to enhance the value of the oral history evidence.

It is not the contention of this article that the mere presentation of any oral history should result in an automatic judgment in favour of Aboriginal litigants. That simply invites criticisms of judicial partiality in their favour. The point of this article has been to encourage Canadian judges to conform in spirit with the Supreme Court principles on oral history evidence so that Aboriginal peoples have a fair opportunity to press their rights claims in an impartial forum, and to suggest improvements in the law of evidence that can realise this objective. There is also another potential avenue, which contemplates a departure from adversarial procedures.

## **Restructuring expert proof of the issues**

### **Problems with the adversarial system and expert witnesses**

Adversarial legal systems are sometimes touted as conducive to a search for truth because each party has an incentive to discover and lead information helpful to their cases. The ideal is that between the incentive acting on both parties, each party adds to a greater sum of information that is available for the court’s consideration. At the same time, there has been no shortage of criticisms willing to relate how adversarial systems actually hinder the search for truth, like, for example, that adversarial advocacy encourages tactics designed to delay or wear down the

117 *R v Catarat* 1998 SKPC 13338 at [85].

opponent.<sup>118</sup> Lisa Dufraimont points out that the adversarial system is problematic in the sense that it can actually provide the parties with a certain disincentive towards discovery of the truth behind a case, as follows:

Like its justifications, criticisms of adversary procedures centre on the control of the evidence by parties and their lawyers. When parties present their cases in the context of a partisan contest, normally neither the parties themselves nor their lawyers have any duty to seek the truth. Admittedly, criminal prosecutors are an exception to this rule, as they are ethically bound to seek justice rather than victory. Other advocates, however, 'are ... attitudinally and ethically committed to winning the contest rather than to some other goal, such as discovery of truth or fairness to the opposing side.' Even the adversary judge as the trier of law has no direct responsibility to ensure that the truth emerges. Insofar as truth seeking is not the primary role of professional courtroom actors, the adversary system relies on an expectation of inadvertent truth discovery. Not surprisingly, adversary procedure has been criticized for being insufficiently committed to, and insufficiently likely to result in, the discovery of truth.<sup>119</sup>

David Paciocco argues that the adversarial system also has troublesome repercussions for expert opinion evidence. Selection bias means that parties select experts who are likely to present evidence that is favourable to themselves. Association bias means that experts will be inclined to favour the parties that called them in their presentation of evidence. This can mean experts modifying their opinions to deliberately assist the party calling them in winning the case, or deliberately searching for evidence to support the party's case, or minimising relevant information that is helpful to the adverse party. Motives for this can include experts receiving substantial income from a certain kind of court party (for example, governments) and thus avoiding a 'biting of the hand' that feeds them, upholding

118 Stephen W. Sussums, 'Adversarial Co-operation: A Model That Works' (1992) 9 *Journal of the American Academy of Matrimonial Lawyers* 61; Marilyn L. Pilkington, 'Equipping Courts to Handle Constitutional Issues: The Adequacy of the Adversary System and its Techniques of Proof' [1991] *Law Society of Upper Canada Special Lectures* 51; see also Rosalie Silberman Abella, 'The Civil Litigation Process Under Siege: Roscoe Pound Redux' (1994) 28 *Law Society of Upper Canada Gazette* 213.

119 Lisa Dufraimont, 'Evidence Law and the Jury: A Reassessment' (2008) 53 *McGill Law Journal* 199 at 235.

their professional credibility by defending their opinions and research against contradiction by other experts, and advancing a perceived noble cause.<sup>120</sup>

These problems may be observable in Aboriginal rights litigation as well. Chris Preston notes that the presentation of oral history evidence to the Canadian legal system relies on an expert interviewer to speak with oral historians, and then transcribe the contents of the interview into a report. Preston considers this problematic since the expert has considerable power to control the contours and directions in the change of information, and has considerable latitude to give oral histories a negative spin, playing into the legal system's preference for written history over oral history.<sup>121</sup>

Dr von Gernet, who derives most of his income from being an expert witness for the Crown, has been accused more than once of being a biased advocate. It is interesting to note that lawyers for the Tsilqhot'in made an interim application to have von Gernet's reports excluded from evidence on the basis that they were the products of advocacy rather than expert evidence that could assist the court.<sup>122</sup> Justice McAulay expressed these concerns about the reliability of the Crown expert's evidence during *R v Jacobs*:

I cannot leave these topics without stating my serious concerns about Ms. Kennedy's lack of objectivity. She appeared, at times, to inflate the value of her own experiences to the point of puffery and was unwilling to concede that any opinion different from hers could have value. Throughout her evidence, but particularly in cross-examination, Ms. Kennedy acted as an advocate for her views rather than an expert assisting the court. She was dismissive of opposing views and often volunteered non-responsive information in cross-examination to augment her opinions.<sup>123</sup>

Of course, to be fair, the knife can cut the other way as well. Justice Vancise of the Saskatchewan Court of Appeal remarked on the bias that was potentially present in oral history evidence given during the trial decision as follows:

120 David Paciocco, 'Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts' (2009) 34 *Queen's Law Journal* 565. For similar arguments, see Tania M. Bubela, 'Expert Evidence: The Ethical Responsibility of the Legal Profession' (2004) 41 *Alberta Law Review* 853 and Yun-Wei Jang, 'Controlling Dishonesty of Expert Witnesses' (2007) *US-China Law Review* 65.

121 Preston, above n. 73 at 59.

122 *Williams et al. v British Columbia et al.* 2006 BCSC 1427.

123 *R v Jacobs* 1998 BCSC 3988 at [82].

The trial judge found that extrinsic evidence could be admitted as there are no written documents available because the Indians did not create and leave a written record at the relevant times. They did, however, express their thoughts orally and to the extent that those thoughts were expressed before any dispute had arisen between the parties as to the entitlements under the Treaty, the evidence met the criteria of reliability and necessity. The trial judge admitted the evidence of the elders but used it 'with caution' because the individuals who testified on behalf of the Band have been actively involved in the 'pursuit of Indian rights' and there was a chance that their personal opinions may have coloured their testimony regarding the history of the negotiations. I agree with that decision.<sup>124</sup>

Likewise, in *Wilson v Canada*,<sup>125</sup> the credibility of the Aboriginal oral historian was fatally impeached when it was found that he had given a prior inconsistent statement in the form of an affidavit that was sworn a year prior to the trial. Perhaps the overriding concern for Canadian courts should be the truth of the past, over and above all else and for the sake of doing proper justice to Aboriginal rights claims, and not so much on how the relevant information is obtained or presented. It then becomes a question of how to go about this.

### **Cooperative fact-finding and court-appointed experts**

It has been suggested that anthropological, archaeological, or historical approaches to discovering the truth do not necessarily require an antagonistic contest with oral histories' approach to relating the truth. Members from both sides of the fence can cooperate and work together in an effort to come up with a reasonably ascertainable truth. Wendy Beck and Margaret Somerville advance the concept of meaningful dialogue between Aboriginal oral historians in Australia and field archaeologists as a method of furthering knowledge of the subject of study, neither enjoying privilege over the other during conversation. Beck and Somerville identify four types of conversations that can occur in a collaborative setting. Intersecting conversations focus on points where archaeology and oral histories contain information that is consistent and thereby validates what each had previously understood as truth. Parallel conversations occur when archaeology and oral histories provide different sets of information about the same subject that do not overlap; this furthers knowledge of the subject by providing additional context not previously available to the participants. Complementary conversations are conversations where one side directly provides additional infor-

124 *Lac La Ronge Indian Band v Canada* 2001 SKCA 109 at [37].

125 2001 FCT 936.

mation on a certain subject that was previously unavailable. Contradictory conversations occur when the information from each side contradicts each other; this can be problematic in the sense that it implies that one side must be deemed wrong. Beck and Somerville, however, contend that even contradictory conversation can be fruitful, since it can spur both sides to acquire knowledge and reach new understandings that neither had previously appreciated. This means that the field expert must be open to revising his or her previous understandings of the subject. The example they give is that hard evidence of inhabitation at a certain site being absent did not necessarily mean that Yarrawarra Aboriginals had never settled at the site. It may instead have helped confirm the sometimes migratory nature of the Yarrawarra and the ephemeral nature of their building structures.<sup>126</sup>

Martindale and Marsden also contend that archaeology and oral histories can be complementary in the sense that each can fill in the gaps of the other:

The implication of this work is that other comparisons between the archaeological and oral records are possible and can enhance an understanding of the past. Archaeological reconstructions are improved from the rich social and political history preserved in oral records. Oral traditions, in turn, can benefit from the structured chronological, technological, and economic data that archaeological culture history studies provide.<sup>127</sup>

Brian Calliou's idea of interviewing Elders in a respectful setting, and then transcribing the interviews, raises concerns about 'freezing' oral histories, or setting them in a format at odds with Aboriginal cultures and worldviews,<sup>128</sup> but it could afford a court a more thorough picture or reconstruction of the past.<sup>129</sup>

How then do we realise this through the court system? The answer may be found in the ability of a judge to call a court-appointed expert. The Rules of Court for British Columbia, a province where Aboriginal rights claims are frequently litigated, states:

126 Wendy Beck and Margaret Somerville, 'Conversations Between Disciplines: Historical Archaeology and Oral History at Yarrawarra' (2005) 37(3) *World Archaeology* 468.

127 Martindale and Marsden, above n. 86 at 34.

128 William Schneider, *So They Understand: Cultural Issues in Oral History* (Utah State University Press: Logan, Utah, 2002).

129 Brian Calliou, 'Methodology for Recording Oral Histories in the Aboriginal Community' (2004) 15 *Native Studies Review* 73.

32A (1) On application, or on its own initiative, the court may, at any time, appoint one or more independent experts to inquire into and report on any question of fact or opinion relevant to an issue in the proceeding.

(2) The selection of the expert may be agreed upon by the parties, but where they cannot agree selection shall be made by the court.

(3) The court, after consultation with the parties, shall settle the question to be submitted to the expert and shall give the expert appropriate directions.

...

The expert shall prepare a report and send it to the registry, with a copy to the parties or to their solicitors, within such time as the court directs.<sup>130</sup>

Rule 52.03 of the Court of Queen's Bench Rules for Manitoba, another province that sees frequent Aboriginal rights litigation, has very similar wording and substantially the same parameters.<sup>131</sup> Perhaps Canadian judges should show a greater willingness to have recourse to this alternative where necessary to avoid the problems involved with partisan expert testimony and to do justice to Aboriginal rights claims. Research suggests that judges are often hesitant to appoint an independent expert out of respect for adversarial procedure.<sup>132</sup> Nonetheless, a significant number of judges surveyed had appointed an independent expert in circumstances, such as one side failing to call expert testimony, one or both parties failing to call a credible expert witness, or both sides calling expert witnesses who provided partisan testimonies that were in disagreement over practically every issue. A positive note is that all but 65 judges indicated that they were satisfied with the assistance that independent experts provided to their courts.<sup>133</sup>

It is imperative, however, that the expert selected be open-minded, and genuinely open to the real possibility that oral histories will reveal reliable information about the past events in question, even at points where the available written history is silent or stands in contradiction. Otherwise, any effort at implemen-

130 British Columbia Supreme Court Rules, r. 32A.

131 Manitoba Court of Queen's Bench Rules, r. 52.03.

132 Joe S. Cecil and Thomas E. Willging, 'Court-Appointed Experts' in Federal Judicial Centre, *Reference Manual of Scientific Evidence* (West Publishing Co.: St Paul, Minnesota, 1994) 529 at 538.

133 *Ibid.* at 537. There may be little, if any, empirical research on judicial use of court-appointed experts beyond this. Anthony Champagne, Daniel W. Shuman and Elizabeth Walker note that this is because court-appointed experts are used so infrequently, in 'The Problem with Empirical Examination of the Use of Court-Appointed Experts: A Report of Non-findings' (1996) 14(3) *Behavioral Sciences and the Law* 361.

tation will only validate the objections of scholars like Winona Stevenson<sup>134</sup> and Angela Cavender Wilson<sup>135</sup> who contend that conventionally trained historians manufacture biased and Eurocentric histories without any real effort at considering the voices of Aboriginal peoples and sources. In that respect, it is wise to insist in accordance with rules of court that resemble r. 32A(2) that the Aboriginal litigants genuinely agree as to which expert will be called as a court-appointed expert.

## Conclusion

Canadian law mandates that Aboriginal oral history evidence be treated with flexibility and generosity so as to facilitate substantive justice for Aboriginal peoples. Canadian courts have consistently shown a failure to observe this in practice in any meaningful sense. Frequently depicting documentary and historical evidence as innately superior to oral history evidence, despite directions to the contrary, has the natural consequence of defeating Aboriginal rights claims. This in turn has the consequence of keeping Aboriginal peoples subordinated to Canadian sovereignty. This is unacceptable, given that there is no sound basis to suggest that documentary or historical evidence is innately more reliable, or that oral history evidence is innately less reliable. There are ways to redress this. One is that judicial education on the realities of evidentiary issues in Aboriginal rights cases can be strengthened so that Canadian judges develop a fuller awareness of the issues that are involved. There is also room to adapt the principles of permissible inference and judicial notice to enable more flexible treatment of oral history evidence. Another possibility is to make greater use of court-appointed expert witnesses to avoid problems with bias and advocacy. A court-appointed expert can work cooperatively with Aboriginal oral historians to provide the court with a complete and fuller picture.

134 Winona Stevenson, 'Indigenous Voices, Indigenous Histories Part I: The Othering of Indigenous History' (1998) *Saskatchewan History*, Fall Edition, 24.

135 Angela Cavender Wilson, 'American Indian History or Non-Indian Perceptions of American Indian History?' in Devon A. Mihesuah (ed.), *Natives and Academics: Researching and Writing About American Indians* (University of Nebraska Press: Lincoln, 1998) 23.