

ORAL HISTORY ON TRIAL

Recognizing Aboriginal Narratives in the Courts

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Preface

My exposure to the Canadian legal system over the last twenty years has led to this book about an issue of considerable public interest and of great importance to Aboriginal peoples: the ways in which Aboriginal oral narratives, commonly called oral histories or oral traditions, have been used in Canadian courts. The Indigenous Bar Association and a panel of elders from across Canada have met on several occasions, sometimes with federal justices and other officials and interested parties, including myself, to query the conditions under which oral narratives can be entered as evidence, and Aboriginal elders can appear in court. Many other people, Aboriginal and otherwise, have expressed their own deep concerns both in print and in private. The overriding worry is that without oral narrative evidence, Aboriginal people cannot adequately present their own evidence in litigation.

My interest is in the larger issues rather than the views of particular people, although I consider many individual views in detail within these pages. I have used, at length in some cases, opposing approaches and points of view not to be critical of their authors, but rather to explore the conflicts and identify possible resolutions that employ the best scholarship and social responsibility to all the parties involved.

Introduction

At one time, in conducting their legal affairs, the ancestors of the people who created English common law depended on the performance of actions that appealed to the human senses of touch, smell, hearing, and taste. The swearing of an oath in some instances included a kiss or a gesture. The anointing of a king, or the legal claim of a noble title, involved the smell and feel of a particular oil and the distribution and eating of food. The transfer of land required riding a horse to legally “see” and thereby acquire the land. Law itself was sometimes created in verse and intended to be sung (Hibbitts 1992). Perhaps most famously, the Bayeux Tapestry shows the powerful nobleman Harold Godwinson touching two reliquaries while promising to support the claim of William the Bastard (later William the Conqueror) to the English throne in the eleventh century (929). This form of oath swearing was recorded not in writing but rather in memory or, in this case, in textiles that could be understood by illiterates, which were wound around the interiors of churches of the medieval period. Often, multiple senses were drawn into legal affairs, and law was not so much said, sung, gestured, or felt, as holistically performed (945). In these earlier times, the performance of law required a speaker and a hearer, someone who touched and someone who was touched.

Today, law is found in documents that can exist independent of the sanctioning of second parties or the knowing associated with touch. Well-established, firmly entrenched law is commonly referred to as “black *letter*

law.” We have developed the means to interpret the world as text, and we diligently translate action into writing. What we take to be the permanence of writing is associated with serious intellectual activity (perhaps a reason for the disinclination of some academics to place weight on apparently ephemeral electronic journals). The common-law legal world now generally associates the oral and the sensory with fraud (Hibbitts 1992, 896), a dramatic change from the times vividly depicted in the medieval Icelandic *Njal’s Saga* (1997), when men who were the oral historians of law occupied the highest position of honour. Performance-based legal systems such as *Njal’s* have come to be thought of as primitive or uncivilized.

But times are always changing and in the 1980s and 1990s courts and tribunals in Canada and other jurisdictions began to seriously consider the relevance of Aboriginal oral narratives – including what are often called histories and myths – to legal proceedings. Indeed, the Canadian Specific Claims Tribunal, which hears Aboriginal land claims cases, is now empowered to receive and accept any oral historical evidence as it sees fit, whether it is admissible before a court or not (*Specific Claims Tribunal Act*, 2008, c. 22, s. 13(1b)). Barry (2009, 4) notes that internationally there is growing acceptance of what he terms “unconventional forms of evidence” in land claims and declaration of rights of Indigenous peoples, even when it would be dismissed as hearsay in other categories of cases. He writes that the South African *Restitution of Land Rights Act, 1994* permits the admission of evidence considered relevant and cogent to the case, whether admissible in any court of law. This act, however, fails to show how the courts might handle such evidence.

This book is an effort, in part, to closely examine significant assertions about oral narratives that have been made by the Canadian Department of Justice, which has faced the task of defending Canada in litigation brought by Aboriginal communities. I hope to broaden the dialogue beyond technical legal arguments about evidence rules and how these might accommodate oral narratives, and the speakers of them, to consider what these narratives are and how they can be evaluated from other disciplinary and Aboriginal perspectives. I argue that there is common ground among the various parties interested in the incorporation of oral narratives into legal proceedings, and that there can be mutually acceptable means for doing so.

Why Include Oral Narratives?

The Canadian court has properly understood that Aboriginal people are at a significant disadvantage if a major source of their knowledge, transmitted

orally, across time, and in a distinctive style, cannot meaningfully be entered as evidence, with the same consideration as written historical evidence. Mr. Justice Addy, for example, writing in *Blueberry River Indian Band v. Canada (Department of Indian Affairs)* (originally known as *Apsassin v. Canada*) in 1988, noted the importance of the performative aspects of evidence. He found that he was surprised by the differences in the way he understood transcripts of testimony and videotapes:

The spoken word and the visual impression are both preserved as part of the record to explain and at times to modify and even upset the conclusions that one might otherwise come to by a mere reading of the transcript. Having read the transcripts previously, I was quite surprised to note the degree to which some of my original impressions as to the effects of the evidence were either modified or completely changed upon viewing the actual videotaped recordings. (*Apsassin v. Canada*, 39-40; quoted in Hutchins et al. 2008, 23)

There are a number of important reasons why Aboriginal oral narratives should be included in the proceedings of Canadian courts, many articulated by members of the highest court. Canadian Supreme Court Chief Justice Antonio Lamer wrote, “The laws of evidence must be adapted in order that this type of evidence 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*” (*Delgamuukw v. British Columbia* [1997; *Delgamuukw III*], para. 87, emphasis mine). Further, as Chief Justice Lamer pointed out, treaty obligations demand that attention be paid to Aboriginal forms of the transmission of knowledge:

This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples ... : To quote Dickson C.J., given that most aboriginal societies “did not keep written records,” *the failure to do so would “impose an impossible burden of proof” on aboriginal peoples, and “render nugatory” any rights that they have ...* This process must be undertaken on a case-by-case basis. (ibid., emphasis mine)

Chief Justice Lamer noted further that in *R. v. Van der Peet*, “I held that the ordinary rules of evidence must be approached and adapted in light of the evidentiary difficulties inherent in adjudicating aboriginal claims” (*Delgamuukw III*, para. 105). His ruling advanced his own argument in *Van der*

Peet (para. 68): “The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.”

The present chief justice of the Canadian Supreme Court, Beverley McLachlin, writing in 2001 in *Mitchell v. M.N.R.*, pointed to a test for the inclusion of oral narratives, namely, their contribution of new evidence that is both useful to the court and reasonably reliable. She suggested that the protection of Aboriginal rights, as dictated by the Canadian Constitution of 1982, was tied to the admissibility of oral narratives and underscored the problem of the imposition of non-Aboriginal notions of fact. I take up this issue in more detail in Chapter 1.

Aboriginal rights claims give rise to inherent evidentiary difficulties. However, the rights protected under s. 35(1) should not be rendered illusory by imposing an impossible burden of proof. The rules of evidence must therefore be applied flexibly, in a manner commensurate with the inherent difficulties posed by aboriginal claims. *Since claimants must demonstrate features of pre-contact society in the absence of written records, oral histories may offer otherwise unavailable evidence of ancestral practices and aboriginal perspectives.* Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge. In determining the usefulness and reliability of oral histories, *judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts.* (*Mitchell*, para. 27, emphasis mine)

A few years earlier, Chief Justice McLachlin had noted still another set of Canadian values enshrined not in the constitution but in legal practice, with direct significance for the incorporation of oral narratives. Writing in *R. v. Marshall* she observed that “*the honour of the Crown* is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown ... *No appearance of ‘sharp dealing’ will be sanctioned*” (para. 49, emphasis mine; but see Culhane 1998 concerning the honour of the Crown in litigation). Honourable dealing, in brief, required the court not appear to disqualify the practices of the cultural “other,” Aboriginal peoples, in a period of official reconciliation, public apologies for historical wrongdoing, and the funding

of programs aimed at alleviating Aboriginal poverty, ill-health, and other consequences of colonialism.

In *Mitchell*, Chief Justice McLachlin pointed out that without the inclusion of oral narratives the precise nature of Aboriginal rights would be difficult to determine. These narratives provide evidence of ancestral practices where none might be otherwise available, and they provide evidence of ancestral perspectives on rights – what Aboriginal people thought at the time relations with the Crown were established (*Mitchell*, para. 32). One observer optimistically noted that this line of thought in *Mitchell* might mean that whatever the Mi'kmaq heard in treaty negotiations in 1760–61 trumps what the British wrote down about it (Howes 2005; and see Niezen 2003, 3). And, in 2005, Mr. Justice Binnie of the Supreme Court noted that Aboriginal law's fundamental objective "is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions" (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, para. 1).

These are all important arguments for the inclusion of Aboriginal oral narratives in legal proceedings. However, although Canada is the only common-law jurisdiction providing constitutional recognition and protection of the rights of Aboriginal peoples, it does not yet have specific rules regarding elders' oral history testimony (Hopkins and Nahwegahbow 2008, 2). In part this deficit reflects the serious concerns about the proper way to engage oral narratives and the potential pitfalls of engaging them improperly. The immediate barrier to allowing Aboriginal community members to give oral narratives as evidence is the ancient English common law practice known as the hearsay rule, which effectively bars lay witnesses from presenting what they have heard from others (except the fact that they have heard it) and substantially limits both what bearers of these oral materials might present and the importance given them (Rones and McNeil 2000, 68). Exceptions, however, are sometimes made.

In addition, Chief Justice McLachlin cautioned that, "The laws of evidence must ensure that the aboriginal perspective is given due weight but consciousness of the special nature of aboriginal claims *does not negate general principles governing evidence*. Claims must still be established on persuasive evidence demonstrating validity on a balance of probabilities." And, she noted that rules of evidence regarding Aboriginal cases "*cannot be strained beyond reason*" (*Mitchell*, para. 32, emphasis mine).

These decisions, *Mitchell* and *Marshall*, and several that followed, marked an effort by the Canadian courts to work out in more detail what to

do with oral narratives, and, arguably, the start of a retreat from the importance given them in *Delgamuukw III*, a landmark land claim decision widely heralded in Canada and in Commonwealth countries taking note of Canadian affairs (Milward 2009, 1; Mildon 2008, 85-87). In brief, the Supreme Court mandates legal principles that pull in two directions: one toward generous treatment and the other toward strict application of evidentiary law.

Other Perspectives on Oral Narratives in Court

The issues around oral narratives are not just the concern of legal practitioners. Those whose oral narratives are entered as evidence (and appear to be put on trial) have quite different perspectives from the court and Crown regarding evidence and legal procedures. Antonia Mills, an anthropologist who gave expert testimony on behalf of the Wet'suwet'en people in the original *Delgamuukw* trial, wrote that the hereditary chiefs met repeatedly to determine how their cases should be presented (Mills 1994, 10-11; and see Mills 2005, Daly 2005). They wanted the court to operate in Aboriginal style, as a potlatch. The Wet'suwet'en believed that the chiefs were the proper people to present the case on behalf of the matrilineages, the historical land-holding units of their society. Mills further notes that *Delgamuukw* set a precedent by having the chiefs act as prime witnesses, unlike other cases in which there is an "implicit understanding that the court system can better understand these issues when they are expressed through the idiom of western culture," that is, by outside expert witnesses. The chiefs, however, decided not to wear their ceremonial button blankets, as they would to their own ceremonial and legal processes in the longhouse, because they believed the regalia would not be honoured in the courthouse (Mills 1994, 13).

The two litigants in *Delgamuukw*, the house chiefs of the Wet'suwet'en and the Gitksan nations (these spellings have changed since the time of the trial), have oral narratives that detail their origins and subsequent histories. These oral narratives are recited by chiefs and are central to the transmission of rights to a territory (Mills 1994, 16). The lawyers for the Crown defence opposed the recitation of these formal oral narratives (known as *kungax* among the Wet'suwet'en and *adaawx* among the Gitksan) because they are oral and unwritten, and therefore are "hearsay." The trial judge agreed to make an exception in this case and to hear testimony directly from the chiefs. However, in the reasons for judgment, the judge held that the oral narratives were without weight (17).

Richard Daly, another anthropologist who offered expert testimony, argues that the judge's position was a refusal of the gift of knowledge: "I

submit that the plaintiffs and their experts deployed their respective gifts in the *Delgamuukw* case. They sought to gift the public with particular knowledge and information, and to give what is at the core of all gifts, namely, ideas and relationships.” And further, poignantly, “The contents of *Our Box Was Full* [his expert report] was given to the court and returned unopened” (Daly 2005, 47). I consider the responses to the repudiation by the trial judge of the testimony of Mills and Daly in Chapter 1.

Canadian courts have attempted to refine the understanding of what oral materials are, how they can be evaluated, the procedures associated with them, and the weight they should be given by the presiding judge. But, I will argue, the courts are far from the best venue to work through the complex issues associated with oral materials. Insufficient serious attention has been given to just what role Aboriginal oral traditions might have in courts or, more generally, in Canadian society. Debates about oral traditions deserve more consideration than can arise from positions taken in an adversarial legal process, particularly contentious cross-examination. First Nations legal scholar John Borrows writes that the inherent time limits to litigation mean that there is not enough time to comprehend oral narratives (cited in Simpkins 2000, 141). The judgment in *Samson Indian Nation and Band v. Canada* that the interpretation of oral material is too slow for the court underscores Borrows’s point. Historian and veteran expert witness Arthur Ray points to another courtroom problem:

The adversarial nature of the process greatly enhances the challenge they [the courts] face. Although expert witnesses are there to assist (educate) the court, their evidence and testimony is challenged (tested) directly by opposing counsel through cross-examination. Cross-examining counsel normally are assisted by their own team of experts. In hotly contested cases, experts often find it difficult to avoid taking such challenges personally and becoming emotionally involved. From the beginning, the adversarial nature of the process frequently has had a divisive impact on the community of experts who have taken part. A key reason is that opposing lawyers often explore the limits of the theoretical differences that exist among experts. *Consequently, expert witnesses are often pushed or pulled towards the boundaries of currently acceptable historical interpretation.* (Ray 2003, 269, emphasis mine; and see 2008)

Ray’s commentary echoes the broader conclusion drawn earlier by Clinton (1986) that the adversarial system in the United States pushes historical

evidence into extreme positions. Richard Daly has reached the same conclusion as Ray regarding the low likelihood of thorough and careful treatment of Aboriginal oral historical evidence in litigation itself, but on somewhat different grounds. In fact, he criticizes Ray's argument (2003, 273) that historians acting as experts in Aboriginal rights cases must not only be guided by the highest ethical standards and professional standards but also bear in mind that their primary responsibility is to the court rather than to their clients. To Daly (2005, 5, 9), this is merely a tacit acceptance of the current power imbalance in society and "positivistic administrative way of thinking based on fixed text-based categories for containing data rather than context-based categories developed from various evidentiary sources, including the oral."

Legal scholar David Milward (2009, 18) notes that the legal realist position argues that the minimization of oral narratives by the court allows the subordination of Aboriginal interests. Writing in 1992, McLeod claimed that Canadian evidentiary rules are used as "tools of oppression" of First Nations. The "best evidence rule," he writes, has this effect, as do other rules and practices. The "parole evidence rule," in which courts interpret agreements put into writing to determine the terms of the agreement, he writes, was applied in *R. v. Horse* case, wherein the trial judge did not consider the transcript of negotiations between the Crown and First Nations in the Treaty Six area because he did not consider the treaty to be ambiguous. Further, McLeod notes that the assigning of weight to evidence by trial judges allows the disregarding of oral materials, as in *Delgamuukw*, which I consider later.

McLeod and Daly's positions, in common with some Aboriginal critics such as Milward, point to a need for a thoroughgoing, rather than piecemeal, revision of some features of our current legal system, at least as it relates to rules of evidence. Mr. Justice John Bouck (interview, 2008), formerly of the Supreme Court of British Columbia, has argued that legislatures, rather than courts, should change some features of the common law. He points to the practice in the US executive branch of convening hearings, in which affected parties can participate, to consider how legislative change might be undertaken, as a model for Canadian practice. Milward, on the other hand, observes that the Supreme Court of Canada itself must account for the importance of oral histories as forms of evidence critical to establishing the basis for Aboriginal rights in Canada under section 35(1) of the *Constitution Act, 1982*. He concludes, "It has therefore fallen upon Canadian courts, the Supreme Court in particular, to develop principles in the law of

evidence that address the admission and weighing of oral histories as evidence in support of Aboriginal rights claims,” although he says the Supreme Court has provided little guidance to date (Milward 2009, 5, 8).

In this spirit, instead of limiting my discussion to the debate in law and to long-held standards of evidence at trial, I consider oral narratives in a wider perspective and contemplate what they are and how they might be treated in the long process from their transmission by one person to another, their placement in archives, their handling by Crown and tribal/band researchers, their performance in a courtroom (outside of their cultural context), and finally to their evaluation by trial judges as forms of evidence. In the Canadian context these questions take on significance because the Crown has argued that oral materials are *transformed* into documents and hence are amenable to standard historiographic methods. A Crown witness on oral tradition described what he took to be the route from elder testimony to trial record and concluded, “Under such circumstances, it cannot be seriously suggested that oral tradition should continue to be understood and evaluated within its original context rather than as a document purposefully introduced into a new setting by an Aboriginal party or their legal counsel” (von Gernet 2006a, 6). I believe this position creates a false dichotomy and implies a subordination of oral materials to written historical ones and of Aboriginal epistemology to that of North Atlantic sensibilities, a position in contradiction to that of the Supreme Court of Canada.

Julie Cruikshank (personal communication, 2007; cited in Simpkins 2000, 138) has pointed out that oral narratives should be treated as parallel to history, but are not understood as such when they are looked on as merely repositories of data. This is a significant consideration because Crown researchers and litigators in a series of land-claim and related Aboriginal litigation since *Delgamuukw* have treated oral materials in this way, as I show in Chapter 1. Further, British Columbia Chief Justice Allan McEachern’s idea in the original *Delgamuukw* trial that the absence of writing in Gitksan and Wet’suwet’en societies marked them as primitive surely implies that the means of transmission of knowledge in such a primitive society, oral narratives, are inferior to those of societies with writing (Miller 1992b). I suggest that the nature of oral materials poses empirical and theoretical questions not considered by the Crown. What *does* happen to oral materials along the path to the courtroom?

To study this process, I rely on published materials and on my own interviews with oral historians, tribal archivists, Crown researchers, and others.

Little previous work on oral narrative has pointed in this direction. Ames (1990), however, has observed the importance of archives and their connection to relations of power as a “political institution,” referring to mainstream societies’ holdings of material about Aboriginal people. Ames is concerned with the principles underlying the production, storage, and distribution of images of Aboriginal people, and the relevance of understanding archives. Consequently, my approach parallels his.

I have also consulted scholars recording oral materials with Aboriginal consultants, academics who have presented oral material in court, attorneys-at-law, and judges. I believe that there is common ground among these disparate sets of people, all of whom have some role in the production and reproduction of oral materials, and suggest that they might benefit from considering the various components of the process leading to the courtroom. It’s certain that anthropologists, historians, tribal oral historians, archivists, and legal personnel of all sorts have not yet gained clarity about oral narratives and their legal role. Nor do these practitioners have sufficient insight into the activities of those in other disciplines, though it would be helpful if they did. As legal scholar Michael Jackson (2005, xi) has noted, “Law and anthropology ought to be on speaking terms.”

The Crown’s Arguments

The Canadian courts and the Crown have raised crucial questions about oral materials, and these merit close consideration. They include questions that arise routinely about any sort of evidence entered into court simply by virtue of the existing rules of evidence in common-law courts. Are the historical conclusions drawn from oral materials supported by other evidence, and especially by documentary evidence? Are there multiple versions of oral materials, and if so, are they consistent? If there are not multiple versions, is the oral evidence widely known and accepted in the community? These questions go to the legal issue of reliability. There are also other very specialized issues. One Crown expert (von Gernet 1996), drawing heavily on the work of Africanist historians, especially Jan Vansina, has raised the issue of whether the process of flattening of oral histories, referred to as a “floating gap,” creates significant and legally meaningful inaccuracies. For example, genealogies of many generations of kings or chiefs entered as evidence might be telescoped into a more limited number, cutting out some, including others, and unduly emphasizing particular ones. This process might arise from the political demands of the moment, such as the need to create legitimacy by demonstrating genealogical closeness to important ancestors and,

similarly, erasing from the record poorly regarded ancestors. As a consequence, oral narratives are routinely said by the Crown to be weak evidence.

There are several ways to understand these issues, as I will point out. Bahr (1993, 48), for example, considering mythology (one form of oral narrative) from a literary rather than a political perspective, notes that the floating gap is about something altogether different. The floating gap separates myth times (the prior, other world) and the present, thereby emphasizing the collective. No single individual can trace back to the myth times. Canadian Aboriginal oral historian Sonny McHalsie makes a related argument in Chapter 3.

The Crown has also suggested that Aboriginal people in Canada sometimes misunderstand culturally important materials, such as the origins and meaning of a two-row wampum belt with a purportedly incorrect attribution. More ominously, the Crown has implied that Aboriginal people outright misrepresent oral traditions to gain advantage in legal proceedings (von Gernet 1996). Such claims are neither new nor local. Strang (2006, 990) references *Kartinyeri v. The Commonwealth*, in which an anthropologist was threatened with a lawsuit and publicly accused of colluding in the invention of evidence in a land claims case with an Indigenous community for whom she acted as consultant. The anthropological evidence was eventually accepted by the Australian court, but the circumstances acted to suppress both anthropological and Indigenous knowledges. These issues, as they are presented in litigation, merely highlight the difficulties inherent in understanding oral materials rather than providing clarification.

But first, a prior question: What does one need to know before making legal claims about oral materials? Because one primary purpose here is to examine the steps along the way to the court, this is not the place to articulate the contemporary theories regarding oral materials in detail. It is valuable to point to the signposts, however. Current anthropological theory has moved far beyond simply debating whether Aboriginal oral materials are truthful, and therefore something like Western histories and available to being disassembled and refitted to historical analysis (Julie Cruikshank, personal communication, 2006). Historians may commonly have more of a focus on issues of reliability, given, in the majority of cases, their greater distance from the oral historical practice (e.g., Allen 1979, 111).

Newer social science approaches are concerned with examining the ways in which contemporary peoples use these narratives to think through and comment on the current situations in which they and their communities find themselves, and the ways in which communities remember and

characterize some events and processes and discard others (see, for example, Gordillo 2004). These approaches feature collaboration between scholars and Aboriginal people (who are sometimes themselves scholars or employ scholarly methods), rather than being the production of scholars working with materials removed from communities.

As a starting point regarding what oral traditions are, I employ Cruikshank's working definition, "Broadly speaking, oral tradition (like history or anthropology) can be viewed as a coherent, open-ended system for constructing and transmitting knowledge," and her conclusion concerning "the evolving recognition that oral tradition anchors the present in the past" (Cruikshank 1994b, 408, 407). For Cruikshank, oral transmission of stories is pan-human and probably the oldest form of history-making (2005, 60). Perhaps even simpler is Schneider's concise notion (1995, 189) that oral traditions are all accounts important enough to be passed along in the collective memory of a group.

However oral materials articulated by Aboriginal people are understood in the scholarly community, when they enter the courts they are entering a foreign legal domain with its own considerable history and formal practices. For many, perhaps most, practitioners of the law in Canada, the introduction of Aboriginal oral narratives as a sort of testimony outside the conventional application of rules of evidence, perhaps even as expert testimony, into legal proceedings would surely be a great shock. At first blush, it would appear to violate the bedrock legal standard of the right to cross-examine the witness to an event. This is certainly the view of mainstream practising lawyers and judges I have interviewed whose work has not generally engaged Aboriginal issues.

Some work therefore has to be done to clarify how oral materials might enter into the practice of common law other than simply noting that to fail to do so would place Aboriginal people at a disadvantage and that fair dealing requires it. Scholars have pointed out that the common law, by its very history as an aggregation of local legal regimes shaped into a larger, national body of law, can and does accommodate Aboriginal law (for example, Borrows 2002, Russell 2000, Milward 2009), but this stops short of clarifying the particular problems of evidence law and the creative arguments that might be made regarding the compatibility of Aboriginal oral materials and Canadian courts. There are interesting conceptual legal arguments both for and against the use of oral traditions in Canadian courts. My purpose here is not to advance particular legal practices that may work in Canada, although

Chapter 5 considers these. Rather, I hope to entice legal scholars to engage this topic in light of the broader issues I will raise.

Because the oral history debate, as I have noted, is not confined to legal scholars and the court, it's useful to look at the arguments generated by anthropologists, historians, and other academics, particularly by those interested in or engaged in court testimony. These scholars have written concerning why oral narratives are or are not compatible with the methods and conclusions of their own disciplines. In response to the trial court decision in *Delgamuukw*, I edited a collection of essays that was published in 1992 as a special issue of *BC Studies* (vol. 95), with contributions by historian Robin Fisher and anthropologists Dara Culhane, Robin Ridington, Julie Cruikshank, and myself. Dora Wilson, a Gitksan and a member of the litigation team, added a commentary. These essays raised questions about how and if Aboriginal perspectives can be heard in the court, and the nature of obstacles to this happening. This edited volume was one of the opening salvos on this topic. The Crown expert on oral histories, in his summary of the literature, cited this collection of papers as among the few to comment directly on the use of oral materials in court (von Gernet 1996). Others, in a variety of fields, have since offered new opinions.

Some, such as the archaeologist Ronald Mason (2000, 2006), argue from the position of normal science to find against the suitability of oral materials in court. These arguments focus on the incommensurability of science and Aboriginal ways of knowing and communicating. Others in the same discipline, for example Andrew Martindale (2006), conclude the converse and present compelling empirical evidence of oral materials persisting in communities over millennia as well as sophisticated theoretical explanations of why this is so. To some extent, all of these debates turn on the issue of fact as it is understood in the court, and reflect the different definitions of fact in legal and academic domains (Kandel 1992).

These issues are not simply Canadian issues, and other legal jurisdictions have something to contribute. Newman (2005, 242) went so far as to observe,

In certain self-congratulatory moments, Canadian law might think of its response on Aboriginal oral history as having much to teach the world and little to learn from elsewhere. And, of course, *Delgamuukw* [the position regarding oral narratives given in *Delgamuukw* III] has been an inspiration to lawyers operating outside Canada as well. However, the achievement of

Delgamuukw in this context ought not to, in the process, insulate us from learning from others. It is sometimes almost forgotten that the Supreme Court of Canada's openness to oral history in *Delgamuukw* was not an entirely novel attitude, even though previous Canadian cases had already begun the process of opening to oral history evidence. We can, moreover, also sometimes see a pragmatic use of oral history evidence in even earlier cases elsewhere.

But I think Newman is a bit uncharitable here. The Zuni land case he cites as case in point (*Zuni Tribe of New Mexico v. United States*) involved only the living memories of people, many or all of whom were not trained tribal oral historians. These are nothing like the formal chiefly narratives of clan history presented in *Delgamuukw*, nor are the issues involved in their deployment as evidence the same as in the Canadian case. The evidence did not require the consideration of exceptions to the hearsay rule.

The Narrator

I wish to make clear my own engagement with the issue of oral narratives and their incorporation in legal affairs. For twenty-one years I have worked as a university professor, and a little longer as an anthropological practitioner. I have provided expert testimony (which has included oral narratives) in various courts, tribunals, and commissions in both Canada and the United States. Sometimes the oral material came from my own interviews with tribal elders and other community members, and in other circumstances I have relied on recorded oral materials, occasionally, but not always, transcribed. I have been interested in the evolving standards regarding these materials, particularly the ways in which they have been tested and weighed in court. I have attempted to educate my own graduate students about the many issues related to oral narratives, and especially to point out to them the need for care in questioning, in recording context, and in making clear the limits of their own knowledge regarding the materials.

I have also attempted to broach serious issues regarding evidence directly with the Canadian Department of Justice, giving an invited talk to the National Aboriginal Law Litigation Conference in February 2004, and an invited talk at the Green College, University of British Columbia, Thematic Lecture Series entitled "The Shifting Culture of Conflict," attended by the chief justice of the Canadian Supreme Court. I have spoken on evidentiary issues, particularly oral narratives and governmental record keeping, at university law school classes and before the 11th Annual National Land

Claim Workshop, hosted by the Union of BC Indian Chiefs, in October 2003. I was invited by the Indigenous Bar Association to address a gathering of elders and Aboriginal lawyers regarding issues of oral evidence in March 2010.

In 2008 I travelled to Brazil to investigate, among other things, the ways in which oral narratives might be incorporated into a legal system based not on the English common law, but primarily on Roman law. I met with colleagues in Brazil, including the staff of the federal *Ministério Público*, the equivalent of a deputy attorney general's office, with members of the Brazilian anthropological association, which has a formal research relationship with the state, and with senior officials of FUNAI (the federal agency in charge of Indigenous affairs). I also taught a graduate seminar at the University of Brasília that included a federal employee of FUNAI who heads the federal process of the demarcation of lands. This is a process in which the lands belonging to the *Índios* are determined. I found that there is, effectively, no way for Brazilian Indigenous people to represent their own oral narratives directly in legal affairs. Rather, their narratives are filtered and tendered through anthropologists and other experts in reports to FUNAI. This is at the other end of the spectrum from the Canadian interest in oral narratives, and an issue of concern to the *Ministério Público*. The circumstances in Brazil reflect its tradition of civil, as opposed to common, law. But as in Canada, oral narratives of Aboriginal people are "cherry-picked" to support the legal narratives of other people (Cristhian DaSilva, Brazilian anthropologist, interview, 2008).

Together with Julie Cruikshank, I organized a graduate ethnographic field school, in conjunction with the *Stó:lō* Nation, spending portions of nine summers residing in a Coast Salish earth-floor longhouse. From this base, graduate students have fanned out into the mountainous Fraser Valley to carry out research, often involving oral narratives, with *Stó:lō* people. I also continue to carry out my own field research with Coast Salish peoples, interviewing members of several communities and helping to develop an understanding of their historical and contemporary practices and viewpoints. One such project, begun with the *Stó:lō* and then broadened to include other communities, culminated in a book about historical justice practices in the Coast Salish world.

More recently, I was engaged to examine the work of the anthropologist hired by the Crown as an expert on oral materials in a series of cases stretching across Canada and including several distinct Aboriginal cultures. As part of this work I read the Crown's expert reports and many hundreds of

pages of testimony under cross-examination. I provided my ideas on this as a consultant and, in one case, submitted a rebuttal report to the court. Anthropologist Julie Cruikshank provided her insights to me in this work.

Meanwhile, I spoke at a conference, "*Sui Generis*," organized by the Canadian Department of Justice to bring together various participants, particularly judges, litigators, and experts, to discuss how to proceed with oral narratives and other questions about Aboriginal litigation. I present a précis of my paper in Chapter 4. Personally, I found this and related conferences insufficient and frustrating. Some speakers openly expressed their anger, including noted historians Arthur Ray and Jim Miller, dissatisfied by the present state of Aboriginal litigation in Canada, and many grumbled in private about the disinclination of the Crown to be truly open to new ways of thinking about the very questions that were the inspiration for the conferences. There was also fear of revealing too much to the other side. Nowhere were the sorts of issues I raise here addressed in these conferences, particularly those that challenge fundamental ideas about oral materials used in Crown conduct of Aboriginal litigation against the state. I applaud the Department of Justice for hosting these events but suggest we push further forward into a discussion of the nature of oral narratives and their engagement with legal proceedings that is both broader and more specific.

Recently the Department of Justice and the federal judiciary have entered into dialogue with the Indigenous Bar Association about the treatment of elders on the stand and the procedural issues regarding oral testimony, although this conversation has not raised many of the issues I address here (IBA 2009). Suggestions have been made that justices might intervene in the case of confrontational and disrespectful cross-examination of elders and that oral histories be presented without interruption, for example. Many participants in the 2010 Indigenous Bar Association meetings in Manitoba felt that there is no way for elders to give testimony in the current environment.

This book is organized to reflect the continuing dialogue, albeit a frustrating and discouraging one, among those interested in oral narratives and their role in the civil life of Canada and elsewhere. It is also personal, in that I have had a direct involvement and a small role in this dialogue over several years. I find it helpful not to erase my own involvement and I include my own oral history of involvement and the development of thinking on this topic. I wish to record something of the history of Crown practice. And, I don't believe that the box of Aboriginal knowledge need remain unopened, as Daly (2005) so aptly put it.

Organization of the Book

The first chapter is concerned with a series of issues that help to establish the questions I raise here, and reveal in more detail the differences and overlaps that exist between the various disciplinary practices that engage oral narratives. First, I consider the role of anthropology in the debate about oral narratives. Then, I examine the conceptual problems inherent in defining oral materials. Should they be called traditions, histories, narratives, or something else? Since there are different sorts of oral materials, no one term will serve all purposes. And each term reflects a particular vantage point and introduces its own problems. I think of oral materials of all sorts as narratives, and I argue that legal strategies and presentations in court share something in common in that they, too, depend on the construction of a storyline (Amsterdam and Bruner 2000).

Then the focus shifts to examining the different training academics and legal personnel receive and the consequent vast differences in their understandings of the idea of *fact*. I further consider what some Aboriginal peoples of Canada make of fact, and the sort of training many of them have undergone historically and contemporaneously. Is there a common ground here? I point to many overlaps in perspectives that might be better mined in coming to mutual understandings.

Next, I consider the issues before the court as they arise in the anthropological world, including sociocultural anthropology and archaeology. Noted archaeologists have written spirited position papers, arguing in all directions, regarding the nature of oral narratives and their suitability as evidence for understanding culture history, and, since many archaeologists give expert testimony in court, in courts themselves. Some archaeologists give compelling accounts of oral narratives that, they argue, accurately capture many centuries of changes in the environment, movement of ancestors, and so on. Others dispute this out of hand. These are the same questions raised in the court and belong to the larger conversation.

Then, I move to another anthropological venue, social-cultural anthropology, and examine the work of Andrew Wiget, an anthropologist, and his thoughts about testimony in the US case known as *Zuni*. I suggest that his approach is not a way forward, despite his considerable success in a US court. Still, academic commentary on *Zuni* suggests that oral narratives and anthropology were more successful in presenting evidence there than in the *Delgamuukw* trial. Wiget has argued that presentation in a deposition form rather than in a more free-flowing form of direct testimony helped to make the evidence more persuasive to a court.

Chapter 2 is entitled “The Social Life of Oral Narratives,” and it introduces ideas heretofore entirely unknown in the dialogue about oral narratives and courts. I discuss an interview with tribal archivists about transformation. I ask, do oral narratives actually become documents, and if so, does this happen in the archives? The archivists provide a nuanced answer, suggesting that their thinking is more complex than conventionally understood and that the oral narratives they work with both have a form of life force and are open to revision by their authors. They associate the oral materials with culturally specific forms of ownership.

Next, I look at how Crown researchers use oral materials in Aboriginal litigation. These researchers reveal in interviews that decisions about the nature of particular oral materials are made *before* the court proceedings. This is part of the framing of a case and the creation of a storyline for the Crown litigators. In some instances, or perhaps most, information is assessed rapidly, data cherry-picked, and complex Aboriginal understandings missed entirely – even when there are both goodwill and ethical practices. The plaintiff’s legal teams have their own ways of engaging oral materials, and the issues and problems are not entirely the same. I consider the views held by experienced legal practitioners working in Aboriginal litigation, as presented in an international conference.

Chapter 2 begins the consideration of Aboriginal perspectives in the discussion of tribal archives, but Chapter 3 engages them more fully. First, I examine what might be called the radical critique of Canadian law. By radical I do not mean views that call for an end to the Canadian state, although some may verge on this, but, rather, those whose propositions for change question some elements of the authority of the state or suggest that there may be more than one sovereign (others being First Nations themselves). Winona Wheeler and other Aboriginal scholars have presented their views to the court on oral materials, without success. But Wheeler’s expert testimony remains a sophisticated, energetic, comprehensive view of the larger problem, and I consider her arguments, prior to concluding that their very complexity gave rise to the court’s preference at that point for the approach taken by the Crown.

Then, I talk with an oral historian, Sonny McHalsie, whom I have worked with over the last twenty years. I ask *him* about his views of the key issues about oral narratives as understood by the Crown witness. His responses reveal grounds not anticipated by the Crown and show, sometimes indirectly, the ethnocentric bias in the Crown position. He responds to the view that

Aboriginal oral historians' testimony might be excluded if they have read the published materials about their communities by anthropologists and historians (sometimes called the problem of contamination) by pointing out that his concern is not *what the anthropologist or historian has written but how the scholar has distorted what he or she has been told*. He entirely re-focuses contamination and other questions raised by the Crown.

There are other sources of insight outside of Canada into the question of integrating oral narratives into the court. The United States has a system of tribal courts that hold significant civil and criminal jurisdictions, although with contested limitations. While some literature claims that even tribal courts have little room for oral narratives, this is not entirely the case. Finally, I look at how oral narratives have been deployed in other jurisdictions.

Chapter 4, "Court and Crown," concerns the responses of both the Canadian Crown and the court to the problems that have arisen in implementing a new approach to oral narratives. I begin by considering recent shifts in the Canadian court's positions on oral narratives. Then, I present a précis of my own talk at the federal "*Sui Generis*" conference, held in February 2007. I argue that academics engaged in the use of oral materials in court must acknowledge the nature of our own non-Aboriginal systems of education, knowledge, and authority, just as McHalsie acknowledges his own Aboriginal education. I suggest that some elements of our Western systems are concealed in the way testimony is constructed and presented, to the detriment of the express purpose of expert witnessing, which is to be of help to the court (in this instance, regarding oral narratives). Next, I briefly sketch the activities regarding oral history testimony of the major Crown witness and present questions he was asked to answer in preparing a background report for the Department of Justice on this topic. This report concerning oral materials (von Gernet 1996) has underwritten the Crown position in more than a dozen cases. It is, in effect, the Crown theory of oral narratives. I refer to this report in Chapter 4, and my work here is in dialogue with this Crown report.

I then consider a Crown expert report, itself built on the 1996 Crown document. Because the Crown has a fiduciary and moral duty to the Aboriginal peoples of Canada, I take careful note of the arguments, and in some instances my own reading of the sources leads me to different conclusions about oral materials.

In Chapter 5, I turn to the nature of evidence, the rules of evidence, and the means by which evidence might be evaluated. I examine Canadian

law, not from the vantage point of a legal practitioner, but from an anthropological perspective. I suggest some potential resolutions to problems regarding evidence, as I understand them from interviews with legal professionals and from the literature, and move to a review of where the Canadian court's opinions on these topics seems to be going.

Finally, Chapter 6 points to ways in which we might reconceptualize the problems around oral narratives. In particular, I suggest we move beyond a simple notion of oral historians as mere reproducers of narratives passed along to them by another generation. Instead I suggest that we understand recognized oral historians as something like Western historians inasmuch as they, too, use the materials available to them to work through intellectual problems regarding the past and present of their communities. Such people can and should be incorporated into the Canadian legal system as experts.

Throughout this book I use various terms to refer to people and groups whose ancestors (some or all) predate the arrival of Europeans to North America. In Canada, the terms *First Nations* and *First Peoples* are commonly used to refer to some of the communities of peoples who are aboriginal to the territory. Other terms include *Inuit* (for the northern peoples of the Arctic) and *Métis* (for those descended from mixed communities that arose in the nineteenth century and were composed of Aboriginal peoples and various of the settler populations). Sometimes the term *Métis* is used for those who are simply of mixed descent. The terms *Aboriginal*, *Indigenous*, *Native*, and *Indian* are used in daily life in particular parts of Canada, but not in others, and not in all circumstances. Each term carries connotations that are unacceptable to some of the Aboriginal peoples of Canada. I use *Aboriginal* as a cover term for all three groups. Federal legislation refers to *Indians*, and I use that term when referring to legislation and the language of government agencies. Today, the terms *Aboriginal* and *Indigenous* are commonly capitalized in Canada.

In some instances I use the term *Indigenous* to emphasize *priority*, the circumstance of being somewhere before the land's colonizers, and the legal entailments following from that priority, including rights and titles to lands and resources. The term *Crown* originally referred to the authority of the monarch; today in Canada it refers to the apparatus of government and specifically, here, to the Department of Justice and the legal teams engaged in litigation against the First Nations and other Aboriginal peoples. Finally, the process of colonization in Canada has led to the grouping of Aboriginal peoples into small units with formal relationships with the Crown. These

are called *bands*, and when bands group themselves together they are commonly called *tribes* or *tribal councils*. The term *nation* is also sometimes used by Aboriginal peoples in Canada to reference the state-to-state relationship they commonly desire with Canada. Finally, I use the term *state* to refer to institutions of governance in countries other than Canada. I use social science conventions of citation, rather than legal ones, because I am writing as a social scientist.

1

Issues in Law and Social Science

The Role of Anthropology

My discipline, anthropology, has its own role in the present conundrum and has failed to adequately present information about the ways in which oral narratives operate. This is of major concern because one could argue that the strength of sociocultural anthropology is both the study of deep local knowledge and the production of comparative ethnography (ethnology), which, taken together, create contextualization. This contextualization is sometimes antithetical to the adversarial procedures and the rules of evidence in Canadian and other courts. However, anthropology has a role to play in creating context for the court.

Denny writes, “Western thought has only one distinctive property separating it from both agricultural and hunter-gathering societies – decontextualization. Decontextualization is the handling of information in a way that either disconnects other information or backgrounds it.” He observes that all societies use context and differentiation, but argues, “Higher differentiation is making more distinctions *within* a thought unit, whereas higher contextualization, as implied above, is making more connections to *other* thought units ... different cultures make some of these thought patterns fluent and automatic, whereas the opposite pattern remains unusual and cumbersome” (Denny 1991, 66).

In a wry, cutting, and deeply contentious 1996 commentary on the original decision in *Delgamuukw v. British Columbia* published in *PoLAR*, an

anthropology journal, Robert Paine laid part of the blame for the failure of oral narratives as evidence in court at the feet of anthropologists, those most associated with the recording and entry of oral narratives into court. He demanded a closer look be taken at how expert testimony is engaged in litigation and how oral narratives are contextualized, and called for closer cooperation between disciplines in working out the intellectual and practical problems:

Now, our discipline has itself wrestled with the epistemological riddle of belief as a kind of fact. Boas and Lowie, early in this century, both rejected oral tradition as “history.” Then, post-World War I, came the Malinowskian historical “charter” mode of interpretation. This was followed, post-World War II, by the literalism of Vansina (*Oral Tradition*); and in recent years by the critique of the “error of literalism” and so on.

I’m drawn to the simple (but not, I trust, simplistic) conclusion that some “backgrounding” – for the court and the judge – as to how anthropology has tussled with this issue would have surely helped. Thence one should proceed to an *interpretation* of the Gitksan and Wet’suwet’en “faith-as-fact” as testimony with evidentiary value. As it was, it seems to have been assumed the judge knew little of all this and would “buy” what he was told by an expert witness (for it also seems to have been supposed that’s what “expert” means). In fact, the Chief Justice was left to draw his own conclusions. More’s the pity that they were largely wrong conclusions. (Paine 1996, 59)

Paine continues immediately:

Issue §2: Oral Testimony

Similarly, it falls to the anthropologist as expert witness to explain the exegetical process involved in oral narration. Julie Cruikshank, a specialist in the field, tells us: Each narrative *contains more than one message*. The listener is part of the storytelling event too, and a good listener is expected to bring different life experiences to the story each time he or she hears it and *to learn different things* from it at each hearing (Cruikshank 1992, 33; my emphases). “More than one message” – what place is there for that in lay persons’ (let alone in Western jurisprudence’s) idea of truth? Similarly, we cannot expect judges, juries (or, in the future, parliamentarians?) to be comfortable with the “veiled language of cosmological symbolism” in which oral testimony may be encoded (Willis 1980, 31).

In *Delgamuukw*, the plaintiffs and the judge, it seems, each ended up imputing a literalism to the other. In McEachern's view what the Gitksan and Wet'suwet'en were claiming as literally true is not so, it is "only" myth; and the Gitksan and Wet'suwet'en felt McEachern rejected their myths because (I suppose them to say), "He says they are not literally true and yet we do not present them as literal truths in the way the judge means when he speaks of something being literally true or not." There are different denotations of *literal* here; for the Gitksan and Wet'suwet'en, their myths are "literally true" in the sense that they carry an "*ipso facto* truth" (Brown and Roberts 1980, 8); but for McEachern, "literally true" means *factually true* in a proven sense (in written documents preferably). Expert witnesses, *led by counsel*, should untangle this. It appears not to have happened. (Paine 1996, 61)

If, as Paine observes, oral narratives contain more than one message, how is a trial judge to understand and meaningfully evaluate the evidence?

The problems Paine describes sometimes arise from wildly different perceptions of science and the humanities. These differences, and their significance, became apparent at a 1995 meeting of anthropologists. The original *Delgamuukw* decision, and its treatment and rejection of oral narratives and anthropological testimony, caused so much consternation among Canadian anthropologists that I organized a session to talk about it. This session was entitled "Anthropologists On Stage and Back Stage: Expert Witnessing in First Nation Litigation," presented at the twenty-second Annual Meeting of the Canadian Anthropology Society (CASCA), Learned Societies Conference, in May 1995. The session generated impassioned, even angry, exchanges, especially about the position taken by Robert Paine, introduced above. Another, open session at this meeting brought together a large crowd of anthropologists to consider what to do in light of the failure of testimony to be meaningfully heard and weighed in *Delgamuukw*.

The question was raised: If anthropological testimony regarding Aboriginal culture and society (itself heavily reliant on oral narratives) was rejected because anthropologists are too close to the communities they study, as the trial judge in *Delgamuukw* said, what could be done (Mills 1994, 18)? Anthropologists Antonia Mills and Richard Daly had each spent three years living in one of the communities that brought suit in order to learn, in detail, information about the communities prior to offering expert opinions that incorporated oral narratives. Both have written their own frank accounts of their fieldwork, evidence, and testimony (Mills 1994; Daly 2005; and see Trigger 2004, 26, about this issue in Australia). Historian Arthur Ray (2003,

260) observes that the judge rejected the testimony of Mills and Daly because he did not understand the participant-observation method.

Someone suggested that anthropologists should provide testimony only about communities with which we have not worked. I have seen this done elsewhere (for example, in *United States v. Washington*, in which I offered testimony in its second phase), and the expert on oral narratives had not worked with any Aboriginal communities. However, this position inconveniently leaves the “expert” part out of “expert witness,” and participants at this meeting gave no support for this suggestion. As Mills and Daly believe, published information reveals only part of the story about a community, and fieldwork is fundamental to gaining detailed understanding. Mills and others have criticized Crown expert witnesses who have testified concerning Aboriginal communities in which they have done no original research (Mills 1994, 19). This position is congruent with the notion that fieldwork is essential to understanding the context and meaning of oral narratives. The oral narratives are always more complex than what is written about them, shorn of the context of delivery, and what is written is inevitably a truncated version of a much longer piece.

Eugene Arima’s study (1976) of Inuit recall, for example, gives striking evidence of the importance of detailed knowledge of a community as a prerequisite to evaluating the reliability and constancy of its body of oral historians and its oral narratives. Arima evaluated language (which he believed was constant over several centuries), details of technology (such as particular design features of kayaks), folklore, and historical material. Arima knew intimately the details of kayaks (he had learned to expertly construct them) and other features of technology, and, significantly, pointed to local concepts of evaluation of narratives. He noted, for example, Inuit awareness that their own recall of traditional, formalized materials may outlive “empirically ‘self-conscious’ historic” narratives (33). Arima’s work shows the value of local practices of assessment, as does Sonny McHalsie, a contemporary Coast Salish oral historian, whose views are considered later in this chapter. In light of such work it is difficult to imagine social scientists offering testimony about oral narratives without fieldwork-based intensive knowledge.

Defining Oral Tradition/History/Narrative

One of the major problems in integrating oral traditions into the court is simply defining the term and its cognates. Too many of the definitions, or manipulations of definitions, appear to have been created by those without direct experience with them, or are too focused on a limited inventory of

examples and types. My argument follows that of Cohen (1989) in emphasizing the diversity of types, and their frequently mundane nature. In addition, the role of Aboriginal intellectuals in working with the oral traditions from their own society is largely unexamined. Since many of these Aboriginal oral historians *are* historians, I suggest that their oral narratives, at least some varieties, should be referred to as *oral histories*. The more conventional use of the term *oral history* refers to a “research method where a sound recording is made of an interview about first-hand experience occurring during the lifetime of an eyewitness.” *Oral tradition* is sometimes used to refer to either “a body of material retained from the past” or “a process by which information is transmitted from one generation to the next” (Cruikshank 1994b, 404). Neither term as presently conceived leaves space for recognizing the process of thinking and analysis undertaken by Aboriginal intellectuals.

Cohen (1989, 9) in arguing against a “rigidity of thinking” put it this way: “This paper points to flaws in formalist definitions of ‘oral tradition’ ... Historical tradition in regions ... is not lodged in a distinctive series of texts read as ‘oral tradition’ but is engaged in and derives from the everyday critical, lively intelligence which surrounds status, activities, gestures, and speech.” Cohen cites Rosaldo (1980), noting his objection that current expectations and definitions hamper our ability to hear what is being said (and see Cruikshank 1994b, 409; Rosaldo 1989).

Oral tradition, says Cohen (1989, 9), has been thought to have its own specialized characteristics and its own “separate processual and cultural life.” A reified oral tradition, he writes, has become part of the conceptual equipment of Africanists, notably Jan Vansina, and at a cost. This, I believe, is one of the problems of relying on the work of Africanists when encountering the work of Aboriginal peoples in North American courts, as the Canadian and American courts have done. Wiget (1982), a careful observer of American Indian oral narratives, notes two differences between the content of the oral narratives and the approach of the academic practitioners. One is Vansina’s (and others’) reliance on “fixed form” testimonies with culturally prescribed formal controls, whereas North American Aboriginal communities more frequently have “free form” testimonies (181). Second, Vansina and Henige’s view that the introduction into oral narratives of publicly shared symbolic content is “distortion,” Wiget argues, can be supplanted by paying attention to the metahistorical framework that supports the narrative (197). Daly (2005, 39) describes such a framework for Gitksan oral histories: “These figures [House crests] and events overlap to an extent

with the narratives and crests of certain other Houses and clans, such that a web of oral historical association is woven over the feasting area.”

Cohen (1989) cites Henige (1980), in particular, for advancing formalist definitions and for rejecting materials that failed to conform to his own approach. This has been a serious problem in the Canadian courts. Cohen also notes the work of Cunnison (1951), who argued for a bifurcated approach, contrasting local with national histories, in his work with the Luapula. Local folk’s considerable knowledge of the past is embedded in and part of social processes, which gives a “firmness and utility transcending the more general histories focused on throne and nation” (Cohen 1989, 11). Cohen writes of oral traditions that result from elder group processes, with each elder providing some of the documentation based on a “very broad knowledge of present and past contexts” (*ibid.*). He observes that among the Smaraka of Suriname, “straight-forward storytelling” is “rather unimportant,” but, importantly, points to the idiosyncratic and continuous assemblage of expert knowledge in numerous settings. The historians there play an active role, listening, doing research, constructing their knowledge, and becoming experts. They are, in a word, historians who operate in an oral venue. They hold no formal status as historians, but their knowledge is entered into juridical practices (12).

Renato Rosaldo is one of the best-known scholars to have criticized overformulaic views of oral narratives. In particular, he critiqued Vansina’s early work (1965), which “overlooked a number of central methodological issues” (Rosaldo 1980, 89; and see Beidelman 1970). Rosaldo (1980, 92) observes that skipping lightly over the narrative form of texts is like studying sonnets while ignoring their poetic form. He argues that Ilongot historical consciousness, the subject of his own research, differs from our own; the job of cultural analysis is to provide an account of how they perceive their own history rather than to deny their version of how their lives have changed over the years. History, he says, is a cultural construct, and “plundering other people’s narratives by sifting them into degrees of facticity – true, probable, possible, false – risks misunderstanding their meanings” (91). To grasp the message, he says, you have to work through the medium.

Most significantly, he writes,

Because the Ilongot have neither specialized historians nor centralized political authority, they also lack a single memorized official version of their past. Thus Vansina’s methods for studying fixed and undistorted group testimonies simply do not apply for he has made the ethnographic error of

regarding rather rare forms of society and history as if they were more generally representative. I would submit that people in all human societies recall the events of their own lives and therefore method in oral history ... insofar as it purports to have general validity – should begin by studying what is most widespread. (Rosaldo 1980, 91)

He notes that Ilongot stories “mapped onto each other” and that “a larger history could be pieced together from the assemblage of personal accounts” (ibid.). This is, I might add, the work of community historians as well as outsiders.

Cruikshank questions whether there is a basis for generalization about oral narratives. Current theory “destabilizes” the simple idea “*that there is a prescriptive, cross-culturally valid method for assessing their historical value*” (emphasis in original). Further, she writes, “If there are broad pan-North American similarities in storytelling traditions, they probably have more to do with epistemology than with content.” She observes that Indigenous people who grow up with these traditions believe that rather than subjecting oral narratives to formal analysis, one should absorb successive personal messages in repeated tellings. Storytelling, she writes, should be studied as a practice that is part of everyday life and provides a “framework” for understanding both historical and contemporary issues (Cruikshank 2005, 60).

A sustained example of the development and work of such an oral historian in a North American Aboriginal context is the work of Stó:lō Nation cultural advisor Albert (Sonny) McHalsie, which I recorded and published as a chapter in a book I edited (McHalsie 2007). McHalsie has other published written work, but this chapter is essentially an oral product, tape-recorded and transcribed to paper. McHalsie made revisions and I edited for minor errors, mostly mumbles. His chapter reveals many of the features presented by Cohen. McHalsie listens, thinks, and synthesizes information learned from a variety of community elders and others, and, over the space of a few decades, became a recognized expert in the history of his community.

McHalsie (2007, 82) observes that an important Stó:lō cultural teaching is that learning is a lifelong quest, and an oral historian is expected to continue to learn. In addition, McHalsie continually relies on his own insights, oral histories given by others, and the work of academic and amateur ethnographers and archaeologists, including their field notes. He relies on these in different ways, and is aware of the deficiencies and advantages of both material from his own community and outsiders.

The following reveals something of McHalsie's understanding of the limitations of the work of academics and the sort of connections he makes in his own scholarly work:

Look at the word *Sólh Téméxw*. The last syllable in *Téméxw* is *méxw* – “to do with like the dirt.” What do we call ourselves? We call ourselves *Xwélméxw*. Not only that, our neighbours, who are considered to be part of the Salish, have that as part of their word that describes themselves – Lillooet-Stl'atlimx. It's a little bit different, there's an “mph” in the sound. And you have the *Nlaka'pamux*. And you have the *Secwepemc*. They all have that little *méxw* sound at the end of their name, just like we call ourselves *Xwélméxw*. Not only are we *Stó:lō*, the river people, but we're also *Xwélméxw*. And so we're connected to the dirt and to the world.

Our burial practices were very important. We had the burial mounds and we had the tree burials. When I talked about tree burials with the late Rosaleen George and Elizabeth Herrling, they said there was a tree burial across from Frank Malloway's house, across from *Yeqwyeqwi:ws*. Rosaleen was saying that at that tree burial place, when they used to put the people up in the trees, it was usually the large maple trees that were used. And that the branch had to be touching the ground when they put the people in there. The branch had to be touching the ground, that was an important part of it. It had to be connected to the ground. And the one tree burial that was up in *Skw'átets*, Elizabeth Herrling talked about that. There was a platform that extended across from one maple tree to another.

Researchers do not ordinarily include these kinds of connections in their work [emphasis added]. For example, linguist Brent Galloway was talking about how he'd collect the name and the meaning to the name. And that was the scope of his work. He wasn't interested in any other context that could be provided. For instance Agnes Kelly – I was talking about how I'd missed out on doing that final day of work with Agnes Kelly – there are probably more specific details I could have gotten out of her. There's one rock with a story of a young maiden who was transformed to stone and all Brent collected was the name and the meaning of that name, but he never asked “Why was this young girl transformed to stone?” or anything like that. So there's no adequate context for this story. It's very limited. As for me, I'm interested in those sorts of things. And the other example is amateur ethnographer Oliver Wells. I just get so frustrated reading his transcripts because he was only interested in language. So every single time

where he writes in his book, “Oh okay. That’s very ... that’s very nice! I’ll come back and talk to you about that.” Every time, you know the elder’s just going to tell him something, wants to tell him something that’s just *so important!* And then Wells cuts him off and says, “What’s the word for this?” You know – “what’s the word for this” or something. That’s all he was collecting, was the language. He didn’t realize that what these elders were trying to do him was provide him with a context that would enable him to understand – it’s not just about the language and the meaning of the words. Oliver Wells contributes a lot to our understanding if you read the transcripts, but it’s just so limited. If he had been more interested in those stories and realized their importance, he would have said “Yeah! Tell me that story!” or “Tell me the story in your language!” or something like that. But quite often, you go through those interviews, and you come to where he says, “Oh. That’s a nice story, I’ll come back to you.” And of course, he never does. All those stories are lost, and the elders, his informants, were ready to tell to him. There were important stories that we’d have a lot of use for today, but they’re lost (McHalsie 2007, 108-9).

McHalsie’s extended account of learning about a Stó:lō memorial site illustrates how he learned from listening to his elders and the importance of connection to place in the production of historical understandings. The strength of his historical interpretations is a consequence of the growth of his own knowledge:

The other thing, too, is that at Í:yem there’s the Eayem memorial, there’s a monument. It’s a memorial to the Stó:lō people: they’ve got the sign right there. It says “Eayem memorial 1938 AD Erected by the Stallo Indians in memory of many hundreds of our forefathers buried here. This is one of six ancient cemeteries within our five mile Native fishing grounds which we inherited from our ancestors. R.I.P.” That memorial is set up at the cemetery there at IR [Indian reserve] 22, also known as Bell Crossing. It was set up by my great-grandfather Dennis S. Peters along with the help of Isaac James, who was his brother-in-law. And they set that up in 1938. I always wondered about the connection of that to the Great Fraser Midden Cairn, which was erected in the same year. I always wondered if my great-grandfather had seen that one and wanted to do that up there – I don’t know. It’s something that I’ve always wondered about because they were both erected in the same year, in 1938. When you look at that memorial what are the key messages? To me, my great-grandfather wanted to make sure that we remember

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