Witness to the Human Rights Tribunals

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Introduction

BC Human Rights Tribunal, Downtown Vancouver, September 2019.
A police officer who had been involved in an episode of mistreatment of an Indigenous woman testifies under cross-examination.

"Can I ask a question? I don't understand why I'm explaining policing matters to the Human Rights Tribunal." The officer gets testy and gives a long discussion of police processes and practices.

"Thank you for the lesson in criminal law." The lawyer for Clara Menzies, an Indigenous woman and the complainant, says.

Later that afternoon, the tribunal jurist holds a feather and the giving of true testimony at the hearing continues. Menzies (a pseudonym for the complainant) is agitated and speaks of the colonial system to which she hasn't given consent. "How can genocide be reconciled? Why should I have to keep explaining?" She dislikes the repetition of questions from the lawyers seeking to get clear answers.

The tribunal jurist is unperturbed. "Just answer the questions one at a time."

Menzies appears to be triggered by these events. Later, she asks why she has to keep answering the same questions.

"This is how the process works – some questions will overlap. Keep answering the questions."

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WHAT HAPPENS WHEN Indigenous people enter the legal systems of Canada and the United States? There are countless ways to approach this question, but I come at it from the perspective of my own work as an anthropologist who has served as an expert witness in legal venues in Canada and the United States and, more specifically, before the BC Human Rights Tribunal.

Human rights abuses generally concern discrimination against the cultural and economic rights of individuals and collectives, including Indigenous nations. Institutions, including tribunals, have been established at the international, national, and regional levels to address these forms of discrimination. The BC Human Rights Tribunal, located in Vancouver, British Columbia, Canada, is an example of a regional (provincial) tribunal directed primarily at individual rights, although class action suits have occurred (including the *Radek* case, which I describe in this book). The province created the tribunal after the Second World War with an emphasis on establishing social, cultural, and economic rights. The *Human Rights Code* of British Columbia was enacted in 1967, establishing a full-time administration and commission. Human rights complaints could be brought to a dedicated agency. From 1983 to 1997, the *Human Rights Code* was administered by the BC Human Rights Council. Later, with the closure of the BC Human Rights Commission, formal complaints were filed directly with the BC Human Rights Tribunal, with the intervening investigation provided through the BC Human Rights Council and BC Human Rights Commission (Froome 2007, 6–7; CAUT 2002). The commission has since been reestablished.

In the English common-law tradition, the people called to testify in court belong to two groups: (1) lay complainants and witnesses, who testify only about what they have personally seen or heard and (2) expert witnesses, who can give opinions about events and processes beyond their own direct experience and who can make inferences relative to the issues at hand in court.

Complainants before tribunals, such as Clara Menzies, have experienced discrimination with a demonstrable impact on their lives. The *Human Rights Code* allows only specific instances of discrimination to be brought to the tribunal by particular categories of people. The forms of discrimination include race, place of birth, colour, ancestry, and religion as experienced in employment, services, accommodation, and more. In the case of the BC Human Rights Tribunal, complainants bring their issues to the direct-access tribunal. Despite the large number of inquiries, most of the cases are either

not accepted, are handled through mediation, or are simply abandoned. Cases that are accepted but not successfully mediated are generally heard in an office tower in downtown Vancouver. There, tribunal members hear the cases individually and render a decision, which may be appealed to courts. There is no mechanism to enforce an order from the tribunal, and a successful complainant might have to go to court to seek enforcement. Only a minority of the cases involve Indigenous people and institutions.

I draw on my own work as an expert witness and on that of others to reveal the difficulties that legal processes – in human rights tribunals and other legal forums – impose on Indigenous people. Today, the number of countries using anthropologists as expert witnesses is increasing, as anthropologist Leila Rodriguez (2020; see Sikkink and Waling 2007) notes regarding developments in South and Central America. In British Columbia, as elsewhere, the end result of human rights tribunals is often perplexing. I found that this is because Indigenous experiences are first transformed into anthropological stories, and then they are transformed into legal stories. Throughout my career, I have been involved in cases dealing with treaties (Miller 1985, 2006, 2010), land claims (Miller 1995, 1999, 2018b), fishing rights (Miller 2012b, 2013; and see Miller and Angelbeck 2006), human rights (Miller 2003, 2006, 2008, 2010, 2018; see Sharma 2015), personal injury, family law, criminal law (Miller 2011, 2012a, 2012b, 2012c, 2012/13), an inquest (see Yukon 2020), and many other sorts of cases at various scales, from multiple tribes in federal court to single families and individuals in local courts. What these cases have in common is the diminution of Indigenous people's lives through the application of stereotypes, forms of discrimination, and the incapacity or disinclination of jurors to understand Indigenous worldviews and displacement. I detail how experts and lawyers might overcome this obstacle and produce more useful testimony in tribunals. My own successes and failures are part of the story because they have allowed me to see dimensions of the legal processes I might not otherwise have noticed.

As I show in Part 1, "Anthropology and Law," in both courts and tribunals, lawyers and judges subject the discipline of anthropology – its methods and findings – to intense scrutiny. Our ideas and disciplinary practices are not viewed as significant on their face; for this reason, anthropologists and social scientists more generally have a stake in these legal processes. In turn, the application of anthropology to legal questions, something that happens routinely, is rarely analyzed by those serving as experts, in part because anthropologist-experts do not want to leave a record of their

own approaches in litigation that might later be used to their disadvantage in court. Nevertheless, the fruits of our intellectual labours as social scientists are perhaps more significant in courts of law than they are in academic journals or courts of public opinion.

For these reasons, in Chapter 1, I describe my own role in litigation involving Indigenous people and how this experience made me aware of problems inherent in the legal process, which is a form of symbolic violence that diminishes Indigenous people's voices and stories, perpetuates Indigenous people's trauma, and hampers their efforts to redress violations of their human rights. This widely critiqued concept is discussed further in Chapter 2. Anthropologist-experts are called upon to enter evidence about Indigenous people's histories and experiences in the courts, but once they enter the courts their expertise is called into question, a further act of diminishment. In Chapter 3, I outline the way anthropologists can be discredited in the courts and the practice of thinning, a term used to describe efforts by opposing counsel to limit expert testimony and the case brought forward by Indigenous litigants. Chapter 4 discusses the way the adversarial system makes the job of anthropologist-expert more difficult by often pitting anthropologists against each other, which can undermine belief in their objectivity, discourage anthropologists from publishing their research, and reduce the pool of experts willing to participate in the system. Chapter 5 examines the many problems anthropologists face while working with lawyers, including mutual misunderstanding about each other's disciplines, lack of ethical guidelines, and fundamental differences in the way anthropologists and lawyers use language and how they think. I ask what lawyers should teach anthropologists about working in court and vice versa.

In all these discussions, I include details from Canadian and US federal courts, human rights tribunals, district and state courts, and commissions and other legal venues of trials, hearings, and processes I have engaged in and for which I have acted as a consultant. These chapters, I believe, create a thick context for looking specifically at a human rights tribunal, the British Columbia tribunal (BCHRT), and for understanding the tribunal in the larger context of Indigenous litigation generally. The diminution I observed constitutes both the grounds for bringing the cases and the experiences of Indigenous people in the process of preparing for and attending legal proceedings. I encountered nothing different in the BC Human Rights Tribunal.

In Part 2, "The Tribunal," I use the anthropological tools and perspectives developed in Part 1 to explore the workings of this tribunal: the

physical setting, the litigants, and the expert witnesses. Here, I shift from my role as anthropologist-expert to anthropologist-ethnographer. I rely on my own extensive field notes from several hearings. In addition, I examine all the BCHRT decisions between 1997 and 2020 to see what trends might be discernable. Chapter 6 sets the stage by taking a more intimate look at the tribunal, to explore whether the concept of human rights is a useful frame for Indigenous people and communities. I note the difficulties of filing charges, the unlikelihood of winning a case, and the alienation the process can produce, among other issues. Chapter 7 focuses on *McCue v The University of British Columbia* (No. 4), 2018 BCHRT 45, brought by an Indigenous University of British Columbia professor denied tenure, and Chapter 8 explores the *Menzies v Vancouver Police Board* (No. 4), 2019 BCHRT 275, which involved an Indigenous complainant mistreated by the Vancouver police. I use the ethnographic materials from these cases to show the way trauma experienced by the Indigenous litigants is reproduced in the tribunal process. I conclude that critique and transformation of human rights tribunals must begin by addressing the violence and trauma (in particular the sense of fear, overwhelming injustice, and rage) experienced by Indigenous people who bring complaints before tribunals.

The sense of injustice and violation expressed by Clara Menzies before the BC Human Rights Tribunal that opens this Introduction is a painful example of this trauma. Menzies was responding, in part, to a police officer, who stated out loud that he did not get why he had to bother appearing in legal proceedings brought because of charges of police misbehaviour. The circumstances of *Menzies v. Vancouver Police Board* are manifestations of a larger issue: the place of Indigenous people in contemporary society and their relation to the state. The trauma of the courtroom and tribunal hall is metonymic of the violence of colonialism more broadly (see Povinelli 2002).

But the goal here is not simply to blame judges for the difficulties that Indigenous litigants face in the legal system or experts experience in giving evidence. Nor is the goal to simply critique the legal systems of the two countries where I have worked as an anthropologist-expert. Judges, tribunal members, and other legal officials face complex and vexing questions in their work, and they work in systems they have inherited and many hope to reform.

In the spirit of reform, I draw on diverse cases to reveal the issues of expert witnesses and to propose ways the BC Human Rights Tribunal – and other tribunals – might be revised in the interests of Indigenous complain-

ants. I suggest ways the tribunal might be transformed to better address and reduce the symbolic violence and trauma experienced by complainants and ways anthropology and social sciences generally might best contribute to providing Indigenous complainants a chance to clearly present their claims to the tribunal.

As noted by historian Arthur Ray (2011, 2016) and anthropologist Dan Boxberger (2007), new data and approaches emerge as we prepare for court; what happens in the courts has real meaning for other experts. Social workers, health professionals, and many other practitioners also come under the scrutiny of judges and lawyers and have a stake in ensuring that their perspectives and insights are heard and considered. They, too, wish to make clear the sometimes-harsh circumstances facing Indigenous people in hospitals and other public services, and they, too, are grappling with understanding the role trauma plays in the lives of Indigenous people.

A Note on Sources and Terminology

There are features of legal processes that are best understood from the inside, as an actor in the formal and informal proceedings. Being inside gives more access to documents and to the action, the conversations, decisions, and relationships that develop before a case enters the courtroom. For this reason, much of my data comes from cases for which I have been retained as an expert and have submitted an expert report and/or testified to the tribunal. Paul Burke, in *Law's Anthropology* (2011), mentions the difficulty of obtaining critical anthropological reports used in litigation, a problem I overcome by using my own reports, in some cases verbatim portions to probe inside the processes anthropologists undertake in entering into the legal system. In some instances, I include them to show what content has been barred from entry into proceedings by legal arguments, that is, thinning, and the restraints this poses on producing a more effective anthropological testimony.

The terms used to identify Indigenous people are changeable, sometimes quickly becoming disfavoured. Just a few years ago, the cover term for various peoples was "Aboriginal" (See Miller 2004, for a discussion of the various definitions of Indigenous people that have been created by states and international organizations). Currently, in Canada, the terms Indigenous and Aboriginal (in law) encompass First Nations, Métis, and Inuit groups. The groups with political recognition by the state, Canada, are commonly referred to as bands or, when grouped together, tribal councils.

Their lands are termed reserves, but there are exceptions, including for those groups that have got out from under the *Indian Act* and now own their own territories under other legal arrangements. In the United States, Indigenous refers to American Indian tribes, whose lands are termed reservations. In both countries, many people object to cover terms and prefer the specific names of their groups. Sometimes, collections of groups that share common histories, languages, and cultures are referred to as nations, but this term is also used for individual tribes/bands. In addition, because the term "Status Indian" is commonly used, as in Canadian legislation, I retain its use.

I use the term "state" to refer to the instruments of governance and the governments themselves. In particular, that includes the United States of America, Canada, the state of Washington, the province of British Columbia, and also the Canadian Department of Justice, which acts for Canada; in this case, I use the term "Crown." I have pointed out in *Invisible Indigenes* (2004, 46) that the state administratively reduces the number of Indigenous people through the act of non-recognition. Further, the state is not a "rational actor mediating between interested parties"; instead, the state is "made up of political actors and irrational, in that policies and practices are themselves frequently at odds" (Miller 2004, 46). Courtrooms and tribunal halls represent the state's sovereignty through judicial power (Bourdieu 1987, 838).

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Part 1

Anthropology and Law

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1
My Life in Anthropology and Law

I HAVE OFTEN WONDERED why I have spent so much time, such a great percentage of my adult life, preparing for and in litigation at the request of Indigenous communities and their lawyers, tasks I do not seek out. In part, this reflects the circumstances that Indigenous communities – American Indian tribes and First Nations, Inuit, and Métis bands in Canada – find themselves in. The current legal nightmare they inhabit has roots deep in the past.

A Brief History of Law and Colonialism in Canada and the United States

Canadian law has long distinguished "Indians" as a legal category. Initially, before the creation of the Canadian state, Indigenous nations were treated by Europeans as distinct peoples with their own systems of law. Over time, they became subsumed into the Canadian legal system, and their own law and legal practices were regarded as relics, although they were not erased by the common law. The lands that now compose Canada were thought to be good for colonization by the French, English, and other Europeans, the earliest of whom arrived starting in the beginning of the sixteenth century. These Europeans and European Canadians eventually practised direct rule of colonies rather than the systems of indirect rule that characterized some other British colonies, such as India, for example. There was no compelling reason to closely study Indigenous legal practices; rather, these were to be

replaced as quickly as possible. The Royal Proclamation of 1763 set the terms for the negotiation of treaties with Indigenous nations.

Historians tend to see the period of the American Revolution and the War of 1812 as the dividing line between the period in which European-descended populations treated Indigenous people as Nations with the potential to be military and political allies and the subsequent period when this was not necessary and Status Indians became, gradually, wards of the state. Prior to this the French, British, and, later, Canada entered into a variety of treaties with Indigenous Nations: Treaties of Peace and Neutrality (1701–60), Peace and Friendship Treaties (1725–79), Upper Canada Land Surrenders and the Williams Treaties (1764–1862/1923), Robinson Treaties and Douglas Treaties (1850–54), and The Numbered Treaties (1871–1921).

The Dominion of Canada was created in 1867, and, subsequently, the underlying concept of Canadian policy has been to assimilate Indigenous Peoples and communities economically, to acculturate them, and to amalgamate the remaining populations biologically through intermarriage. All of this was encapsulated in the *Indian Act* of 1876.

More recently, spurred by the Indigenous rights movement and awareness of the legacy of colonialism, Canada has entered into a variety of modern treaties and agreements with Indigenous Peoples. Established in 1974, the Office of Native Claims defined two types of modern land claims: specific and comprehensive, to address the failure to adhere to the terms of promises under the Indian Act and clarify issues of title. The Specific Claims Tribunal (2008) has since supplanted the Office of Native Claims and is the federal body that continues to hear specific and modern land claims.

A major shift came with the *Constitution Act, 1982,* section 35, which recognizes and affirms Aboriginal rights. Treaty negotiations have been underway in British Columbia since 1991, with a small number of treaties concluded. Recent legal decisions have concerned the federal government's duty to consult with Indigenous groups and the recognition of the Métis as Indigenous Peoples along with the First Nations and Inuit.

The history of Indigenous Peoples and the law followed a similar but slightly different trajectory in the United States. Contemporary American Indians, also called Native Americans, are the descendants of the original inhabitants of the territory now encompassed by the United States. They are members of 561 tribes recognized by the federal government or state government and are regarded in law as "domestic, dependent nations." They retain specific economic, political, social, and cultural rights. State, federal,

and tribal laws govern these communities, called nations or peoples by their members. Unlike in Canada, Indigenous people have only one legal category of membership.

Europeans, French, British, Dutch, and others entered North America from the east coast in the early seventeenth century; the Spanish entered from the southwest a century earlier. The defeat of the French and the Royal Proclamation of 1763 established the conditions for the negotiation of treaties with Indigenous nations and legally defined the North American interior west of the Appalachian Mountains as Indigenous lands. This proclamation continues to be part of Canadian law, as well. But the expansion westward in the United States in the nineteenth century gradually forced large numbers of Indigenous people to move further west. *Johnson v. M'Intosh,* 1823, the first of the "Marshall Trilogy," three court cases heard by the US Supreme Court, became the foundation on which American Indian law is decided and holds that the tribes have only the right of occupancy to their own lands.

The federal *Indian Removal Act of 1830* authorized the president to conduct treaties to exchange Native American land east of the Mississippi River for lands west of the river. Thousands of Indigenous people died during the enforced movement out of their lands in the southeast, in what has been called the Trail of Tears. The brutal removal led to conflicts between Indian nations and US troops as a result of the Indian removal policy, and in 1876, the United States government ordered all remaining Indigenous people to move onto reservations and stopped negotiating treaties. Later, the *Indian General Allotment Act, 1887,* known as the Dawes Act, authorized the division of Indian tribal land into allotments, replacing the tribal system of common property. The Dawes Act had disastrous effects on Indian tribal identity and culture, and Native Americans lost some two-thirds of their land to non-members living in tribal areas.

US policy towards Indigenous people and nations has fluctuated between efforts at termination of federal recognition and recognition of autonomy. The *Indian Reorganization Act,* of 1934, also known as the Wheeler-Howard Act, reversed the Dawes Act's privatization of common holdings and supported tribal self-government. The act also restored to Native Americans the management of their land and attempted to provide economic benefits for American Indians. But termination and assimilation, which affected more than one hundred tribes, became the policy from the 1940s to the 1960s. The *Indian Relocation Act,* of 1956 led to the relocation

of thousands of people to cities. The policy switched back to recognition of sovereignty and self-governance. Federal statutes, such as the *Indian Civil Rights Act of 1968* (also known as the Indian Bill of Rights) and the *Indian Self-Determination and Education Assistance Act of 1975,* deal with Indian rights and governance. Many tribes have created their own courts, with considerable civil and criminal jurisdiction.

So, in theory, the effort to assimilate is no longer Canadian or US policy. But in my own experience as an expert witness in civil and criminal cases and human rights tribunals, I have found, as has my colleague Gustavo Menezes in Brazil (Miller and Menezes 2015), that the commonly held wisdom is that Indigenous people either once existed but no longer do or are assimilated (see also Weiss 2018). These beliefs sometimes create an obstacle to providing clarity or context on the legal issues at hand.

The Legal Context Today and My Role in It

It is certainly true that Indigenous people have defended themselves, using the law in many cases, since their early contacts with Europeans. The Indigenous people of what became New England, for example, early on attempted to use colonial courts to defend their land and their persons in the seventeenth century (Philbrick 2006). This is not the place to describe this long history. Yet, there is something distinctive about recent decades, a period in which Indigenous people of North America have created the capacity to bring important cases and to enter into courtrooms with their own lawyers and their own tribal governments backing the effort.

The new capacity and energy to regain control over their lives has been recently described as a resurgence (Asch, Borrows, and Tully 2018) and, relatedly, a refusal (Simpson 2007, 2014; McGranahan 2016), processes that reject non-Indigenous perspectives and practices, including courts. It is easy to overstate the new, improved circumstances of North American Indigenous communities, however, and many remain trapped in lengthy litigation, sometimes lasting decades, to protect themselves and to rearrange their relations with the state. For this reason, anthropological experts continue to be engaged to provide evidence for Indigenous litigation. For at least some anthropologists of my generation, an overriding issue, perhaps the primary focus of research and writing, has been to understand and aid the movement towards Indigenous sovereignty and autonomy. This has led us into courtrooms and law offices.

My time as an anthropologist from the 1970s to the present has been characterized by repeated efforts of Indigenous groups to defend their lands and waters, to gain access to hunting, fishing and other animal relatives, and to assert their human rights as they have come to be encoded in law. And since I have been engaged in litigation as an expert anthropologist, I wish to understand what these various sorts of legal defence have in common. Why these sorts of legal entanglements at the same time? How are these legal forays related? And what do anthropology and the social sciences have to offer these legal processes?

Because my own work in litigation gives a distinctive view of our legal institutions, I have come to realize that I am in a position to make an assessment, from my own perspective, of these institutions and their efficacy for Indigenous people and groups who enter into them. I do this by working at the interstices, the critical points of contact, between the mainstream society and Indigenous society. This is not solely about cases won or lost by Indigenous people. There are other issues at stake, as I will show, and cases won are sometimes lost as well. And other members of other disciplines and in different social positions provide their own perspectives on legal processes. I do not write as a police officer, legal practitioner, professor of law, historian, tribal member or leader, museum curator, judge, tribunal member, or some other anthropologist. These people have their own stories to tell. I am a white, late-middle-aged anthropologist in Western Canada. This is my story.

My story derives from the sort of engagements I have been asked to undertake and have carried out. I think of this as beyond participant observation, in that I am not limited to participation in the daily lives of Indigenous communities, although I have done that. In the 1990s, I directed an ethnographic field school based in the Stó:lō Nation. In addition, I have learned from eight summers spent in residence in his longhouse with the late Grand Chief Frank Malloway (Siyémches), of the Yeqwyeqwí:ws First Nation, on the Fraser River, in British Columbia. I have spent forty-five years with other Coast Salish peoples, documenting fishing, hunting, and gathering practices and engaging in ritual events, and with many others in Indigenous North America, Brazil, Papua New Guinea, and Taiwan, hearing about their legal, cultural, and other issues.

But I am not solely an observer. I have spent nearly forty years working regularly in long-term collaboration with the council and members of the Upper Skagit tribe, located on the Skagit River, Washington, and for whom

I have edited an historical atlas (2021). I have participated in several bouts of their treaty litigation and in tribally sponsored studies of their historic culture, place names, and vision questing locations. On occasion I have had to write detailed accounts of the lives of communities and of the ancestors of the present-day members. Sometimes I have been asked by communities to write documents for court that define them as a people, and to define their culture, residences, economy, political organization, history, and other intimate features of their lives and those of their ancestors. These requests emerged from legal requirements Indigenous communities face, for example, in trying to gain official recognition by the state.

It is always troubling as an outsider to be placed in such a position and to write in ways that could define and limit their futures in unexpected ways. But our legal systems continue to require that this work be done, and it is my job to be sure that the work I do is recognizable by both the community members and the court, even though it is, in part, in anthropological language that community members may not ordinarily use. In addition, in some cases after years of work with a community, I am in a distinct position to understand their history and to know the anthropology related to them. There is often no one else in this position and then, when asked by communities to assist the court to understand, it is hard to refuse after the hospitality extended by these individuals and communities to me. My work has also made me an observer of the ways the system fails Indigenous people, both in regular litigation and in human rights tribunals.

Litigation Work

I have been asked to participate in cases that fall into several categories. These cases provide evidence that refines, illustrates, and supports my claims about the often-adverse relationship between legal systems and Indigenous people, and the relationship between the law and anthropology. Each case adds something distinct about one or more of these topics, and the diversity of these cases reveals something of the variety of cases Indigenous people are drawn into and the presence of the legal regime in the everyday lives of people.

I provided evidence in the United States in criminal and family law cases but primarily in federal treaty cases – including rights to fishing, shellfishing, and hunting. These cases originally were brought against state governments but later broke out into conflict between tribes. Typically, my

work in the cases involved reconstructing the Indigenous world in an earlier period, often the time in which the treaty was signed or the time of first contact. As with the human rights cases, the problem was understanding how colonial processes disrupted Indigenous lives and the ways in which Indigenous people have set about carrying on their cultures and social lives in the face of disastrous imposed changes.

After some years doing episodic treaty work, I was drawn into examine the role of oral history evidence in litigation. In particular, this work derived from a decision in the Canadian Supreme Court, *Delgamuukw,* 1997, in which paragraph 88 of the decision states, "[justices] order that this type of evidence [oral history] can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents." Following that, a debate arose about what this meant and how this accommodation might be done. Oral history (or oral tradition) evidence clearly violated the canon of the common law that those providing evidence be available for questioning by the opposing counsel. But Indigenous oral historians are inherently unable to fulfill that requirement – they talk about things they have not seen or heard for themselves. The Department of Justice in defending Canada in litigation brought by Indigenous groups sought a way to respond by searching for grounds on which the evidence and the oral historians could be disqualified on technical grounds.

I was initially asked to see if these technical grounds met the standards of good anthropology. They did not meet the standards, in my view. Nevertheless, this approach had a long run and was successful in a few dozen cases across Canada. I later gave testimony in federal court about Indigenous oral materials. *Oral History on Trial* (2011a), in which I examine the role of anthropology in presenting and critiquing Indigenous oral history evidence in court, emerged from several talks at conferences and publications on this topic. I provided my own thoughts on remedies to make this project more successful and acceptable to the Indigenous people giving the evidence. Prior to this, I edited a volume of commentaries on the original *Delgamuukw* case (Miller 1992a).

My time living in the state of Washington and later in the province of British Columbia has placed me near an international border that split the Coast Salish culture group into roughly halves. The lives of Coast Salish people require them to regularly cross this border for Indigenous ritual purposes, to visit family, and for a great variety of other purposes,

including attending church and fishing. What had once been perhaps more of an inconvenience became considerably more complicated following the disaster of 9/11 and the hardening of the border (Miller 2016a). I was asked to participate in two cases involving Salish people, one regarding crossing from the United States into Canada for ritual purposes and the other from Canada to the United States to fish. This latter case was a criminal matter involving a Canadian First Nations man arrested for fishing in US waters. The issue was that the fisherman regarded the waters as historically belonging to his tribe and his family (Miller 2014, 2016a). These cases reveal tactics used by opposing counsel to disrupt anthropological evidence.

I attended another trial in a court colloquially called "Port Court," then situated directly over the border guard stations, in which US officials denied the identity of an Indigenous man, Dr. Roberts, attempting to enter the United States from Canada. This was despite his possession of the appropriate documents. He was told by the presiding judge, in my presence, that he did not look like an Indian and that they would find something to charge him with. Dr. Roberts gave up his effort to enter the US using his authorized band card. My examination drew me into a wider consideration of the problems, including discrimination faced by members of the Nooksack, an American tribe, that arose for a fractured community whose ancestors had lived on what became the Canadian side of the border. A family from this Washington state tribe was cut from tribal membership and disenrolled, and family representatives asked me to explain to their own tribal court why they rightfully belonged. The ethnohistorical and genealogical records show the family do belong; nevertheless, they were not re-enrolled. Part of this problem arose from disputes between families, and disenrollment of tribal members is today a common occurrence across North America. Here I draw on the sometimes-arbitrary nature of legal processes and the way they may unfairly attack the identity of an Indigenous person, an issue which arose in *McCue*.

In the 1970s, I became aware of a problem largely hidden from public view: a number of American tribes and Canadian bands have no formal recognition by the state and, therefore, cannot share in many of the rights reserved or benefits derived from treaties that their ancestors signed or share in most of the arrangements worked out between the state and Indigenous communities. I first learned this when encountering the Steilacoom of

central Puget Sound, Washington, and the Duwamish who live in the area that is now Seattle. Later, I worked with the Samish of Anacortes, Puget Sound, helping to prepare their ultimately successful petition for recognition; the Snohomish in their unsuccessful bid; and, more recently the Hwlitsum, located at the mouth of the south fork of the Fraser River just south of Vancouver; and the Pender Harbour First Nation, north of Vancouver. I spoke with members of the Mashpee Wampanoag, of Cape Cod, Massachusetts, a tribe that has struggled for recognition and for lands of their own, and whose members I first encountered as a five-year-old. One of my books, *Invisible Indigenes* (2004), featured the role of anthropologists in the federal recognition processes in the United States and Canada of non-recognized tribes/bands.

My involvement with these various groups included writing portions of petitions to federal agencies, attending numerous meetings with federal fisheries officials, port authorities, and others, and simply giving my opinion about the processes to recognition and about rights to resources. In the case of the Hwlitsum, I undertook with colleagues detailed ethnohistorical and ethnographic accounts of Hwlitsum ancestors and the contemporary community. For the Samish, after they won re-recognition, I spoke with the tribal council about their creation of a tribal court. I published a chapter examining treaty law from an anthropological perspective (Miller 2016b). Other of my papers look at law and the anthropology of borderlands (Miller 2016a), and the politics of apology (Miller 2006b).

The Samish case provided me a stunning introduction to the intrusion of politics into the legal processes of the United States as it relates to Indigenous people. Initially rejected for federal recognition as a tribe, the Samish used the Freedom of Information act to find that the federal Department of the Interior had colluded against the Samish to deny their status. The process was ordered reopened, and, incredibly, the same thing happened again, and the Samish were again able to prove this. A court ordered the tribe to be recognized, bypassing the responsible federal agency. Initially denying recognition to the Samish, the agency had claimed in its report of refusal that the random selection of tribal members whom I had interviewed in order to study their social networks was not random. This claim was made up out of thin air.

I have undertaken a number of other tasks. In one instance, I was asked by legal counsel to help the court understand the contributions of a Coast

Salish ritual leader to his family and community so that they could be compensated for his wrongful death in an auto accident. I did this by interviewing his parents, and I learned that he took on the roles of transporting people to ritual events and carrying out the extensive work required to host such events. In addition, although the deceased had no wage income, which commonly serves as the basis for calculating settlement payments, he hunted and fished for the family. I consulted First Nations friends from the area and calculated the number of deer and fish he would have taken and their value in dollars in order that the parents receive a financial settlement. In this instance, the invisibility of Indigenous lives became a legal issue.

In another task, I attempted to explain to a commission the spiritual properties of a large rock, three hundred metres long, and ninety metres high, which was scheduled to be demolished and rendered into saleable rock, in order that it might be protected. It was not. I was asked to explain to a court why a young man might not give full information about his culture to an arresting police officer as part of the Innocence Project; and I was asked to explain to a district court why a young girl should live with her grandmother to learn the spiritual practices of her culture, and not with her father and stepmother. In Coast Salish societies it is a common practice for children to be placed with family members, but in this case the stepmother objected to support payments for the little girl being made to the grandmother.

Finally, another area concerned why Indigenous women have gone missing and are presumed or found to be dead, an issue that became publicly visible in the 2010s. I attended a conference, "Missing Women Commission of Inquiry: Unpacked and Revisited" in 2013 and spoke with several of the family members of the missing women (Miller 2011b, 2013). Although I did not give testimony, I was struck by the difficulty posed for Indigenous women giving testimony before the commission on behalf of missing family members – they had to walk the length of the hall, past all the police gathered there with their lawyers, and stand and speak and answer questions in front of a hostile audience. There are lessons here from this commission about power and legal processes and expert involvement. The trauma brought on by the process itself, the pain, fear, and disillusionment, were clearly and explicitly articulated by the family members in the conferences.

Human Rights Tribunals

It is no accident that it was the experience of Indigenous women that drove home the issue of trauma and the problem of the law's diminution of Indigenous people. One feature of my study of the BC Human Rights Tribunal has been that most, but not all, of the people involved were women, including the four complainants whose cases I detail in this book (Gladys Radek, June McCue, Clara Menzies, and Ms. Blackjack), the lawyers in the *Menzies* case, and the lawyers in some of the other cases I address. Anthropologist Sally Engle Merry (1990, 4), in her study of the legal consciousness of working-class Americans, finds that women bring suits because, rather than in spite of, the fact that they are relatively powerless.

In a world that values or even privileges strength, the willingness to use violence, and the possession of economic resources, women have less power. They appeal to courts because they are vulnerable and hope to find an ally. In the BC Human Rights Tribunal, over 60 percent of suits were brought by Indigenous women. The opposite can be true as well, as anthropologists Patricia Ewick and Susan Silbey (1998) found in their own study of the legal consciousness of American men and women. Some women, and some people generally, regard the law as outside of their experience and not a part of their lives. Radek, McCue, and Menzies, in my conversations with them, saw the law not so much as their great hope, but as a possibility and perhaps something that, at its best, could and should be of assistance to them in making public and righting the wrong they experienced.

These women held the widely shared Indigenous cultural notion of women as protectors of their family and by extension, of their communities, however defined. Gladys Radek was an Indigenous woman in her middle years who watched the abuse of Indigenous people by security guards in a Vancouver mall from across the street in her apartment in Native Housing. She decided to take it upon herself to act on this discrimination and had the grounds to do so once confronted herself in the mall. Clara Menzies, too, stated that she took on her human rights complaint as an Indigenous mother for her son, but also for others. Taking on social conflicts in defense of their community is often a gendered role for middle-aged (but sometimes younger or older) Indigenous women (see Schweitzer 1999, for an example of those making this argument, and, further, this point is often made by speakers in Indigenous events in Coast Salish longhouses or in public gatherings).

But there is another important way in which law is gendered for Indigenous people, namely the ways legal systems act on, ignore, and expose women to harm. Professor of American Indian Studies Dian Million (2013, 7), for example, writes that the pervasive gendered violence is a feature of colonial power relations. Canadian Indigenous leaders Beverley Jacobs, Yvonne Johnson, and Joey Twins (2021, 252) point to a significant issue regarding women and the issue of trauma beyond the three cases I present here (and largely beyond the scope of this book):

> We were also very well aware of the intergenerational traumas and the circumstances that Indigenous women faced prior to them entering the criminal legal system. NWAC and Justice for Girls found: 'The state has effectively trained many aboriginal women to believe they are on their own in circumstances where they face violence ... when women are forced to meet violence with violence, the travesty is they are then susceptible to facing criminal charges.'
>
> We continued to be disappointed that the system and the state continued to abuse and violate the women. A large number of Indigenous women and girls are criminalized because of the intergenerational traumas, historical traumas and current traumas that they have lived and survived.

My experience confirmed these observations. In each case, something new was revealed about the tribunal and how it operates and how individuals experience it.

Radek, as I have mentioned, concerned a First Nations woman who was mistreated by security guards in a large mall in downtown Vancouver. This case was heard by the British Columbia Human Rights Tribunal (2005) and has turned out to be significant. A second case, the Knucwentwecw Society Human Rights Complaint before the BCHRT in 2006, for which I was retained, was never heard; the issue was resolved shortly after I submitted my expert report to the BCHRT but provides an insight into tribunal processes (Miller 2006b). This case arose after an inter-tribal group in a rural area in British Columbia attempted to create a small residential centre for youth at risk and was opposed by several townsfolk who placed egregious ads in newspapers and signs on streets associating Indigenous youth with violence and rape. In this instance, the complainants' lawyer took actions including filing my expert report with the tribunal, and eventually

the respondents gave up and agreed to remove the signs and to submit no more ads.

A third case is an outlier as it was with the Yukon Human Rights Tribunal (Miller 2014), for which I wrote an expert report and gave live testimony in the form of remote direct examination and cross-examination. This case was about discrimination in hiring practices. The particular feature was that the tribunal found in favour of my opinion that discrimination against an Indigenous man in hiring had occurred but found this did not affect the hiring process, and the decision gave him no remediation. The lawyer acting for the complainant found this puzzling and I do, too, and I wonder what the client made of this. Perhaps he felt his time and effort had been wasted.

A fourth case involved rough police behaviour towards an Indigenous woman, Clara Menzies, living in Vancouver. In this case, too, I was commissioned to write an expert report and give testimony about the incident and how it may have affected an Indigenous woman.

In addition to these cases, I also attended cases as a witness. The most significant of these was *McCue v. UBC,* heard in 2016. In this instance, I attended the three weeks of hearings and read the decisions, both preliminary and final. But I also spent time with June McCue helping her carry the several large suitcases of documents she brought from her home to the tribunal and hauled back each evening. We talked at the breaks and on the rides after the conclusion of the day at the tribunal as she dropped me off at my home. I had no formal part in this case, although I sometimes provided my opinions about what the counsel for UBC was arguing and how the hearing was going. I had informal conversations with professorial colleagues at UBC about the implications of the case. My concern was with the case as heard and performed in the tribunal hearing, which gave me a powerful glimpse into the efficacy of the tribunal and its human costs. This hearing, for all its legal trappings, registered on the human scale as profoundly disturbing. In that McCue acted as her own counsel and without legal assistance at the tribunal hearings, the case was also disturbing in a legal sense.

In these cases, I attempted to explain to the tribunal members my understanding of how and why Indigenous people face discrimination in their access to public settings, in hiring, and in treatment by police, security guards, and others. My task was to describe the nature and historical trajectory of discrimination, stereotyping, and popular culture in North America

and how these act to systematically disadvantage Indigenous people. Watching these cases play out, I noticed the significant obstacles that the complainants faced in bringing and conducting their cases, and I watched with dismay the feelings and emotions of these litigants. I wonder what a human rights tribunal might look like to better serve these participants. It is a concern I share with Indigenous and non-Indigenous scholars and expert witnesses around the world.

2

Symbolic Violence, Trauma, and Human Rights

WHAT I OBSERVED IN my work is that diminution constitutes both the grounds for bringing cases and the experience of Indigenous people preparing for and attending legal proceedings. All the types of cases I have participated in undermined the credibility of Indigenous people in public settings by opposing counsel and the legal processes and by the insistence of the mainstream society and the state that Indigenous people accept and internalize their position in society based on this diminution. Diminution occurs in terms of the laws they are challenging, which embed in them antiquated notions of wardship and assimilation, failed treaties, dated neo-evolutionary anthropological models by the state, and forms of defense tactics and language. The diminution also results from the long and dreadful legal processes themselves, which drag on for years in many cases (over three years in the *Menzies* case and much longer, even decades, in many others) and in some instances ought not to have been defended by the state. Diminution involves the transgressions experienced by elders giving testimony and the violations of Indigenous protocols of deference to knowledge holders and spiritual practitioners. Communities are sometimes set against each other.

This diminution is especially significant in an era when Indigenous people are trying mightily to re-establish and restore historical practices, ways of living in the world, and epistemologies of their ancestors. This is their right under the terms of the United Nations Declaration of the Rights of Indigenous Peoples, which guarantees their rights to enjoy and practice their cultures and customs, their religions, and their languages, and to

develop and strengthen their economies and their social and political institutions. Many wish to escape the neoliberal world by reviving their cultures and languages.

Indigenous Voices Regarding Law

I reference Indigenous voices in a variety of ways, and I want to be clear about the presence of their voices. Some are Indigenous legal experts and include Justice Harry Laforme (Mississaugas of the New Credit First Nation), James (Sákéj) Youngblood Henderson (Chickasaw Nation), and Aaron Mills (Anishinaabe), John Borrows (Chippewa of the Nawash First Nation), David Milward (Beardy's and Okemasis First Nation), Patricia Monture-Angus (Mohawk Nation), Jean Teillet (Métis), Val Napoleon (Saulteau First Nation), Darlene Johnston (Chippewa of the Nawash First Nation), Dian Million (Tanana Athabascan), Beverley Jacobs (Bear Clan, Mohawk Nation of the Haudenosaunee Confederacy, and member of the Order of Canada), and Justice Ardith Walkem Walpetko We'dalx (Nlaka'pamux Nation). Other Indigenous lawyers include Amber Prince (Sucker Creek First Nation), June McCue (Ned'u'ten from Lake Babine, a complainant, lawyer, and legal scholar), and Myrna McCallum (Métis-Cree), a proponent of "trauma-informed lawyering" (McCallum 2020). Some voices are Indigenous scholars in anthropology, including Audra Simpson (Kahnawake Mohawk) and Riley Bertoncini (Métis). Shawn Atleo (Ahousaht First Nation) is a political leader, as is Chief Roger William (Xeni Gwet'in). Still other voices are women writing collectively for the Native Women's Association of Canada, the Swinomish tribal women authors of *A Gathering of Wisdoms* (Clarke 1991), and those in the publication *Red Women Rising* (Martin and Walia 2019). One voice is an Indigenous police liaison officer (name withheld). Others are the researchers and authors (not all of whom are Indigenous) of the Royal Commission on Aboriginal Peoples (1991) report, *Looking Forward, Looking Back*. Several voices enter into the story through interviews with me, including Alice Williams, of the Upper Skagit tribe, family members disenrolled from the Nooksack tribe (names withheld), Gladys Radek (from Gitxsan Wet'suwet'en territory), and Clara Menzies (Indigenous Nation affiliation unknown to me). Some, like Tanya Silverfox, are community members. Some voices are shown through their work, including Musqueam elder Roberta Price, who opened a hearing of the BC Human Rights Tribunal with a prayer, and June McCue, who lends her voice during her cross-examinations of witnesses in her own proceedings at the tribunal.

In other words, in my work I present a broad range of Indigenous perspectives. To start with the academic voices, a number of Indigenous legal scholars have advanced similar or related views to my own about Canadian law and diminution. James (Sákéj) Youngblood Henderson (2002, 2), for example, takes note of the need to "decolonize judicial precedents," and of the "existing colonial ideology of contrived superiority of European law and humanity and the psychology of cultural and racial inferiority of Aboriginal peoples." Justice Harry Laforme (2005, 15) notes: "Indeed, over the past 20 years, various commissions of inquiry have confirmed the existence of systemic racism against Aboriginal people at all stages of Canada's criminal justice system." He points to "a foreign justice system that appears to consistently put Aboriginal people at a disadvantage ..." (17). Aaron Mills (2010) writes that Canadian law retains its colonial identity and the legal framework practices colonialism. Sharon Venne (Notokwew Muskwa Manitokan) (1998), a lawyer and expert in international law and a fierce critic of Canadian law and political practices, writes of the colonial genocide of Indigenous people and the importance of Elder knowledge about their rights.

John Borrows (2002), in advancing the case for the resurgence of Indigenous Law, details the failures of the Canadian legal system in regard to Indigenous Peoples and questions the law underpinning Canadian title to land and resources. Borrows and others, particularly Val Napoleon (2019), in her many publications, including a graphic novel (2013), are working on revitalizing Indigenous Law in an effort to replace or parallel Canadian law. David Milward (2012) is among the other Indigenous scholars envisioning free-standing Indigenous legal practice.

My perspective has also been shaped by two events. In March 2010, I had the chance to listen to and speak at the Indigenous Bar Association Elders' Gathering on Oral History Evidence, at Turtle Lodge, Manitoba (Miller 2010). The event gave me an opportunity to describe my own research on oral histories as evidence and to see a group in action that has been engaged in working with the Canadian legal system to create space for Indigenous people. A year later, when my book *Oral History on Trial* (2011a) and Sophie McCall's book, *First Person Plural: Aboriginal Storytelling and the Ethics of Collaborative Authorship* (2011), were the topics of a panel discussion sponsored by UBC Press, Indigenous legal scholar Darlene Johnston (2012), of the University of British Columbia law faculty, noted that the Canadian Supreme Court building in Ottawa was on unceded land of her own nation and questioned why the court would be trusted (the event

was *Aboriginal Oral Histories in the Courtroom: More Than a Matter of Evidence,* a UBC Press forum at the Liu Institute for Global Issues on February 8, 2012).

By listening to Indigenous voices, I have come to hold a perspective similar to that of John Reilly, a non-Indigenous retired Canadian judge of the Provincial Court of Alberta. In his provocative book *Bad Law: Rethinking Justice for a Postcolonial Canada* (2019, 18), he makes the argument that he "came to see our system as an instrument of their [Indigenous] oppression" and that rather than seeing a separate system for Indigenous people, he would rather see a single system for all built on Indigenous justice concepts (15).

Symbolic Violence and Trauma in Law

Anthropology professor Eve Darien-Smith (1999, 20; see 2007) notes that the law has a double aspect – it regulates by marking the social boundaries of particular categories of people and by working at deeper levels of personal meaning and concepts of self and society. This is the "inside/outside" feature of law. One inside feature that is related to diminution (an outside feature) is the trauma experienced by Indigenous people who directly engage with the symbolic violence of legal processes. Symbolic violence refers here to a non-physical violence rooted in power differentials and the imposition of the norms of the dominant society (see Das 2008 and Kleinman et al. 1998).

I learned firsthand that it can be hard for Indigenous people to talk about the discrimination they face, which is often at the heart of cases they bring to court and tribunal. There are few topics so personal and linked to the core of one's identity as discrimination, an act built on denying and denigrating an individual or group's identity. Ralph (2020) gets at this point with his idea of "double trauma," the trauma of having something happen and then being told by authorities that it did not happen.

Indigenous lawyers Amber Prince and Myrna McCallum develop this theme in McCallum's podcast series on trauma-informed lawyering, in which they note the importance of lawyers giving their Indigenous clients time to talk about what is important to them because encounters with police have both set off existing traumas and created new ones. It is traumatic, they say, for Indigenous people to relive how they were treated under a colonial setting (McCallum 2020). McCallum and Prince observe that non-Indigenous lawyers often fail to see the discrimination which their clients faced and that these lawyers believed that the cases brought to them had

no merit. Indigenous people entering the legal system, McCallum and Prince conclude, are "up against a [legal] system not built for Indigenous people." For these lawyers, the problems and traumatic triggers for Indigenous people arise in multiple ways: in adverse interactions with police and other officials, with lawyers they do not trust and who demand they sign complex agreements and pay large retainers before providing legal services, in encountering lawyers who cannot comprehend the discrimination the clients have faced, and in viewing the sometimes arrogant testimony of police and others in courts and tribunals who express their racial and institutional privilege (2020).

These acts of discrimination and their aftermath are both historical and contemporary everyday experiences. The Swinomish, Washington state, tribal mental health team publication *A Gathering of Wisdoms* (Clarke 1991), researched and written by tribal members and to which I contributed as a researcher, aptly describes the background of trauma of the historical circumstances facing their community, the stress syndrome, the sense of alienation even from their own community, and the fatalism experienced by their youth in the contemporary world.

The Canadian Royal Commission on Aboriginal Peoples (1991, 579) makes clear the issue of trauma – mistrust, outrage, shame – in Indigenous lives to the present day. Consider this powerful statement about Canadian law and its impact on an Indigenous person by Patricia Monture-Angus ([1998] 2015, paragraph 35):

> When I finished law school, I quite often described the feeling at graduation as the same feeling of relief combined with fear I had after leaving an abusive man. It felt like I had been just so battered for so long. Finishing law school is an accomplishment. Yet, I did not feel proud of myself. I just felt empty. This feeling forced me to begin considering why I felt the way I did. It was through this process that the ways in which law is fully oppressive to Aboriginal people began to be revealed. It is important to understand this process of self-reflection as an obligation that I have as a First Nations person trying to live according to the teachings and ways of my people. However, it is much more than a personal obligation. It is a fundamental concept essential to First Nations epistemology. It is, in fact, a methodology.
>
> The realization that law was the problem and not a solution of transformative quality was a difficult one for me to fully accept because

> it made the three years I had struggled through law school seem without purpose. I did not want to believe it. Think about everything that First Nations people have survived in this country – the taking of our land, the taking of our children, residential schools, the current criminal justice system, the outlawing of potlatches, sundances, and other ceremonies, as well as the stripping of Indian women (and other Indian people) of their status. Everything that we survived as individuals or as "Indian" peoples: How was it delivered? The answer is simple, through law. Almost every single one of the oppressions I named, I can take you to the law library and I can show you where they wrote it down in the statutes and in the regulations. Sometimes the colonialism is expressed on the face of the statute books and other times it is hidden in the power of bureaucrats who take their authority from those same books. Still, so many think law is the answer.

In a similar vein, the Royal Commission on Aboriginal People (1996, 58) concluded: "It is difficult and disturbing to realize that Aboriginal people see the non Aboriginal justice system as alien and repressive, but the evidence permits no other conclusion."

I include here the perspective of Richard Daly (2005, 6–8), a white anthropologist writing from his experience as an anthropologist-expert in a significant Canadian case, *Delgamuukw,* because he astutely and evocatively captures something of the trauma and symbolic violence of the legal processes specific to Indigenous people through a lack of acknowledgement of one's personal dignity.

> Let us take for a moment a hypothetical elderly woman seated in the witness box, a female chief from one of the several Houses of the four Gitksan or five Witsuwit'en clans. She has grown up on the land under dispute ... In town she looks poor and inarticulate, but she is a woman of reputation in her community. She is the matriarch of several generations; she holds one or more feast names ... The seat in the witness box is very hard and narrow and upright. It is meant for the criminals one watches ... The judge is announced and she has to stand for his entrance, despite her own status, venerability, and arthritis. He sits above her and does not acknowledge her presence. The lawyers look into her eyes – something if they were not so ignorant, they would know is insolent ...

> But here on the witness bench she is not accorded the smallest scrap of respect. Any old lawyer can interrupt her words whenever he or she likes.

I do not wish to suggest that victories in litigation cannot be experienced joyfully and as a triumph of perseverance, as, for example, the public expressions of Chief Roger William (Xeni Gwet'in) following the 2014 *Tsilhqot'in Nation v. British Columbia* Supreme Court of Canada decision concerning title to a large swath of territory in British Columbia, after twenty-five years of struggle in various courts. Yet, this was a drawn-out and arduous experience for the communities involved.

Nor am I suggesting that Indigenous communities and individuals must be described in traumatic terms. There is a critique of the evocation of trauma. Dian Million (2013, 1–4; and see Waldram 2004) describes trauma as a portmanteau of various psychic and physical events with little in common. Trauma, she writes, is the ethos of the times and a major signifier and political narrative in an era of global neoliberalism: "Canadian Aboriginal peoples, subjects of a history of colonial violence, are thickly ensconced in the intensities, logics, and languages of trauma, particularly now as they are called on to speak as subjects of 'truth and reconciliation'" (3). The violence producing this trauma is constitutive of capitalist development rather than a by-product. The colonized subject, in our period, Million argues, becomes a trauma victim, and trauma is linked to "state-determined biopolitical programs for emotional and psychological self-care" (6). Trauma narratives, she writes, are often linked to healing discourses and healing to human rights (8).

My aim is not to introduce healing as a concept. My focus, rather, is on the legal settings and the trauma and traumatic processes I have witnessed. In the instance of the BC Human Rights Tribunal, a significant issue is how to turn experiences of racial discrimination into evidence, which can be a strange, confusing, and hurtful experience. I have also learned that those Indigenous people who prepare their own application to the tribunal sometimes struggle with their emotions and often make emotionally driven applications, which are easy to undermine by the respondent's lawyers. The fear of giving testimony in courts and tribunals can trigger significant, overwhelming stress, an issue that almost led one complainant, in a case in which I served as expert, to drop her case after her hearing was scheduled. Other complainants I have worked with have experienced ill health from the legal

processes they have entered, and still others have stated that for an entire generation the focus and energy of their community has gone into legal processes rather than into looking after their own elders and reviving their cultural practices. And, because part of the process of human rights tribunals is aimed at undermining the credibility of an Indigenous person or persons who has brought an action, the process can drain and demoralize a complainant and erode their well-being.

In her case study of the Inter-American Court of Human Rights, Danish anthropologist Kirsten Hastrup (2003, 309) argues that rights-based conceptions of justice can distort understandings of suffering: "Legal language instrumentalizes, cutting out the symbolic and expressive dimensions of violence." All too often, "the *rights* part tends to dominate at the expense of the *humanity* part" (317; emphasis added). I wish to bring these symbolic and expressive understandings to the surface. Anthropologist Lori Allen (2009, 2013; see Mendeloff 2009) considered the experience of suffering that human rights activism has brought in the occupied Palestinian territories. Human rights discourse, she writes, creates a "shared charade" played out in the performance of roles, becoming a spectacle that obscures the trauma of occupation. Janzen (2016, 75; and see Elringham 2013) advocated that anthropologists read the "emotional register of narratives – an indicator of trauma" of those we work with in intense settings.

The Anthropologist as Expert Witness

To do this, it is necessary to scrutinize my own role as expert witness in the legal process. My discipline, anthropology, has been implicated in the colonization and dispossession of Indigenous people. The phrase "handmaiden of colonialism," attributed nonspecifically to Levi-Strauss and popularized by Talal Asad, captures something of the relationship of the discipline to colonial authority, but another part of the story is the role anthropologists have played as social analysts and experts in court since the 1940s.

Debate about the role of anthropologists in expert testimony regarding Indigenous people began in the United States following the creation of the Indian Claims Commission, which was designed to eliminate the backlog of Indian claims. The commission was established in 1946 and lasted until 1978, and its creation led to the establishment of a new discipline, ethnohistory, which provides new sorts of evidence for litigation, and to the creation of the American Society for Ethnohistory (see Stewart 1973, 1979; Rosen 1977, 1979; Asch 1992; J. Steward 1955; Wiget 1982, 1995, 1996; Lurie

1955, 1956). There were some points of confusion as this work got underway; Nancy Lurie, for example, observed that anthropologists in the Indian Claims Commission hearings in the 1960s were treated as surrogate Indians (Ray 2011, 34).

My Brazilian colleague and coauthor Gustavo Menezes (Miller and Menezes 2015) has written that the legal system in his country retains some suspicion of people who work directly with litigants, the Indigenous people, and are therefore suspected of bias. The same is true in Canada. Anthropological fieldwork methods, which foreground participant observation, are thought to be inherently suspect in some cases or are treated as producing trivial understandings of "Indian lore." A particular problem for anthropologists giving expert testimony is the notion that they are too close to the claimants who have hired them. This is a dilemma because fieldwork requires that anthropologists get to know the communities, the people, and the culture.

The *Delgamuukw* case in the 1990s brought these issues to the fore in Canada, provoking a painful debate among Canadian anthropologists about their role in Indigenous litigation (see Paine 1996; Boxberger 2004, Palmer 2000; Miller 1992a, 1992b; Ridington 1992; Culhane 1992, 1998). *Delgamuukw* concerned a land claim brought against British Columbia by house chiefs of the Gitxsan and Wet'suwet'en peoples and is significant for the treatment of Aboriginal title and oral history evidence. The plaintiffs lost the case at trial, but an appeal to the Supreme Court of Canada sent the case back to a lower court and led to the 1997 decision and the ruling that the province had no right to extinguish Indigenous rights to ancestral lands. Further, the decision clarified Aboriginal title and affirmed that Aboriginal title is an Aboriginal right under section 35 of the *Constitution Act, 1982*. The decision had an impact on later title cases, in particular the Supreme Court 2014 decision in *Tsilhqot'in Nation v. British Columbia,* which held that "Aboriginal title over the area requested should be granted."

Canadian anthropologist Antonia Mills (1994, 1996, 2005) produced some of the earliest efforts to explain what working within the legal domain meant in her research and testimony in the *Delgamuukw* case. She emphasized the problems of establishing anthropological authority in testifying, the clash of worldviews between Indigenous witnesses and the court, and the plaintiff's sense of the court's negative evaluation of their worth.

In his discussion of the problems of being an anthropologist-expert in *Delgamuukw,* Richard Daly (2005, 3) likewise took notice of the power

dimensions: "From an analytical perspective, the courtroom deliberations constituted an arena of interactions, or overlapping fields of interest, played out upon a sloping plane of power and powerlessness. Having experienced this courtroom situation from the inside, I have gained an existential appreciation of French sociologist Pierre Bourdieu's field, habitus, and symbolic capital. The courtroom in which an Aboriginal rights case is tried is a social situation marked by a definite field of power – even spatially." This courtroom, he writes, constitutes a "vertical force field" (3). Daly questioned whether the process renders anthropologists "traitors or subalterns to the relations of ruling" (8).

The Australian Paul Burke, in *Law's Anthropology* (2011, 24), draws a conclusion similar to that of Daly: "When the law interacts with anthropology ... it is not a dialogue, but an act of digestion, in which law converts anthropology into what it needs for its own functioning ... Free anthropology becomes enslaved and transformed into law's anthropology." He emphasizes the competition between judge and anthropologist over control of the anthropological archive, judicial "structural" superiority (15) and, sometimes, judicial suspicion of the intellectual, especially those (such as anthropologists working with Indigenous people) immersed in the community. Burke also notes what he terms a "general judicial anxiety" that experts tend to favour the parties who hire them, especially if these experts are engaged in new research for the purpose of litigation (20). Further, he worries about the problem of judges creating their own anthropology and interpretation outside of anthropological evidence. Finally, he points to the judicial inclination to accept the arbitrary (such as colonial domination of Indigenous people), which is already embedded in case law, as natural, a form of Bourdieuian symbolic violence that plays a role in domination.

Burke offers unusual insights into the workings of scholars in court who attempt, as Canadian historian and expert Arthur Ray (2011, 145) puts it, to educate the judge-students in a "strange classroom," the courts. Ray observes that it was his role to educate the court about Indigenous history, but there were at least two intermediaries between himself and the court – the lawyers who retained him and those who opposed him, which made his job difficult. I have had the same sense of strangeness and have felt that cross-examination, at its worst, is like teaching a class in introductory anthropology with someone (opposing counsel) yelling obscenities in the background. Further, jurists are not students but, rather, people who must decide how to answer complex legal questions and, often, assign liability.

Ray notes that some judges whom he appeared before (147) were there to be educated on issues such as Indigenous history or the nineteenth-century fur trade; others were there solely for the facts pertinent to the case.

Law professor and anthropologist Randy Kandel (personal communication, 1998) has made the argument that anthropological expertise need not be understood like engineering expertise, in which objectivity in law is linked to distance from the project. Instead, anthropology could be understood as something like the caring professions, such as medicine or nursing, in which a health professional giving testimony might have encountered the patient. Getting to know the Indigenous community to prepare an expert report, then, ought not be considered a marker of a lack of objectivity.

There are other problems in the anthropological engagement with legal affairs. A long-time Canadian trial lawyer with Indigenous clients, Peter Hutchins (2011, xxv-xxvi) observed that "lawyers and jurists have numerous flaws – among them professional arrogance ... and an instinctual conservatism parading as *stare decisis*." These characteristics may make it difficult to incorporate anthropological insights into legal proceedings. And Ray, commenting on his own experiences as an expert, described the legal system (not just the trial itself) as a sometimes hostile and suspicious place.

Métis lawyer Jean Teillet (2011, xx) finds something similar to what Menezes observed in Brazil, noting that judges sometimes think they know history, but it is a version that may reflect their prejudices and the notion of Indigenous people as assimilated. She writes that the task of the historical expert (or anthropologist) is to challenge and displace these earlier colonial ideas of "primitive savages." She observes that this is a difficult task because of the "tendency of most judges to wedge new facts into old assumptions and beliefs."

Similarly, Canadian anthropologist Julie Cruikshank (1992, 26) has commented on what she terms "the invention of anthropology" by the British Columbia Supreme Court in the *Delgamuukw* case based on nineteenth-century positivism. She further notes the trial justice's idea that expert testimony about the litigants was "exceedingly difficult to understand." Cruikshank, Canadian anthropologist Robin Ridington (1992), and other commentators have described the ways in which the justice's view of Indigenous people and, hence, the law, reflected evolutionist models of society, long obsolete. This problem has arisen in other cases, including *R. v. Van der Peet,* in which the trial justice, relying on 1960s anthropological evolutionary models of social organization, held that the sale of fish

by the Stó:lō people of British Columbia was not part of their Aboriginal right, since they were not at the appropriate evolutionary scale as tribal people to have commercial enterprises (Carlson 1996).

Burke (2011, 254, 258), too, describes "Judges [acting] as amateur anthropologist[s]," drawing their own conclusions from the separate expert submissions to the court. He notes the view of his colleague "who wondered whether a judge would approach an expert physicist in the same way." He observes that "not all disciplines are equally immune from such meddling."

There is something, I believe, about a human subjects discipline that encourages other people, with their own lifetime of experience with people, to believe they have expert knowledge equal to that developed within the social sciences. Hutchins (2011, xxx, referencing Ray) observed that judges tend to value all historical experts similarly, believing that anyone can be [or perhaps is] an historian, making historians something like clerks who bring documents to court.

The forms of restraint on anthropological and historical information and bias that Ray, Teillet, Hutchins, Burke, Cruikshank, and Ridington note are all part of the situation, but as Menezes and I have pointed out (Miller and Menezes 2015), not the whole of it. Existing negative stereotypes and the notion that anthropological testimony is not definitive like "hard" sciences and is, therefore, suspect are also situations that anthropologists have encountered.

The legal system and the courts, tribunals, commissions, and inquests themselves, then, are not the natural domain of anthropology, and our disciplinary concepts and practices must find a way to fit within the legal system. There are problems in giving testimony that arise with this approach, however. In particular, both Menezes, working in a civil law system, and I, in a common law system, focus on our common problem: the difficulties in showing to the court the bias, stereotyping, and racism that Indigenous people commonly face in quite different societies and legal orders and the consequences that flow from these attitudes.

My hope is that we can have anthropological knowledge entered into court in which the anthropologists themselves are not "traitors" or "subalterns," in Daly's phrasing, and that we are not "digested" or "enslaved," as Burke suggests, and that, instead, the testimony fully serves its intended purpose – providing clarity.

The cases I have engaged in as an expert show that legal consideration of the racialization and bias faced by Indigenous people can be derailed at one of many stages of, or prior to, the legal process. It can be blocked as not fitting into the scope of expert analysis given to explain issues such as the murder of hundreds of Indigenous women and the disinclination of the police to act and seek to understand the circumstances and whereabouts of these women. This was a situation I faced in my research in British Columbia with the Missing Women Commission of Inquiry (Miller 2011b, 2013). I was asked by the legal staff of the newly created BC Commission of Inquiry to examine internal police documents to see if there were signs of systemic discrimination that might have influenced the behaviour of the police towards the women who had dropped from sight.

I prepared a report but ultimately did not give testimony because I was asked by senior members of the commission to change my report. Unlike the working legal staff, the commission itself was not interested in the issue of systemic racism. Explanations of race and racialization can be intentionally left out by inquiry commissioners and police who fail to account for the systemic racism that characterizes all institutions, including police forces (Miller 2011b). Accounts of the lives and cultural practices of Indigenous people may be regarded in court as colourful but legally meaningless folklore, a problem I have encountered several times in giving testimony. Trivialization is a problem those giving testimony might consider in organizing their testimony.

In other instances, recognition of the history of colonial distortion of Indigenous lives is stopped simply by the failure to acknowledge such a category, as in the instance of the Legal Services Society's denial of funding to a lawyer for an anthropological expert to help expand the *Gladue* decision. *Gladue* was a Supreme Court of Canada ruling in which the court took the position that lower courts should consider an Indigenous offender's background in sentencing. This effort to extend *Gladue* to include understanding the offender's background when examining the initial interaction between police and the accused was held by the funding agency to not be significant enough to fund. This problem of misidentifying colonialism shows up in the (now purportedly obsolete) "frozen rights" concept, that Indigenous people's rights to territory or resources are tied to their practices of a century or more ago. But as Menezes (Miller and Menezes 2015) shows, this approach lives on in Brazil as well as in North America.

I do not dispute Daly's and Burke's dismal analysis of vertical power relations in the courtroom. They are surely correct. But I am equally interested in viewing the process of anthropologists engaging in the law from the perspective of power deployed at the margins, often in simple interactions, and in what French philosopher and historian of ideas Michel Foucault views as the capillaries (Foucault 1979, 1980), including the interactions long before a trial or hearing commences. Although Foucault refused to analyze courtroom trials, he writes that the court was linked to carceral mechanisms that tend to exercise a power of normalization (Foucault 1979, 308; Eltringham 2012, 433). More recently, anthropologist Mark Goodale (2017, 204) observes that post-Cold War anthropologists of law "insisted on following the capillary networks of law wherever they led ... to a portal named 'human rights.'"

The Problem with Human Rights

Richard Wilson (2006, 77) has said the following of human rights, but it would be true for other forms of Indigenous legal claims: "An ethnographic approach to human rights is especially appropriate because the human rights regime includes a vast array of different kinds of moral and political projects, which are often incompatible." Human rights became a problem for ethnographic research in the 2000s (Goodale 2017, 102), but some have found the turn less than productive (Afshani 2012; Englund 2012). Stephen (2017, 100; see Carr 2010) points out that anthropological testimony implies that the "story" told by a litigant is not validated in its own terms.

> She points to a problem that has long concerned me, that the anthropological report [on Indigenous concerns] reproduces a hierarchy of knowledge, with the Indigenous perspective requiring expert validation (see Stephen 2017, 100; also see Carr 2010). My own work as an expert witness lies within this system and in that sense perpetuates the hierarchy of knowledge and power imbalances based in race, gender, and so on.

However, Goodale (2017, 23) notes that an anthropological perspective is "now a common, even indispensable, presence within academic debates over human rights ... and among human rights practitioners." Goodale (97–98) casts an interesting light on the work of anthropologists: "As a ... social field that is bound up with profound questions of suffering, redemption, collective responsibility, social punishment, and justice, human rights demands introspection and even self-confrontation from the scholar or practitioner. This is particularly true for anthropologists, whose professional

interest in the theory and practice of human rights is often motivated by personal experiences of activism, struggle on behalf of vulnerable populations ... and often a broader commitment to human rights as a powerful tool for opposing the pretentions of structural power."

Studies in other areas and parts of the world have likewise exposed the limitations of viewing human rights as a weapon of the weak, in political scientist and anthropologist James C. Scott's (1985) phrasing, as a way that everyday practices can be used to limit colonial domination. Professor of International Affairs David Mendeloff (2009), writing from a psychological viewpoint, questions whether war crime tribunals ease the suffering of trauma.

In his study of the role of expert witnessing at the International Criminal Tribunal, legal scholar Nigel Eltringham (2013; and see West-Newman 2005; Moore 2001), notes that the expert role required knowledge of the crimes in question and also knowledge about cultural values and the relationship between these values and the human rights violations. Merry (2006b, 2009), Nitsan (2014), and Cheng (2011), studied the processes by which international standards of human rights became localized, or "vernacularized," and how these local practices reflect and transform the discourse of human rights. Drawing on years of experience working with UN-sponsored relief and mediation efforts in Africa, John Janzen (2016, 75) advocates reading the "emotional register of narratives – an indicator of trauma" of those we work with in intense settings. He later deployed this approach in his work as an anthropologist-expert in the courts.

What I and these scholars and many others are doing is adopting a relational rather than rules-based view of the law, a significant concept in legal anthropology (Conley and O'Barr 1990; Ewick and Silbey 1998 provide examples of those who hold versions of these positions). Briefly, a rules-based approach is related to legal positivism, which assumes, in part, a logical system in which rulings reflect laws without consideration of social relations; the relational-based view is that law is responsive to the ways in which individuals and social groups interact and even the emotional state of litigants.

The critique of human rights from a twenty-first century anthropological perspective is well underway. As an example, at the 2019 American Anthropological Association annual meetings held in Vancouver, a full day of papers were delivered under the heading "When Human Rights Fail: Human Rights on the Ground." The speakers deployed an ethnographic lens to study on

the ground, rather than theoretically, the failure of the human rights concept, the paradoxes it creates, and how human rights might be reconceptualized. The session abstract reads, in part, "The human rights system's conceptualizations of humanness, has also meant that race, gender, socioeconomic class, and sexual orientation (among many other categories) may be used to deny certain groups human rights because they are not human enough to claim such rights ... Human rights discourses may be mobilized to hurt the very people they claim to protect ..." (Madron and Estrelle 2019).

The legal process of human rights tribunals can also be manipulated to thin the evidence presented by complainants.

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