

# **What My Elders Taught Me Oral Traditions as Evidence in Aboriginal Litigation**

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## **Introduction**

This paper is an effort to share with others some of the wisdom of my elders.<sup>1</sup> When I say “elders” I do not mean my parents, grandparents or other relatives. Nor am I referring to any of my First Nations friends such as the late Chief Jacob Thomas. Rather, I am talking about my academic mentors who used both oral communication and numerous learned treatises to instruct me in the skills of my profession. Among other things, they showed me how archaeological data, written documents, and oral traditions are used in methodological conjunction to illuminate the past. After summarizing what I was taught about oral traditions,<sup>2</sup> I will offer a few observations on the *Delgamuukw* case.

I would like to begin by reviewing some modern perspectives on reconstructing the past in the present. At the risk of obscuring the full range of opinions, I will simplify matters and focus on two rival epistemologies located at the extreme ends of a continuum.

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Notes will be found on pages 118–121.

## Historical Objectivism

At one end of the spectrum of approaches is an interpretative position known as historical objectivism or positivist history. This position has a commitment to the reality of the past, a belief that there is a single solution or one “true” history, and a tendency to eliminate other possibilities. Its sprawling set of assumptions includes the notion that historical facts are embedded in documents and need only be extracted; hence, there is a focus on the collection and critical analysis of documentary materials to ascertain their origins, date and trustworthiness. There is a sharp separation between fact and fiction. Facts are independent of interpretation. The historian should have an attitude of neutral objectivity and disinterest and should never be an advocate or propagandist. The result is an authoritative, chronologized text about what “actually happened” in the past.<sup>3</sup>

## The Postmodernist Critique

Historical objectivism, in various incarnations, has been the dominant paradigm in Western historiography. But in recent decades it has been challenged as problematic by an intellectual movement loosely organized under the rubric “postmodernism.” This alternative position is, in many respects, a type of historical relativism in which interpretation changes in relation to changing circumstances. It is also a type of idealism in which humans are said to adjust not to a world as it really is, but to a world as they imagine it to be. Instead of a single, “true” history, there is pluralism, with multiple locations of historical knowledge. A value-free, empirical, objective history is an impossible ideal: historians can never free themselves from their own biases and all pasts are culturally mediated and socially constructed. Historical works written by “expert” historians; anthropologists and members of other academic guilds are socially constituted as authority and have no privileged claims on universal truth. They are closer to ethnocentric ideology than to scientific objectivity. There is no past to be *reconstructed*—only many, equally “true” or equally fictitious pasts to be *constructed*. There are no objective means of distinguishing between truth and falsehood since reality is what each individual believes it to be. As such, postmodernism is primarily a critique of many basic tenets of objectivism and positivism rather than a viable alternative.<sup>4</sup>

## The Role of Oral Traditions

Oral traditions have an important role in the contested terrain between historical objectivism and postmodernism. While they have often focused on written documents, historical objectivists have not totally ignored oral sources and have incorporated them into their re-

constructions of the past after first subjecting them to varying degrees of scrutiny. In a recent study, I reviewed numerous examples of Aboriginal oral traditions which contained useful facts about remote periods in history, as well as many instances in which scholars employed this evidence in standard historical reconstructions.<sup>5</sup>

Critics of the objectivist approach believe that oral traditions should not be mined for facts to be used as evidence in positivist histories, but should stand on their own as valid alternatives to such histories and regarded as worthy of study in their own right. Postmodernists raise questions about who is empowered or authorized to tell the story about the past, who controls the authentication process, and whose voices are included and whose are excluded or marginalized. Indeed, the term “voice” is prominent in the fashionable language of postmodernist discourse. It is with the “return of voice” that marginalized or minority groups, including Aboriginal peoples, can reclaim the past from “expert” academics, construct their own pasts, assert social power and claim rights. It is argued that oral traditions, in particular, can challenge biased, hegemonic history based on written records; democratize elitist historical disciplines; and give balance to an historical record.<sup>6</sup>

Reputable scholars draw from both ends of the continuum and try to situate their work in a comfortable middle ground. Unfortunately, excessive fidelity to the postmodernist end of the spectrum as well as a number of peculiar misconceptions have fostered untenable generalizations in the academic community, in First Nations political rhetoric and in Aboriginal litigation. I will briefly explore only a few of those generalizations.

### **Bias**

It is frequently suggested that history, as told by outsiders, is inherently biased, politically motivated, and amounts to an assertion of dominance and power over those whose past is being told. The voices of First Nations people are believed to be essential because only they can confront the distorting cultural biases that allegedly inform “expert” views of Aboriginal history. These biases are said to include, for example, the notion that Aboriginal societies were static and without history until after contact with “progressive” European cultures.<sup>7</sup> However, non-Aboriginal archaeologists first corrected this bias by demonstrating that the cultures of First Nations people underwent constant change prior to European contact, challenging the racist attitudes of nineteenth-century evolutionism and outdated ideas of progress.<sup>8</sup> Significantly, the bias was confronted internally, in the absence of trendy postcolonial theory and without recourse to oral traditions or an overt

challenge from First Nations people.<sup>9</sup> Clearly, it is not necessary to be an Aboriginal person to identify and overcome distorting biases.

Many also assume that the written record produced by Europeans is inherently biased because it was not produced by Aboriginal people but by strangers who had little understanding of the people they were writing about. How, then, does one explain the fact that written accounts by missionaries, fur traders, soldiers, explorers and other newcomers are commonly used to support Aboriginal claims? Good examples are the records of Hudson's Bay Co. trader William Brown and Peter Ogden which were relied upon by the Gitksan and Wet'suwet'en plaintiffs in the *Delgamuukw* trial to challenge the idea that an Aboriginal land-tenure system developed in response to the European fur trade.<sup>10</sup>

The postmodernists are correct in their observation that Western historical disciplines can become tools for use in the subordination and domination of non-Western peoples. Yet it must be conceded that these same disciplines also become the tools of resistance. Many First Nations people have overcome their long-felt mistrust of Western approaches and have used modern science in research, exhibition and education<sup>11</sup> to challenge other versions of their history,<sup>12</sup> to support Aboriginal rights,<sup>13</sup> or to oppose development on their lands.<sup>14</sup> As one Blackfoot Elder said, archaeology "had done more for the betterment of native peoples than all of the missionary and government agents had ever done."<sup>15</sup> Archaeology is a source of information that is independent of written accounts and can help to ensure that history is not only written by the winners.<sup>16</sup> Critics who charge that Western anthropologists and archaeologists are inherently biased because of their non-Aboriginality, or who argue that their research and findings harm First Nations interests,<sup>17</sup> must also be prepared to explain why it is that archaeological data often provides compelling support for Aboriginal claims.<sup>18</sup>

Those First Nations activists who claim that unflattering academic views of their history are the result of Western prejudices are just as likely to accept positive contributions emerging from the research of non-Aboriginal scholars.<sup>19</sup> In many respects, historical objectivism, including the scholarly apparatus that goes with it, has become the dominant posture of modern Aboriginal intellectuals involved in the public representation of their history.<sup>20</sup> Others have been influenced by postmodernist literature and are employing this relatively new Western approach to dismantle colonial thought.<sup>21</sup> Curiously, Aboriginal intellectuals who see the use of oral traditions by Western historians as a form of cultural appropriation have themselves appropriated the discourse of Western postmodernism to make the argument.<sup>22</sup> Many First Nations writers have voluntarily incorporated Western scholarship into their own 'voice,' partly because modern anthropology, history

and other disciplines frequently challenge rather than perpetuate the myths used to assert dominance and power over Aboriginal people.<sup>23</sup>

Aboriginal people are humans like everyone else and their voices can be just as self-serving and biased as the writings of non-Aboriginal people. This makes it particularly important that all assertions about the past, whether written or oral, are subjected to scrutiny and are not accepted at face value for any reason, including political expediency or cultural sensitivity. Unlike heritage, which often makes the past an exclusive possession created to protect group interests, history is an open inquiry into any and every past; it is comprehensive, collaborative and open to all.<sup>24</sup> Members of any given culture are not inherently better qualified to give an accurate representation of themselves and their history. No scientific or moral arguments can be advanced for restricting the study of the past to members of the group being investigated, or for giving any group exclusive proprietary rights to its history. On the contrary, the history of any people is greatly enriched because individuals from outside the group study it.<sup>25</sup> Charges of cultural appropriation<sup>26</sup> are often misguided and based on an outdated view of scholarly practice. In my view, James Henderson, a prominent Aboriginal legal scholar, is simply wrong when he alleges that efforts to understand Aboriginal pasts using a foreign world view “is the essence of cognitive imperialism and academic colonization.”<sup>27</sup>

There are many reasons why the perspective of the people whose past is being explored must be given serious consideration, but the absence of bias and assurances of accuracy are certainly not among them. Postmodernists agree that voices coming from the inside are not necessarily free from bias. Indeed, most argue that since *all* voices are inherently biased, *all* stories about the past are equally valid alternatives. Despite many attractions, this position also has profound limitations. When taken to its obvious radical conclusion, postmodernism leads to a conundrum. It is a socially constructed Western ideology that cannot present itself as a better alternative to its older competitor without creating a privileged position for itself, thereby undermining its own ideals. It must also dilute its own relativism or be charged with tolerating morally repugnant or socially noxious historical theories. Furthermore, in its extreme form, it offers only a debilitating nihilism that denies the existence of a basis for knowledge and precludes any consensus on what happened in the past. The notion that there is no past to be reconstructed and that all stories are equally true is contrary to common human experience and is rejected by most Aboriginal as well as non-Aboriginal people. More importantly, it is an entirely impractical epistemology when dealing with situations in which decisions about what happened *must* be made.

### The Orality-Literacy Continuum

A second problem that deserves attention is the common tendency to dichotomize orality and literacy. While the terms 'oral' and 'orality' have often been contrasted with 'written' and 'literacy,'<sup>28</sup> these seemingly obvious distinctions are rather slippery in practice.<sup>29</sup> Aboriginal cultures have often been characterized as 'oral.'<sup>30</sup> Since it is no longer possible to generalize validly about oral or literate individuals, it would be a mistake to divide entire cultures along these lines. There is now a widespread academic consensus that orality and literacy should not be regarded as a dichotomy. Even literacy may not represent a pole, now that the world has entered an era of 'post-literate' communication. Simply put, orality and literacy are no longer among the reasons for distinguishing between Aboriginal and non-Aboriginal peoples.<sup>31</sup>

It is often forgotten that alphabetic systems are not the only form of writing in Aboriginal North America.<sup>32</sup> Prior to European contact, there were systems of writing without words which constituted a non-alphabetic form of literacy. Since there is nothing inherent in orality that fosters accurate transmission of information, and since the memories of Aboriginal people are no different from those of other humans, it comes as no surprise that First Nations people had *aides-mémoire* such as notched or marked sticks, dendroglyphs, wampum and pictography. The fact that these exist is in and of itself evidence that the people who invented them understood the limitations of memory. They not only illustrate how oral traditions frequently depend on mnemonic cues, but serve to undermine generalizations about how "Canada's First Nations had no written history."<sup>33</sup>

For millennia, Aboriginal people had writing *without* words. Over the course of the last few centuries, many have also written *with* words. This makes for a situation that is far more complex than advocates of a simple orality-literacy dichotomy would have us believe. In some cases, missionaries adapted European languages to indigenous sound systems. In other instances, native speakers modified European writing for their own use. Still others devised and perfected entirely new systems, including syllabaries, ideographic script such as hieroglyphic writing and countless orthographies.<sup>34</sup>

Then there is English—a language that (either through a voluntary strategy of adaptation or, more often, involuntary participation in that catastrophic experiment known as the residential school) has become the lingua franca and the basis of literacy for the majority of First Nations people in Canada.<sup>35</sup> For some peoples, such as the Inuit of the Arctic, English literacy has been a recent development.<sup>36</sup> In other parts of Canada, however, Aboriginal peoples have been speaking and writing in English for more than three centuries.<sup>37</sup> The degree to which

written sources have been incorporated into oral documents has often been underestimated. Scholars working in many different countries have noted this phenomenon, known as “feedback.” The feedback effect is common in oral traditions related in all but the most remote areas of the world.<sup>38</sup> Throughout the twentieth century, First Nations people have increasingly consulted the corpus of written research in the public domain,<sup>39</sup> while at the same time drawing on their rich inventory of non-recorded oral traditions.

### **Aboriginal Traditions and Non-Aboriginal Traditions**

A third popular but untenable generalization posits a stark distinction between Aboriginal and non-Aboriginal historical traditions. Anthropologists discovered long ago that temporal orientation is, to a certain extent, a cultural construction. The past is not always remembered linearly, sequentially, chronometrically or calendrically. For this reason, history may involve compression or telescoping of time, or may even be conceived of in cyclical terms.<sup>40</sup> Unfortunately, these insights have led to extreme forms of cultural relativism, in which differences are frequently accepted without question. Maurice Bloch recognized this as part of a “recurrent professional malpractice of anthropologists to exaggerate the exotic character of other cultures.”<sup>41</sup> Extreme relativism is an exaggeration because if every culture conceived of things in entirely unique ways, no culture but our own would be comprehensible to us. In other words, if members of other cultures really did have entirely different concepts of time and history, we simply could not do what we obviously do, that is communicate with them.<sup>42</sup> Just as ethnocentrism assumes that everyone thinks alike, so too extreme relativism takes it for granted that all cultures are completely different. Frequently, neither position is founded on solid cross-cultural research.

Having examined numerous studies and researched this issue at some length, I have come to the conclusion that the contrast between the two “traditions” or “perspectives” is fraught with oversimplification, generalization, and reductionism. First Nations cultures are rich in their diversity. While it is appropriate to recognize and celebrate differences between these cultures and more recent immigrants, facile dichotomies between linear and cyclic, between an interest in the past and a timeless present, or between a caricatured non-Aboriginal historical tradition and a monolithic Aboriginal historical tradition are overstated and contrary to evidence.<sup>43</sup> In the case of Aboriginal claims, such dichotomies can lead to the type of divisive “us” and “them” mentality that limits intercultural communication and ultimately works against consensus-building.

### **The Delgamuukw Trial Judgement**

Oral traditions figured prominently in the *Delgamuukw* trial.<sup>44</sup> Some judges in earlier years may have been guilty of a mechanical application of the rules of evidence which rendered entire classes of materials inadmissible even before they could be weighed against other evidence. This was not the case here, for many of the oral documents tendered by the Gitksan and Wet'suwet'en, either through *viva voce* testimony or in the form of written affidavits, were admitted as evidence. It was only after careful deliberation that Chief Justice McEachern ultimately gave them little weight. I recently had occasion to study the trial decision and am preparing a detailed analysis; for now, I will confine my remarks to a few observations on the published reaction to the decision.

There is a widespread consensus that in his Reasons for Judgement, Justice McEachern volunteered several unnecessary remarks in a language reminiscent of nineteenth-century evolutionism. His notion that the Aboriginal plaintiffs were a "primitive" people prior to contact with Europeans and his use of Western technologies as a yardstick to measure progress<sup>45</sup> was offensive, not only to the First Nations plaintiffs, but to the many non-Aboriginal academics who have struggled hard to overturn such ethnocentrism. For these reasons, his judgement has been justifiably criticized.<sup>46</sup> It has also been charged that Justice McEachern's treatment of ancient documents is not in accord with mainstream historical scholarship.<sup>47</sup> Since the Chief Justice appears to have adopted the long-abandoned view that such documents largely speak for themselves,<sup>48</sup> this criticism also has validity. Complaints about his treatment of oral traditions, on the other hand, have in my view generally been unfair and off the mark.

Justice McEachern has been chastised for ignoring context in his use of written documents and for failing to subject these sources to further corroboration before giving them probative value.<sup>49</sup> However, in a classic example of dammed if he does and dammed if he doesn't, some of his detractors have accused him of "ethnocentric biases," and an "ethnocentric vanity verging on racism"<sup>50</sup> for applying these same, commonly accepted principles of research to oral documents. There have been complaints that the Judge's narrative "is about the unchallengeable authority of the now familiar 'Western scientific tradition'"<sup>51</sup> and that his dismissal of Aboriginal oral traditions is based on a "naive positivism."<sup>52</sup> Julie Cruikshank criticizes Justice McEachern for being overly concerned about the "reliability" of oral traditions and for seeing the value of oral traditions exclusively in terms of their contribution to a positivistic reconstruction of "what really happened." She advances the thesis that "the court's decision to present and evaluate oral tradition as positivistic, literal evidence for 'history' is both ethnocentric



and reductionist, undermining the complex nature of such testimony because it fails to address it on its own terms.” She asserts that “there is in anthropology an extensive body of literature which guides scholarly analysis of oral tradition; in that literature, concerns about ‘literal truth’ of oral traditions were superseded almost a century ago.”<sup>53</sup>

Critics like Cruikshank ignore two important facts. First, the Aboriginal plaintiffs *themselves* tendered oral traditions as truthful statements about what really happened and it was they who went to great lengths to establish the historicity and trustworthiness of these traditions by pointing to internal training, testing and validation procedures and by calling on independent, scientific corroboration. It seems clear that many Gitksan believe that their oral traditions come from the past, are about a remote past, and can be used as evidence to construct history in a positivistic sense.<sup>54</sup> More specifically, both lay and expert witnesses relied upon the traditions to prove the connection between pre-contact and present societies, ancient land use and territorial boundaries.<sup>55</sup> Whatever their usual role within the community, once oral traditions are offered as insights into a past that is contested or otherwise under investigation and are marshaled in support of an argument in a dispute with outsiders, they are either transformed into or specifically generated as *evidence* and can no longer be addressed solely on their own terms.

Secondly, Cruikshank’s assertion that anthropologists no longer have an interest in the historicity of oral traditions and no longer seek to extract facts about what “actually” happened in the past represents a rather narrow slice of the range of approaches having currency in the second half of the twentieth century.<sup>56</sup> Cruikshank’s antipositivism has by no means superseded other approaches. True, some historians and anthropologists, including myself, have gone beyond what “really happened” and developed an interest in what people believe might have happened. They acknowledge the legitimacy of self-representation and write accounts outlining how a group of people conceive of their histories on their own terms and construct their own historical consciousness within their own frameworks of analysis. Nevertheless, since some oral traditions are demonstrably containers of facts about the past, scholars continue to combine them with other evidence in standard positivist histories.<sup>57</sup>

A careful reading of his *Reasons for Judgement* suggests that Justice McEachern’s critical approach to oral traditions was not stimulated entirely by his personal predilections or the ideology of his profession, but was also inspired by mainstream academic opinion. For instance, he cited a lengthy excerpt from Bruce Trigger’s *Time and Traditions*, in which one of the most influential Canadian anthropologists of this century

noted that oral traditions are as much about the present as the past, that they are reworked from generation to generation, that they require careful evaluation, and that when used uncritically they can be a source of much confusion.<sup>58</sup> Since this scholar was among the many ‘learned authors’ who reminded the judge to be cautious,<sup>59</sup> it is unfair to intimate that Justice McEachern’s critical approach was not in accord with modern anthropological thinking. Or, as other critics claim, that his approach was generated “exclusively within the framework of western jurisprudence,” arose from a “Canadian legal ideology,” and conveyed an “orientation lag between current academic approaches and conservative judicial practice.”<sup>60</sup> By admitting oral documents into evidence, recognizing that they are not *prima facie* proof of the truth of the facts stated in them, taking note of the context in which they were generated, evaluating them for internal consistency, comparing them with other available evidence, and carefully weighing them, the judge did precisely what his critics suggest he should have done with written documents.<sup>61</sup>

### **Delgamuukw in the Supreme Court of Canada**

Chief Justice Antonio Lamer of the Supreme Court of Canada noted that the *Delgamuukw* appeal raised “an important practical problem relevant to the proof of aboriginal title which is endemic to aboriginal rights litigation generally—the treatment of the oral histories of Canada’s aboriginal peoples by the courts.”<sup>62</sup> The Court’s response to Justice McEachern’s decision will undoubtedly influence the way in which lower courts approach Aboriginal oral traditions for many years to come. Although I have studied the decision in considerable detail, I again offer only a few preliminary remarks.

Since the trier of fact is in direct contact with the mass of evidence, the Supreme Court has been reluctant to interfere with the findings of fact made by a trial judge.<sup>63</sup> Indeed, the Court refused to question Justice McEachern’s decision to reject the testimony of two anthropologists who served as expert witnesses on behalf of the Aboriginal plaintiffs.<sup>64</sup> However, when it came to the same trial judge’s decision to assign little weight to the oral traditions, the Court waived the principle of noninterference and offered a lengthy critique. The Chief Justice argued that such appellate intervention was warranted because the trial judge did not have the benefit of the principles laid down in the *R. v. Van der Peet* case, which instructed courts to appreciate the unique evidentiary difficulties inherent in adjudicating Aboriginal claims and to adopt a special approach that does not undervalue the evidence presented by First Nations people. Since Aboriginal rights are defined by reference to pre-contact practices (or, in the case of title, pre-sovereign-

ty occupation), the Court reasoned that written documents are usually unavailable and oral documents are often “the only record of their past.” Hence, the “Aboriginal perspective” must be accorded “due weight” by the courts. The oral evidence given by Aboriginal people must be accommodated and “placed on an equal footing with the types of historical evidence that the courts are familiar with, which largely consists of historical documents.”<sup>65</sup>

The Supreme Court agreed with the trial judge that the *adaawk* and *kungax* oral traditions of the Gitksan and Wet’suwet’en people were admissible out of necessity as exceptions to the hearsay rule, but disagreed with his decision not to give them independent weight. The Chief Justice feared that since the deficiencies identified by the trial judge are inherent in all oral traditions (an assumption that is, incidentally, demonstrably false), such traditions would be consistently “undervalued” in Canadian courts.<sup>66</sup> Furthermore, the trial judge apparently erred when he discounted the “recollections of aboriginal life” on the grounds that they did not demonstrate land use beyond 100 years ago; here, Justice McEachern had “expected too much.”<sup>67</sup> Finally, the trial judge erred in his treatment of oral documents adduced in the form of territorial affidavits. He should not have rejected them on the grounds that their contents were not known in the general community, that the subject matter was disputed, and that they had been generated in the context of land claims discussions.<sup>68</sup> Since conclusions on issues of fact might have been very different had the trial judge assessed the oral traditions “correctly,” the Supreme Court suggested that his factual findings cannot stand and that a new trial was warranted.<sup>69</sup>

The *Delgamuukw* decision is in keeping with a recent trend that has effectively lowered the standard of proof in Aboriginal and treaty rights cases.<sup>70</sup> In my view, the decision is problematic because, while lowering the standard is well intentioned, the rationale for doing so is based on misconceptions that can be traced back to the earlier *Van der Peet* decision.

In *Van Der Peet*, Chief Justice Lamer held that since producing “conclusive” evidence about Aboriginal practices, customs and traditions prior to contact with Europeans is a “next-to impossible task,” the evidence relied upon may relate to Aboriginal practices “post-contact,” provided these have their “origins pre-contact” or “can be rooted in the pre-contact societies.”<sup>71</sup> This is apparently intended to overcome “the evidentiary difficulties in proving a right which originates in times where there were no written records.”<sup>72</sup> Such reasoning will appear puzzling to anyone familiar with modern approaches to reconstructing the past.

First, even if it were possible to obtain conclusive evidence about the past, the conclusiveness of such evidence would have nothing to do

with whether it relates to pre- or post-contact times. Suggesting that pre-contact evidence is more difficult to obtain than post-contact evidence is indulging in a baseless generality, since there is nothing inherent in the latter evidence that lessens the difficulties. For reasons I need not detail here, the written records generated during the period after European contact and the oral traditions collected in recent times are not necessarily more conclusive than archaeological evidence that serves as the basis of much of our knowledge about pre-contact life. In fact, in many cases, a good argument can be made that the archaeological record (which, after all, was generated by Aboriginal people living at the time), must be preferred over later written and oral records, which can only be projected into the past through inferential argument.<sup>73</sup>

It is of course true that the pre-contact record does not contain all the perishable components of land use and practices, which might form the basis of title and rights. As Justice Mahoney said in *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, “snow houses leave no ruins.”<sup>74</sup> Yet reconstructing pre-contact Aboriginal land use and associated practices such as hunting and fishing is not at all a “next-to-impossible task,” particularly with the emergence of archaeozoology, archaeobotany and other specialized fields which have provided valuable insights into subsistence activities. In some instances, extensive knowledge is now available about all the different animal and plant species hunted, fished or collected by a particular Aboriginal group, the time of year during which they inhabited a particular campsite, the amounts of edible meat they obtained, how they butchered and cooked their food and how they disposed of their garbage.<sup>75</sup> In many cases, we are also able to outline, with a reasonable degree of certainty, socio-political systems and even ideology, symbolism and religion.<sup>76</sup> If disputing parties invested as much money in state-of-the-art archaeological fieldwork as they now do on lawyers, they might be surprised at the result.

Secondly, if it is indeed “next-to-impossible” to produce evidence from pre-contact times, how is anyone to overcome the hurdle of demonstrating that the post-contact practices, customs and traditions have their “origins pre-contact” or “can be rooted in the pre-contact societies”? There is no practical way of untying this Gordian knot, although it can be cut by adopting the type of inferential argument known as analogical reasoning. This involves carefully projecting a post-contact known (the source-side of the analogy) back into a pre-contact unknown (the subject side of the analogy). When done properly, this sophisticated method has successful applications.<sup>77</sup> In the hands of the untrained, however, it is prone to misuse and can easily turn into circular reasoning.<sup>78</sup> A skilled ethnohistorian can project written records

and oral traditions into the past, but to 'root' a practice in pre-contact times requires at least some independent evidence of the type only archaeology can provide.

The Supreme Court's rationale is at least partly based on a well-known necessity argument that, together with the circumstantial probability of reliability argument, constituted the original common law justification for admitting oral traditions as exceptions to the hearsay rule. The necessity justification seems straightforward enough since there is no dependable way of consulting a witness once he is dead. Resorting to other types of evidence is essential; otherwise a claimant would never be able to prove anything. That this *necessarily* means recourse to oral traditions is, however, an unwarranted assumption. In my experience as an expert witness in numerous Aboriginal litigations from Newfoundland to British Columbia, I have always incorporated oral traditions as part of my evidence whenever they were available. Yet, I have never encountered a case in which oral traditions were absolutely necessary because they were "the only record of their past." On the contrary, in most parts of the country the material date (either European contact or assertion of sovereignty) is beyond the temporal scope of many oral traditions and it usually becomes necessary to tender other evidence.

The Supreme Court's instruction that oral traditions be "placed on an equal footing" with historical documents<sup>79</sup> has already become a source of much confusion and speculation. Does the Court mean that oral traditions be placed on an equal footing because they may contain at least some features of historicity which are *not*, in the Court's words, "tangential to the ultimate purpose of the fact-finding process at trial—the determination of the historical truth"?<sup>80</sup> Does equal footing mean that oral traditions should be subjected to the same rigorous tests routinely conducted by historians on written materials? Or does the Court have in mind something closer to the postmodernist end of the spectrum—perhaps an approach that gives "due weight" to any Aboriginal voice merely because of its Aboriginality and irrespective of whether it is tangential to the task or fails standard tests? Of course, the latter approach risks an imbalance in which oral traditions will be consistently and systematically *overvalued* in the courts below because who will dare question an elder? The rejection of McEachern's critical analysis will almost certainly be regarded by some not merely as an effort to level the field or lower the standard, but as an outright abandonment of the rigorous scrutiny that is essential to any fact-finding process. When taken to its logical conclusion this would seem unworkable in conflict resolution and, as others have noted,<sup>81</sup> it would open the way for a radical reinvention of the law itself.<sup>82</sup>

It is unfortunate that the Supreme Court in *Delgamuukw* has perpetuated the untenable orality/literacy and Aboriginal/non-Aboriginal dichotomies, since the net effect has been to isolate oral traditions as an exotic species of evidence. I hasten to add that I do not place the blame on the learned justices but, rather, on the absence at trial of expert witnesses qualified to assess the tendered oral documents, form opinions on their strengths and weaknesses, and demonstrate how these commonly-used sources are best used in methodological conjunction with other evidence.

### **Conclusions**

My elders taught me that a respect for people's beliefs should not preclude scientific inquiry.<sup>83</sup> Furthermore, I learned that reducing all human ideas to a common level conflicts with the fact that our modern scientific understanding, despite all its shortcomings and possibilities for misuse, remains qualitatively different from other belief systems and more closely approximates what is external to the individual.<sup>84</sup> That this understanding emerged from the Western intellectual tradition should not disqualify it as a suitable framework for studying Aboriginal pasts. It has given rise to methods that remain the most comprehensive, inclusive and flexible available.<sup>85</sup> Although it is incapable of arriving at absolute truth, it is a way to knowledge that can be both dependable and reliable.<sup>86</sup> When used as a tool of oppression, a Western approach can do much harm to First Nations people, but when used responsibly and fairly it can serve members of all cultures well. This is particularly true when the rigour of positivism incorporates some of the more important and useful messages of the postmodernist critique.

The relativistic orientation of postmodernism (much like the anthropological cultural relativism from which it is partly derived) leads to a fuller appreciation of First Nations and the ethical and moral principles underlying the actions, beliefs and practices of their members.<sup>87</sup> That complete objectivity is unobtainable is also an important lesson, although it must never become an excuse for abandoning the positivist ideal.

Courts simply do not have the ivory-tower luxury of pronouncing that all stories about the past are socially constituted and equally true. Aboriginal litigations are invariably fact-finding exercises and usually involve making decisions about what actually happened in history. However, while judges may have brilliant legal minds, they often lack the specialized training that is required to reconstruct Aboriginal pasts. Fortunately, there are competent expert witnesses who do have the requisite skills, have spent their lives working with the same types of evidence, and are able to assist courts in their difficult tasks. Since

judgements issued by courts impact the lives of many Canadians, it is absolutely essential that decisions be informed by the best research available today.

As a participant in numerous litigations across the country, I have adopted an approach that I believe is most useful in resolving the complex historical issues before the courts. In accord with mainstream scholarship,<sup>88</sup> this approach tries to achieve a rapprochement between various scholarly disciplines and to effect a balance between historical objectivist and postmodernist, or between positivist and relativist positions. It recognizes the legitimacy of self-representation and acknowledges that what people believe about their own past must be respected and receive serious historical consideration. At the same time, it assumes that there was a real past independent of what people presently believe it to be, and that valuable information about that past may be derived from various sources including oral histories and traditions. It accepts that both non-Aboriginal and Aboriginal scholars can be biased, that various pasts can be invented or used for political reasons, and that a completely value-free history is an impossible ideal. Nevertheless, it postulates that the past constrains the way in which modern interpreters can manipulate it for various purposes. While the actual past is beyond retrieval, this must remain the aim. The reconstruction that results may not have a privileged claim on universal 'truth,' but it will have the advantage of being rigorous. The approach rejects the fashionable notion that because Aboriginal oral histories and traditions are not Western, they cannot be assessed using Western methods and should be allowed to escape the type of scrutiny given to other forms of evidence.<sup>89</sup> Ultimately, the perspective is in accord with Bruce Trigger's belief that public wrongs cannot be atoned by abandoning scientific standards in the historical study of relations between Aboriginal and non-Aboriginal people.<sup>90</sup>

## Notes

- 1 This paper is based in part on research conducted while preparing several studies commissioned by the Department of Indian and Northern Affairs (see von Gernet 1996, 1998), as well as on the author's forthcoming book on the use of oral histories and traditions in reconstructing Aboriginal pasts. All references contained in the footnotes are listed alphabetically in the references cited section.
- 2 I follow the common scholarly practice of distinguishing between oral history and oral tradition. Although the literature is not always consistent, oral histories are most often defined as recollections of individuals who were eyewitnesses or had personal experience with events occurring within their lifetime. Oral traditions, on the other hand, are oral narratives about past events transmitted by word of mouth over at least a generation.
- 3 Carr 1961: 5-7; Fogelson 1989: 135; Hedican 1995: 25-29; Kellner 1975: 291; Krech 1991: 351-352; Lowenthal 1996: 106-111; Miller 1992b: 56; Novick 1988: 1-2; Tough 1990: 6.
- 4 Cohen 1994: 4, 241; Cruikshank 1994a: 162-163; Culhane 1992: 70; Fien-up-Riordan 1988; Fogelson 1989: 135, 138; Grace 1998; Hill 1988: 3; Krech 1991: 352; Novick 1988: 3, 16-17, 523; Tough 1990: 6-7; Trigger 1995: 319-321; 1998: 5-6, 15.
- 5 Von Gernet 1996.
- 6 Cohen 1994: 79; Cruikshank 1988: 198; 1992a: 33; 1992b: 8; 1994a: 147-148; 1994b: 403, 417; Culhane 1992: 68; Finnegan 1992: 48; Fisher 1992: 46-47; Fortune 1993; Kew 1994: 83, 92; McDonald et al. 1991: 75; Moss and Mazikana 1986: 19, 73; Perdue 1980: xix; Quintana 1992: 86; Reimer 1981: 30-31; 1984: 2; Seligman 1989: 176-177; Thompson 1988: 5-6; Treaty 7 Elders 1996: 327-329; Trigger 1998: 15; cf. O'Farrell 1979: 5.
- 7 Fortune 1993: 92; Gisday Wa and Delgamuukw 1988: 37; Henderson 1997: 21-23.
- 8 Pryce 1992: 38; Trigger 1980; 1989; 1995: 324; 1998: 22-23.
- 9 Trigger 1998: 22-23.
- 10 Gisday Wa and Delgamuukw 1988: 39-40; Ray 1990: 15-19; 1991.
- 11 Anawak 1989: 48-49; Bielawski 1989: 231-232; Cruikshank 1992b: 9.
- 12 McDonald et al. 1991: 77.
- 13 Sioui 1992: 82-89.
- 14 Wickwire 1991: 53-54, 69.
- 15 quoted in Fox 1989: 31.
- 16 Gathercole 1990: 1; Rubertone 1989: 32, 37-43.
- 17 e.g., Callison 1995: 168; Deloria 1995.
- 18 Devine 1991: 16.
- 19 Trigger 1982: 7.
- 20 Ciborski 1990: 244; von Gernet 1995: 123.
- 21 e.g., Henderson 1995: 207; 1997: 23.
- 22 e.g., Callison 1995.
- 23 At the same time, this Western scholarship is also engaged in debunking tenacious myths entertained by some Aboriginal people. These include the



- idea that Indians did not practice scalping until after Europeans taught them how, as well as the notion that the United States Constitution was closely patterned on the League of the Iroquois (Axtell 1988: 252; Tooker 1988).
- 24 Lowenthal 1996: 119-120, 128-129; Washburn 1987: 95-96.
- 25 Trigger 1982: 8.
- 26 Callison 1995.
- 27 Henderson 1997: 23. This is not to say that the reconstructions of outsiders are always more accurate. In fact, some local histories told by First Nations people have been shown to be more accurate than those offered by their non-Aboriginal neighbours (Meighan 1960: 60).
- 28 e.g., Ong 1982.
- 29 Finnegan 1992: 5-6, 50.
- 30 See, for example, Gisday Wa and Delgamuukw (1988: 33). They are also commonly regarded as 'preliterate' (e.g., Gover and Macaulay 1996: 60), although this term is fraught with an implicit technological determinism and evolutionary connotation (Chamberlin 1997: 8; McRanor 1997: 81-82).
- 31 Battiste 1984: 37-39; Edwards and Sienkewicz 1990: 6, 215; Finnegan 1992: 141; Goody 1987: xii-xiv; Heath 1984: 54; Pomedli 1992: 335-336; Pylpchuk 1991: 55-56; Sherzer and Woodbury 1987: 9-10; Tannen 1982a: 3; 1982b; Urion 1991: 6-7.
- 32 Battiste 1984: 28-31; Daly 1993: 223; Vastokas 1996: 57; Walker 1981.
- 33 McLeod 1992: 1279.
- 34 Battiste 1984; Walker 1981.
- 35 Miller 1996.
- 36 Petrone 1988: xi-xiii; see also Moses and Goldie 1998.
- 37 Petrone 1983: vii, 169.
- 38 Cohen 1994: 230; Henige 1974: 96-103; 1982: 81-83; Sturtevant 1966: 31-32; Vansina 1985: 31, 156-157; von Gernet 1995: 120-123.
- 39 Spurling 1988: 74; Sturtevant 1966: 31-32; Trigger 1985: 167; von Gernet 1994b: 12-13.
- 40 Allen and Montell 1981: 25-26; Fontana 1969: 370; Fortune 1993: 90; Hal-lowell 1937: 652, 665-666; Henderson 1995: 223-224; Henige 1974: 2, 14; McClellan 1970: 116, 118; Mills 1994: 30; Morantz 1984: 174; Ratelle 1992: 4; Stone 1993: 3, 63-72; Sypher et al. 1994: 54; Vansina 1985: 173.
- 41 Bloch 1977: 285.
- 42 Bloch 1977: 283; Hedican 1995: 28.
- 43 Layton 1989: 4; Williams and Mununggurr 1989: 73.
- 44 The disputing parties and the judge subsumed under the rubric 'oral histories' a number of different oral documents which, according to the definitions given *supra*, are more properly characterized as oral traditions, since they depend on the intergenerational transmission of successive memories.
- 45 McEachern 1991: 208, 221, 222.
- 46 Asch 1992; Asch and Bell 1994; Burns 1992; Cassidy 1992; Cruikshank 1992a; 1994b: 411-413; Culhane 1992; Daly and Mills 1993; Fisher 1992; Fortune 1993; Foster 1992; Frideres 1998: 67; George 1992; Gover and Macaulay 1996; Jeffrey 1992; McLeod 1992: 1282-1283; Miller 1992a; 1992b; Mills 1994: 3-33, 177-187; 1995; Monet and Skanu'u 1992; Pylpchuk 1991:

- 72-73; Ray 1990; 1991; Ridington 1992a; 1992b; Schwartz 1992; Slattery 1992; Sterritt 1992; Stone 1993: 122-143; Storrow and Bryant 1992; Tennant 1992; Wetzel 1995: 85-86; Wilson 1992; Wilson-Kenni 1992.
- 47 Fisher 1992; Fortune 1993; Miller 1992a: 6; 1992b.
- 48 McEachern 1991: 251.
- 49 Asch and Bell 1994: 514-515, 537; Culhane 1992: 78; Fisher 1992: 44, 46-47; Fortune 1993: 101-102.
- 50 McLeod 1992: 1283-1284.
- 51 Fortune 1993: 114.
- 52 Miller 1992b: 55-56, 62.
- 53 Cruikshank 1992a: 26, 37, 38.
- 54 Anonymous 1992; Asch and Bell 1994: 542; Cassidy 1992: 6-7; Culhane 1992: 68; Fortune 1993: 95; Gisday Wa and Delgamuukw 1988: 26-27, 34-36; Jeffrey 1992: 58; Joseph 1994: ix; McEachern 1991: 243, 258-259, 263-270, 272; McLeod 1992: 1288; McRanor 1997: 69; Mills 1994: 17-18, 74; Monet and Skanu'u 1992: 3, 30, 32, 36, 38, 92, 110, 139; Ray 1990: 14; Stone 1993: 127-129; 137-138.
- 55 McEachern 1991: 243-245, 252, 258.
- 56 Brown 1991; Harris 1968; Krech 1991; Layton 1989; Trigger 1989; Vansina 1985.
- 57 For a brief review see von Gernet 1996.
- 58 McEachern 1991: 246.
- 59 McEachern 1991: 259.
- 60 Asch and Bell 1994: 505; Cruikshank 1992a: 40; Stone 1993: 122.
- 61 Culhane 1992: 78; Fisher 1992: 44, 46; Fortune 1993: 102. Critics who, because of strong commitments to a postmodernist relativism, decry the tendency of Canadian courts to apply Western principles of rigorous scholarship to Aboriginal oral documents, offer little in the way of alternatives. Joel Fortune, for example, conveniently resorts to the well-worn excuse that this is "beyond the scope" of his commentary (Fortune 1993: 107).
- 62 Lamer et al. 1997: 1027.
- 63 Lamer et al. 1997: 1064-1065, 1070.
- 64 Lamer et al. 1997: 1071.
- 65 Lamer et al. 1997: 1065-1077.
- 66 Lamer et al. 1997: 1072-1074.
- 67 Lamer et al. 1997: 1075-1076.
- 68 Lamer et al. 1997: 1076-1078.
- 69 Lamer et al. 1997: 1079.
- 70 Gover and Macaulay 1996: 56-59.
- 71 Lamer et al. 1996: 205.
- 72 Lamer et al. 1996: 207.
- 73 Unlike oral documents, which because they are generated in the present can raise suspicions about their pastness, the antiquity of the archaeological record is generally indisputable.
- 74 Gover and Macaulay 1996: 48, 58.
- 75 e.g., von Gernet 1992b.

- 76 von Gernet 1992a; 1993. Aboriginal religious beliefs can also be reconstructed with a tolerable degree of certainty from written records produced by Europeans shortly after first contact (e.g., von Gernet 1994a).
- 77 e.g., von Gernet 1993.
- 78 It is, for example, inappropriate to argue that a post-contact practice has an origin pre-contact and at the same time infer the pre-contact practice solely from post-contact evidence.
- 79 Lamer et al.1997: 1069.
- 80 Lamer et al.1997: 1068-1069.
- 81 Fortune 1993: 95-96.
- 82 It does not appear that the Supreme Court is ready for such a reinvention; as the Chief Justice says, the accommodation that accords due weight to the perspective of Aboriginal peoples, must be done in a manner which “does not strain” the Canadian legal structure ( Lamer et al. 1997: 1066).
- 83 Fontana 1969: 366-370; Sturtevant 1966: 22-23; Trigger 1982: 6; Washburn 1987; Wiget 1982: 181-182.
- 84 Trigger 1995: 323.
- 85 Axtell 1997: 23.
- 86 Feder 1990: 12.
- 87 Hedican 1995: 26.
- 88 Krech 1991: 352.
- 89 Wilson 1997.
- 90 Trigger 1982: 8.

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