

**Bringing Water to the Land: Re-cognize-ing  
Indigenous Oral Traditions and the Laws Embodied within them**

by

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## Abstract

This is a study of whether, in the introduction of Indigenous oral traditions as evidence in court, they are being in the complex cultural interplay that occurs in courts. and whether, given the central role of oral traditions in Indigenous cultures, the nature of Indigenous Peoples are being transformed in the process when their rights are adjudicated before the courts. Chapter 2 discusses the ways that the Supreme Court of Canada has defined s. 35 Aboriginal Title, Rights and Treaty Rights (as unlimited or lawless and therefore a danger to general public interests; assimilated into Canadian sovereignty; removing the source of these rights from the land in their legal definition; and, removing Indigenous laws from their definition). Chapter 3 examines the role that history has played in the legal interpretation of oral traditions, and argues that a primarily historical consideration obscures the alive, legal, and dynamic elements of oral traditions. Chapter 4 discusses the ways in which a methodology of suspicion has operated to reduce and diminish Indigenous oral traditions when they are introduced as evidence in court (rating them as faulty, light weight historic evidence while obscuring their legal content) through a survey of cases that have considered oral traditions at the trial level. Chapter 5 explores the devaluation of the Indigenous laws contained in oral traditions through an acceptance of the common sense assumption that Canadian conservation and safety laws are both rational and necessary. Chapter 6 argues that recognition (or denial) of Indigenous laws is politically contingent, and that despite limited legal recognition (in cases such as *Delgamuukw v. B.C.* and *R. v. Van der Peet*), these laws have yet to flow back onto the land, and are yet to be invigorated in Canadian law. There remains a lack of recognition of the legal content of oral traditions, and Indigenous jurisprudences risk being subsumed and transformed when they are introduced as evidence in Canadian courts.

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## Preface

### Our Stories

*Our stories are the evolving and continuing dance  
across time on the tongues and breathe of our elders  
binding the people to the land, trees, rocks, rivers, valleys and tides.*

*Our stories are the blankets we weave,  
words placed carefully and wound tight  
securing a future for our children and a reverence for our grandmothers.*

*Our stories tell of a time when the Chief and his three sons  
lifted the cover of the ocean back to visit the sea world underneath the waves.  
They had tea, and then the salmon chief sent the gift of salmon home with the  
people.*

*Our stories tell of a time when a giant moose paused for rest  
on a flat land of marshes and bogs, deep oil pockets swirling beneath, and  
thousands of moose broke free from her slumbering stomach which sits still as  
the only rise on the flat horizon  
to bring life and meat to the people.*

*Our stories tell of the time when the coyote people practiced  
all winter, honing their muscles tight and instincts sharp  
to steal a giant ball which broke open on the way home revealing  
a solid core of shit. And humanity and humour was all  
that was left to bring home for the people.*

*Our stories tell of a time when wildwoman roamed the  
hills, hiding in groves of cedar and bracken, her basket  
knocking against her hip as she watched and waited  
and through her hungry regard built the foundations of  
respect in little children.*

*Through the telling of our stories, we are rendered active participants  
and warriors for our own survival. Past reason and science  
we hold fast to the sacred, to the stories which gave our  
people being and taught us how to walk gently on the land  
or to laugh aloud in the midst of great fear.*

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*Kwkwscemxw* (thank you) to

My Dad who told stories, recited poems, loved the land and drove through gates; My Mom who loves us all fiercely and is lighting fires still; Uncle Bill and all of the other Nlaka'pamux people who took the time to try to teach me how to listen; My thesis supervisors, Michael Jackson and Douglas Harris, who offered very valuable comments and were very patient as this work progressed in fits and starts; My dear friends Halie Bruce (who read too many drafts to count, helped me to laugh through it all, and never failed to find a point in need of discussion), June McCue (for the discussions and encouragement) and Louise Mandell (who helped me learn about oral traditions in a different way); My sisters, nephew/brother, and all my nieces and nephews who missed me at family dinners and birthday parties for too long; Mandy Na'zinek Jimmie who provided translation of Nlaka'pamux words; and, Catherine Twinn who shared information used in Chapter 4.

## Chapter 1. *Sʔecenkʷu*: Indigenous Oral Traditions in Canadian Courts

### A. *Sʔecenkʷu*: Testing the Waters

Nlakaʼpamux people have a word that describes seemingly calm water, undercut by churning rapids beneath the surface, *sʔecenkʷu*.<sup>1</sup> *Sʔecenkʷu* is deceptive and can lull you into thinking it is safe. Waters whose calm surface hides currents and back eddies not evident on the surface. A particular danger of *sʔecenkʷu* waters are vertical whirlpools which can trap logs and sticks (or unfortunate people) cycling them through a dangerous circularity. Logs and other flotsam remain caught until the water loses interest or changes course. The danger is that people fight to break free when brought momentarily to the surface and struggling for breath. These attempts are never successful as the unseen currents and powerful pull of the water are too strong at the surface. The only way to break free is at river's bottom, by grabbing hold of rocks and clinging to the submerged land, fighting to a place where the circular motion does not hold so strong.

For Indigenous Peoples, the court process and openness to receiving Indigenous oral traditions as evidence represents a legal form of *sʔecenkʷu*. Stories are not neutral, nor can they be safely tucked away and forgotten about, or called upon only to support a legal case. They have a life of their own, and depend upon the breath of those who hold them now to maintain their life, to carry them forward. Oral tradition evidence reflects the testimony of an active participant who is both influenced by, and influencing, the flow of their Nation's history and culture – reflecting the past and calling forth the future through the process of

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<sup>1</sup> Pronounced, roughly, “cheeach-ing-ko”. Thank you to Mandy Jimmie, Nlakaʼpamux educator, for providing the spellings of the *N̓č̓eč̓kepmxc̓in* (Nlakaʼpamux language) words contained here.

telling. In giving evidence of (or in) the oral tradition, Indigenous witnesses attempt to reflect their own being as Peoples in order to have this existence validated or protected in the present-day.

The power of an oral history tradition is that it lives of, in, and through, the people. Oral traditions are constitutive of, and constituted by, Indigenous cultures and their use in courts mandates a critical examination of whether they are being transformed (and, given their central role in Indigenous cultures, if Indigenous Peoples are being transformed) in the complex cultural interplay that occurs in courts. Has engagement in the legal process transformed oral traditions through their legal tellings? By introducing oral traditions as evidence are Indigenous Peoples struggling to break free at the surface, only to become caught in a dangerous circularity? Does the use of oral traditions as evidence further Indigenous Peoples' aspirations of creating and protecting distinct legal and political space; or, is the acceptance of oral tradition evidence transformative, risking assimilating and ultimately subsuming Indigenous laws and legal traditions? Asking these questions is necessary to allow us to determine if the water is safe, or alternatively, to search for the submerged ground that will enable us to break free. In my attempt to answer these questions, I have tried to be guided by my own Nlaka'pamux legal traditions and ways of assessing and weighing the potential repercussions of our actions ground this analysis.<sup>2</sup>

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<sup>2</sup> The narrative (storytelling) style I have adopted in this chapter, and at other parts of the thesis, reflects the incorporation of Nlaka'pamux oral traditions (and methodology) into this investigation.

## **B. Nlaka’pamux Law: Driving through gates and lighting fires<sup>3</sup>**

### *(i) Driving through Gates.*

My father taught me about Nlaka’pamux law by driving through gates. Memories of my dad, who taught me about our relationship with the land as Nlaka’pamux, and our responsibility to recognize our own laws above others in relation to the land, help to guide me. Two particular stories stand out, both in my memory and the legal record. I have carried these stories with me, but was less aware of their legal component until I was sorting through my dad’s papers after his death, and legal summons and letters from lawyers spelled out the other part of the story.

Once, when my dad and I were driving, we came across a gate with a “No Trespassing” sign posted square in the center. The gate was firmly padlocked to a newly constructed fence. The sign and gate cut clean across a vital artery of Nlaka’pamux territory, and blocked a route traveled by Nlaka’pamux people from the Nicola River upwards to the rich plateau above. These were lands that I had traveled while still in my mother’s womb, lands that my dad, and his great-great-grandfather before him had traveled. When my dad was unable to open the gate, he simply backed up his truck, geared-down, and drove through. My dad said that he had previously been stopped by the private property owners and told that he was not allowed to drive through this area any longer. My dad, in turn, had explained that this was Nlaka’pamux territory.

In telling me this story, my dad reminded me that this was our land, we had to look out for it, had responsibilities to maintain, and we could not let gates or fences interfere with that responsibility. We drove through the padlocked gate again several weeks later. After

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<sup>3</sup> An edited version of parts of this section appeared in “Bringing our Living Constitutions Home” (written with Halie Bruce) in Ardith Walkem and Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton: Theytus Books Ltd., 2003) 344 [Bruce and Walkem].

that, the now-battered gate and “No Trespassing” sign remained, but the padlock was gone, and we would open and close the gate on our way through. When sorting through his papers after his death, I found a stack of papers from lawyers for the private property owners (who, according to Canadian law, owned this artery of Nlaka’pamux territory) containing escalating threats of lawsuits. Over the years, my dad continued to visit this land regularly, as he had been taught, and just as regularly the letters threatening legal action continued to arrive.

Many of my earliest memories of my dad involve water. When I was a child, we would travel together the small creeks and waterways which fed the lands where we lived. Our travels occurred at various points over the seasons. In summer we would visit to see how the water was running. In winter we would check the snow cover to assess what the water flow would be in the upcoming year. We would look for tracks to see which animals were visiting the watering holes, and speculate where they traveled when the water dried up. Dad always explained to me that we belonged to the water, never that the water belonged to us, but always that we had to monitor and watch out for the water.

Nlaka’pamux territory, in the interior of British Columbia, is dry and semi-arid and subject to steadily increasing pressures for water. Twaal Valley is the homeland of the Cook’s Ferry Nlaka’pamux and has long been a source of conflict between the Nlaka’pamux and newcomers. Early settlers diverted a feeding source of water for Twaal Creek, which ultimately resulted in Nlaka’pamux being forced to leave Twaal Valley.<sup>4</sup> The provincial government subsequently over-issued water licences on Twaal Creek which was not capable of sustaining these allocations. When my father was in his seventies, he was criminally charged for blocking access to an outtake valve on the Twaal Creek to prevent downstream

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<sup>4</sup> For further information on Twaal Valley and the causes of the water shortage see Chapter Six (Bringing Water to the Land: Re-cognize-ing Indigenous Laws).

users from completely drying out the water source. In my dad's papers, there were further bundles of court summonses and letters from lawyers dealing with these criminal charges. Despite these stacks of legal papers, my dad was undeterred. He continued to visit our territory and to protect the water, he refused to break Nlaka'pamux law.

(ii) Lighting Fires

My mom taught me about Nlaka'pamux law by lighting fires. It is an important part of the Nlaka'pamux hunting tradition that we have responsibilities to the wildlife to ensure that their habitat is healthy. Our territory is covered with forests of lodge pole pine, and hunting families consistently clean and clear these territories in the wet months before and after the blistering summer heat. We do this by setting controlled flash fires that burn quickly through the forest, removing accumulated debris from the forest floor, scorching, but not permanently damaging, the standing forest trees. This process prevents forest fires (such as those that have now become epidemic in the interior of B.C. after Indigenous Peoples were prevented from continuing this practice), increases grazing areas, and controls insect infestations which otherwise pose severe problems for the deer and other wildlife, and could cause them to avoid certain territories.<sup>5</sup>

This flash-burning practice was made illegal when newcomer society assigned a monetary value to the forest, and failed to see how a flash burning program could be effective in protecting the habitat of the wildlife that depended upon the forests. As a child my parents and I, and often my mom and I alone, would routinely travel over our hunting

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<sup>5</sup> For further information on ecosystem management involving controlled burns among the Nlaka'pamux see Nancy J. Turner, *The Earth's Blanket: Traditional Teachings for Sustainable Living* (Vancouver: Douglas & McIntyre Ltd., 2005) [Turner]. See generally Stephen Pyne, *World Fire: The Culture of Fire on Earth* (New York: Henry Hold & Co., 1995). Interestingly, the province of B.C. has subsequently proposed using an altered form of this management technique in an effort to stave off the forest fires that have plagued the Interior of British Columbia in recent years: See e.g. Gary Filmon, *British Columbia 2003 Firestorm Report*. Ministry of Competition, Science and Enterprise. (Victoria: Queen's Printer, 2004).

territory and set small controlled burns. It was our obligation, as Nlaka'pamux; if we wanted to continue to hunt, we had to be prepared to protect the deer and their habitat.

My mom was more prolific at this task than my dad, and she would often bundle me up and off we would go with a box of matches and newspapers. Unfortunately, the smoke from the fires would alert the conservation officers and they would come to put the fires out. If we happened to be there when they arrived, the conservation officers would mention the illegality of these actions and the possibility of fines or jail.<sup>6</sup> "What is the matter with them? Do they want to wait until a big fire comes?" my mom would ask, or, "Don't they care about the deer?" Despite threats of fines or arrest, my mom never stopped her activities; she merely assigned me the task of watching for the conservation officers.

### (iii) Submerged Ground

My parents taught me that there is another law that we, as Nlaka'pamux, follow. It exists independently of Canadian laws, and upholding our law may mean coming into conflict with Canadian laws, but the mere conflict provides neither a justification, nor an excuse, to ignore our own obligations to the land. Nlaka'pamux law is an exacting law. A law that flows from the fact that we are owned by the land, by the water, that we owe our existence to the relationship of our peoples to the territories where our grandmothers, and their grandmothers before them, came into being. The land and waters have given our people life, and we are not free to disregard that relationship because of the assertion of other laws. This law is not diminished by licenses, certificates of title, or stacks of legal papers that array themselves in challenge. It is the law of our heart, our memories, a law drawn of the physical fact that the very components of our bones and marrow are comprised of the sustenance that

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<sup>6</sup> Twice, my father was conscripted into service as a firefighter, under threat that otherwise my mother may be arrested or charged.

we have taken from the land.<sup>7</sup> It is a law carried forward through stories, nourished and shared through the words we speak and the actions we take. Indigenous laws are alive and not remnants of the past, and we have an obligation to follow them, and to reinvigorate them where they have become weakened.<sup>8</sup>

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<sup>7</sup> Along similar lines, Craig Howe has observed that the intimate interconnection between Indigenous Peoples and their lands reflects the fact that "its substance is in part composed of the dust of the bones of generations of people" ("Keeping Your Thoughts Above the Trees: Ideas on Developing and Presenting Tribal Histories" in Nancy Shoemaker, ed., *Clearing a Path: Theorizing the Past in Native American Studies* (New York: Routledge, 2002) [Howe]).

<sup>8</sup> For a fuller examination of Indigenous Peoples who have called for the reassertion and recovery of Indigenous laws see John Borrows, "With or Without You: First Nations Law (in Canada)", (1996) 41 McGill L.J. 629 [Borrows, 1996], "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy," (1997) 47 U.T.L.J. 417 [Borrows, 1997(a)], "The Trickster: Integral to a Distinctive Culture," (1997) 8:2 Constitutional Forum 27 [Borrows, 1997(b)], "Frozen Rights in Canada: Constitutional Interpretation and the Trickster," 22 Am. Indian L. Rev. 37 (1997-1998) 37 [Borrows, 1997-98], "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*," (1999) 37 Osgoode Hall L.J. 537 [Borrows, 1999], "Listening for a Change: The Courts and Oral Traditions," (2001) 39 Osgoode Hall L.J. 1 [Borrows, 2001], *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) [Borrows, 2002], "Creating an Indigenous Legal Community" (2005) 50 McGill L.J. 153 [Borrows, 2005]; Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences," (1989-1990) 6 C.H.R.Y.B. 3 [Turpel, 1989-90] and "Aboriginal Peoples and the Canadian Charter of Rights and Freedoms: Contradictions and Challenges" (1989) Vol. 10, Nos. 2 & 3 Canadian Woman Studies/Les Cahiers de la Femme 149 [Turpel, 1989] (Turpel has proposed the recognition of Indigenous Peoples own laws, based on an ethic of respect and responsibility, as a means of ensuring substantive and real equality for Indigenous Peoples.); Taiaiake Alfred, *Peace Power Righteousness: an Indigenous manifesto* (Don Mills, Ontario: Oxford University Press, 1999) [Alfred]; June McCue, *Treaty-Making from an Indigenous Perspective: A Ned'u'Ten-Canadian Treaty Model* (LLM Thesis, University of British Columbia, 1998) [unpublished] [McCue] (McCue proposes the creation of a new relationship between the Ned'u'ten and Canada through the vehicle of the bah'lats, or potlatch, of her people, which would recognize the international status of the Ned'u'ten); Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) [Monture-Angus, 1995], *Journeying Forward: Dreaming First Nations Independence* (Halifax, Fernwood Publishing, 1999) [Monture-Angus, 1999]; Sakej Henderson, "Postcolonial Ledger Drawing: Legal Reform", in *Reclaiming Indigenous Voice and Vision*, Marie Battiste, ed., (Vancouver, UBC Press, 2000) 161 [Sakej, 2000], "Postcolonial Legal Consciousness" (2002) 1 Indigenous L. J. 1 [Sakej, 2002], "Aboriginal Jurisprudence and Rights," in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing Ltd., 2004) [Sakej, 2004]; Bruce and Walkem, *supra* note 4; and Ardith Walkem, "The Land is Dry: Indigenous Peoples, Water and Environmental Justice" in Karen Baker, ed., *Eau Canada! Governing Water Wisely* [Vancouver: UBC Press, 2006. Forthcoming].

Non-Indigenous Peoples have also identified the necessity of returning Indigenous laws and knowledges to the land in a meaningful fashion, including for principled humanitarian reasons and in the belief that this recovery will enable all Peoples to live more peaceably in our shared environment. See e.g. Louise Mandell, "Offerings to an Emerging Future" in Ardith Walkem and Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton: Theytus Books, 2003) and Turner, *supra* note 5.

Dale Turner has described Indigenous “word warriors”<sup>9</sup> charged with two intertwined tasks: “to explain to the dominant culture why our ways of understanding the world ought to remain in our communities, and to assert and protect the sovereignty- nationhood – of our communities.”<sup>10</sup> These tasks are necessitated by the fact that Indigenous Peoples live amidst larger powers that continue to have the ability to determine our futures, to grant or deny space.

The survival of Indigenous laws and legal orders can only in part (and it is a small part) be forwarded by word warriors who chose to engage, to explain, to fight to create space. The real survival of Indigenous Peoples laws and legal orders will be achieved by those who are willing to drive through gates and light fires - to honour and live by their own laws in the face of great fear (of arrest, of court proceedings, of contempt of court orders). This is an internal transformation and recovery, and one that is unique to different Indigenous Nations. While these efforts (aimed internally) form the bedrock of Indigenous efforts to protect Indigenous laws and legal orders, they alone are not enough.

Within Canada, the struggle of Indigenous Peoples to have our sovereignty, nationhood and dignity as self-determining Peoples accepted has been intricately woven with

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<sup>9</sup> Dale Turner, “Oral Traditions and the Politics of (Mis)Recognition” in Anne Waters, ed., *American Indian Thought: Philosophical Essays* (Malden, MA: Blackwell Publishing, 2004) 230 at 231 [Turner, 2004]. The phrase “word warriors” was brought to prominence within Indigenous thought by Paula Gunn Allen’s use of it in her groundbreaking book *The Sacred Hoop: Recovering the Feminine in American Indian Traditions* (Boston: Beacon Press, 1986) [Gunn Allen]. Gunn Allen refers to Indigenous storytellers, poets, and writers as “word warriors” and locates these people at the forefront of Indigenous resistance and re-building from the process of colonization: “The oral tradition ... has, since contact...been a major force in Indian resistance. It has kept the people conscious of their tribal identity, their spiritual traditions, and their connection to the land and her creatures.” According to Turner, Indigenous Peoples who have training in Western knowledges and institutions, and are tasked with using this knowledge in an effort to make or protect space for Indigenous sovereignty and nationhood to flourish, including a responsibility to “defend the integrity, and legality, of tribal governments in the hostile intellectual community of the dominant culture” and to “concern themselves with the way words are used, and the way words form intellectual landscapes, yet...do so as citizens of Indigenous nations” (*ibid.* at 237). See also Taiaiake Alfred, “Warrior Scholarship: Seeing the University as a Ground of Contention” in Devon Mihesuah and Angela Wilson, eds., *Indigenizing the Academy: Transforming Scholarship and Empowering Communities* (Lincoln: University of Nebraska Press, 2004).

<sup>10</sup> *Ibid.* at 231.

law and legal process. Peoples seeking to protect an area, exercise their responsibilities to care take the land, or sustain themselves and their families with the resources of the land, often come into conflict with Canadian law and are subject to arrest or legal proceedings where Canadian law does not recognize or make space for the exercise of Indigenous laws. As a consequence of the overarching power imbalance (and ability of Canadian law to declare Indigenous laws, and the actions prescribed by them “illegal”) there is a necessity of working outside of our Nations and being engaged with broader society in an effort to make or protect space for the exercise of Indigenous laws and legal orders.

Most often, engagement with the legal process occurs when Indigenous Peoples are criminalized for practicing the ways of life that have sustained our Peoples since time immemorial, including hunting, fishing, trapping, or other activities reflecting our relationship with our traditional territories. In these instances, Indigenous Peoples are called to appear before foreign courts and are forced to defend the legitimacy of our laws, traditions and ways of life. In court, Indigenous Peoples seek to find refuge and protection against federal and provincial laws intent on regulating and constraining our ways of life. Less often, Indigenous Peoples voluntarily seek to use the courts in an attempt to push back the boundaries of Canadian state intervention in our lives, and initiate legal cases with this aim. Indigenous Peoples engage within the legal process with the underlying aim of forwarding our aspirations for protection and recognition of our separate existence as Nations and as Peoples.

The danger with using the Canadian Court system to forward calls for recognition of Indigenous Peoples laws is found in the fact that Indigenous claims must be framed in a way

that fits into a foreign legal structure with the attendant possibilities for their being transformed in this process.

### C. *S7ecenk*<sup>w</sup>u and Oral Traditions

Scholars who have examined the law from the perspective of colonialism have offered the critical insight that law has been, and continues as an active force forwarding the colonial project.<sup>11</sup> Law is not a neutral process; it reflects and duplicates societal norms and values, and itself serves as a site of colonialism, sometimes through outright imposition of foreign laws, but also through a transformative process which does not obliterate Indigenous laws outright, but rather reshapes them. Merry Engle has argued that “Colonialism typically involved the large-scale transfer of laws and legal institutions from one society to another, each of which had its own distinct sociocultural organization and legal culture”.<sup>12</sup>

There is considerable debate about the utility or appropriateness of engagement with Canadian courts within the Indigenous community; Canadian courts remain a foreign and hostile space. Using litigation to forward Indigenous Peoples aspirations through Canadian courts requires some degree of recognition of the legitimacy of colonial power, as courts are instruments of colonial society and reflect colonial rules and aspirations.<sup>13</sup> A transformation occurs in the very act of agreeing to go to court, because it entails recognition of the power

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<sup>11</sup> See e.g. Sally Engle Merry, “Law and Colonialism” (1991) 25 Law & Soc’y Rev. 889 [Merry Engle, 1991], “Resistance and the Cultural Power of Law,” (1995) 29:1 Law & Soc’y Rev. 11 [Merry Engle, 1995]; Kenneth Nunn, “Law as a Eurocentric Enterprise,” (1997) 15 Law & Inequality 323 [Nunn]; John L. Comaroff, “Colonialism, Culture and the Law: A Foreword,” (2001) 26 Law & Soc. Inquiry 305; Douglas C. Harris, *Fish, Law and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001) [Harris, 2001], “Territoriality, Aboriginal Rights and the Heiltsuk Spawn-on-Kelp Fishery” (2000) 34 UBC Law Review 195 [Harris, 2000], “Indigenous Territoriality in Canadian Courts” in Ardith Walkem and Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton: Theytus Books, 2003) 175 [Harris, 2003]; Jo-Anne Fiske, “From Customary Law to Oral Traditions: Discursive Formation of Plural Legalisms in Northern British Columbia, 1857-1993,” (1997/1998) 115/116 BC Studies 267 [Fiske].

<sup>12</sup> Merry Engle, 1991, *ibid.* at 890.

<sup>13</sup> Turpel, 1989-90, *supra* note 8; Turpel, 1990, *supra* note 8; Peter H. Russell, “High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence” (1998), 61 Sask. L. Rev. 247 [Russell]; and, Kent McNeil, *Emerging Justice?* (Saskatoon: Houghton Boston Printers, 2001) [McNeil].

and authority of Canadian courts (established and empowered by Canadian governments) to decide upon disputes. Courts are colonial institutions empowered by the state to unilaterally decide the issues brought before them, including the power to accept or reject the claims or defences offered by Indigenous Peoples, and to render Indigenous Peoples as “right-full” fishers or hunters (who are therefore protected under the law) or criminals for these activities.

Nonetheless, many Indigenous Peoples either choose, or are compelled, to advance claims within Canadian courts. Using Canadian law in an effort to protect our relationships with the land involves using oral traditions as evidence.

Ceremony  
I will tell you something about stories,  
[he said]  
They aren't just for entertainment.  
Don't be fooled  
They are all we have, you see,  
all we have to fight off illness and death.  
You don't have anything  
if you don't have the stories.  
Their evil is mighty  
but it can't stand up to our stories.  
So they try to destroy the stories  
let the stories be confused or forgotten  
They would like that  
They would be happy  
Because we would be defenseless then. <sup>14</sup>

Indigenous Peoples locate within their oral traditions the force uniting present day Indigenous Peoples with our ancestral pasts, the mythical world of spirit, the land itself, and finally our futures.<sup>15</sup> The oral traditions of Indigenous Peoples hold within them, sustain and

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<sup>14</sup> Leslie Marmon-Silko, *Ceremony* (New York: Viking Press, 1977) at 2.

<sup>15</sup> Borrows, 1999, *supra* note 8 at 554 (references omitted) has commented on the importance of oral traditions within Indigenous cultures and societies and the dangers of affording non-Indigenous People to participate in those traditions:

For millennia, Aboriginal peoples created, controlled, and changed their own worlds through the power of language, stories, and songs. These words did not just convey meaning, they could also change reality, as Indigenous languages and cultures shaped their legal, economic, and political structures, and the socio-cultural relationships upon which they were built. Many of these narratives were considered private property. The restriction on their presentation and interpretation helped to ensure that the authority to adjudicate and create meaning remained within Aboriginal societies. When Aboriginal

nourish, the aspirations of the people. They embody the laws of the Indigenous Nations, distinct to the territories where they came into being and of the Peoples who carry them forward. The oral history tradition lives of, in and through the people. Through our naming of the world, and our place within it, that we call forward and make our own realities.<sup>16</sup>

Given the cultural currency conveyed through oral traditions, many Indigenous Peoples have explored the ways in which these traditions are vulnerable to transformation or colonial imposition.<sup>17</sup> Indigenous scholars such as Archibald,<sup>18</sup> Sarris,<sup>19</sup> Fixico,<sup>20</sup> Deloria,<sup>21</sup> Sterling<sup>22</sup> and Cajete<sup>23</sup> have undertaken studies of Indigenous oral traditions, ways of holding and transmitting knowledge, and of the central role of oral traditions within Indigenous cultures and societies.<sup>24</sup>

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narratives are given to another culture to authoritatively judge their factual authenticity and meaning, Aboriginal peoples lose some of their power of self-definition and self-determination.

<sup>16</sup> See e.g. N. Scott Momaday, *The Names: A Memoir* (Tucson: The University of Arizona Press, 1999) ("The storyteller Pohd-lohk gave me the name Tsoai-talee. He believed that a man's life proceeds from his name, in the way that a river proceeds from its source" (introduction)); Richard Wagamese, *for Joshua: An Ojibway Father Teaches His Son* (Toronto: Doubleday Canada, 2002) ("The father would point out the things he saw on those outings and tell his child the name of everything he saw, explain its function, its place in creation. ... the father would perform this ritual so the child would feel that it *belonged*. He would do this so that the child would never feel separated from the heartbeat of Mother Earth" (at 8)).

<sup>17</sup> Kimberly Blaeser argues for the necessity, when working within Indigenous oral traditions, to be conscious of the way in which the stories are used, and the way in which their use can become a new form of colonization. ("Native Literature: Seeking a Critical Centre," in Jeanette C. Armstrong, ed., *Looking at the Words of our People: First Nations analysis of literature* (Penticton: Theytus Books, 1993) at 51). Loretta Todd has suggested that appropriation of Indigenous voice is a form of colonization and has cautioned against the ways in which use of Indigenous stories, voices and images can become a colonial tool ("Notes on Appropriation" (1990) 16:1 Parallelogramme 24). See also Jace Weaver, *Other Words: American Indian Literature, Law, and Culture* (Norman: University of Oklahoma Press, 2001) [Weaver].

<sup>18</sup> Jo-ann Archibald, *Coyote Learns to Make a Storybasket: The Place of First Nations Stories in Education* (PhD Thesis, Simon Fraser University, 1997) [unpublished] [Archibald].

<sup>19</sup> Greg Sarris, *Keeping Slug Woman Alive: A Holistic Approach to American Indian Texts* (Berkeley: University of California Press, 1993) [Sarris].

<sup>20</sup> Donald L. Fixico, *The American Indian Mind in a Linear World: American Indian Studies and Traditional Knowledge* (New York: Routledge, 2003) [Fixico].

<sup>21</sup> Vine Deloria Jr., *Red Earth, White Lies: Native Americans and the Myth of Scientific Fact* (New York: Scribner, 1995) [Deloria].

<sup>22</sup> Shirley Sterling (Seepeetza), *The Grandmother stories: oral tradition and the transmission of culture*. PhD Thesis. University of British Columbia, 1997 [unpublished] [Seepeetza].

<sup>23</sup> Gregory Cajete, *Look to the Mountain: An Ecology of Indigenous Education* (Skyland, NC: Kivaki Press, 1994) [Cajete].

<sup>24</sup> See generally: Ann Waters, ed., *American Indian Thought* (Malden, MA: Blackwell Publishing, 2004); Marie Battiste, ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000); and, Armand

A considerable number of non-Indigenous People have also studied oral traditions, primarily for the purpose of examining the utility of oral traditions as a source for doing history, including Nabokov,<sup>25</sup> Vansina,<sup>26</sup> Tonkin,<sup>27</sup> Portelli,<sup>28</sup> Thompson<sup>29</sup> and von Gernet.<sup>30</sup> Others have explored the broader cultural role and meanings of oral traditions within Indigenous societies, including Ridington,<sup>31</sup> Cruikshank,<sup>32</sup> and others.<sup>33</sup>

One area that remains to be fully examined is the legal content and aspects of oral traditions. However, some Indigenous Peoples have started the necessary task of identifying and locating Indigenous laws within oral traditions.<sup>34</sup> In *We Get Our Living like Milk from*

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Garnet Ruffo, ed., *(Ad)dressing Our Words: Aboriginal Perspectives on Aboriginal Literatures* (Penticton: Theytus Books, 2000).

<sup>25</sup> Peter Nabokov, *A Forest of Time: American Indian Ways of History* (New York, Cambridge University Press, 2002) [Nabokov].

<sup>26</sup> Jan Vansina, *Oral Tradition as History* (Madison: The University of Wisconsin Press, 1985) [Vansina].

<sup>27</sup> Elizabeth Tonkin, *Narrating our Pasts: The Social Construction of Oral History* (Cambridge: Cambridge University Press, 1992) [Tonkin].

<sup>28</sup> Alessandro Portelli, *The Death of Luigi Trastulli and Other Stories: Form and Meaning in Oral History* (New York: State University of New York Press, 1990) [Portelli].

<sup>29</sup> Paul Thompson, *The Voice of the Past: Oral History* (Oxford: Oxford University Press, 1988) [Thompson].

<sup>30</sup> Alexander von Gernet, "What My Elders Taught Me: Oral Traditions as Evidence in Aboriginal Litigation" in Owen Lippert, ed., *Beyond the Nass: National Implications of the Supreme Court's Delgamuukw Decision* (Vancouver: Fraser Institute, 2000) 103 [von Gernet, 2000], "Oral narratives and Aboriginal pasts: an interdisciplinary review of the literature on oral traditions and oral histories" Ottawa: Indian & Northern Affairs Canada, Research & Analysis Directorate, 1996 [von Gernet, 1996].

<sup>31</sup> Robin Ridington, "Cultures in Conflict" in W.H. New, ed., *Native Writers and Canadian Writing* Canadian Literature (Special Issue) (Vancouver: University of British Columbia press, 1990) 273 [Ridington]; *Little Bit Know Something: Stories in a Language of Anthropology* (Iowa City: University of Iowa Press, 1990).

<sup>32</sup> Cruikshank, Julie (with Angela Sidney, Kitty Smith and Annie Ned). *Life lived like a story: life stories of three Yukon native elders* (Vancouver: University of British Columbia Press, 1990); *Social Life of Stories: narratives and knowledge in the Yukon Territory* (Vancouver: University of British Columbia Press, 1998); "Oral History, Narrative Strategies, and Native American Historiography: Perspectives from the Yukon Territory, Canada" in Nancy Shoemaker, ed., *Clearing a Path: Theorizing the Past in Native American Studies* (New York: Routledge, 2002) 3 [Cruikshank].

<sup>33</sup> See e.g. Turner, *supra* note 5; and, J. Edward Chamberlain, *If this is your land, where are your stories? Finding Common Ground* (Toronto: A.A. Knopf, 2003).

<sup>34</sup> See e.g., *supra* note 8; George Blondin, *Yamoria the Law Maker: Stories of the Dene* (Edmonton: NeWest Press, 1997) ("My ancestors lived according to strict Dene laws that are like the Ten Commandments...") (*ibid.* at vi-vii); Lee Maracle and Jeannette Armstrong et al., eds., *We Get Our Living Like Milk from the Land*, Okanagan Rights Committee & Okanagan Indian Education Resource Society (Penticton: Theytus Books, 1993/4) [Milk from the Land]; M. Teresa Carlson, Keith Thor Carlson, Brian Thom and Sonny McHalsie, "Spoken Literature Sto:lo Oral Narratives," in Keith Thor Carlson, ed., *You Are Asked to Witness: The Sto:lo in Canada's Pacific Coast History* (Chilliwack, Sto:lo Heritage Trust, 1999) 181; Betty Patrick and Jo-Anne Fiske, *Cis dideen kat – When the Plumes Rise: the Way of the Lake Babine Nation* (Vancouver: UBC Press,

*the Land*, for example, the Okanagan Nation compiled a collection of writings as part of an internal effort to both teach and draw forth their collective future as a united People. In discussing the oral tradition of the Okanagan, it makes explicit that there are laws contained within the oral traditions of the People, and these laws are carried forward through story:

The syilx people know history, passed on from one person to another, from generation to generation, as a record called cepcaptikwl. It is a history of the meaning of being syilx, rather than a history of dates. The **meanings** in the cepcaptikwl are formed through story. They are the truths and knowledge of the natural laws made active through story.

In the cepcaptikwl we are told that kwlencuten, created and sent senklip, Coyote, to help change things so that our people might survive on the earth. Coyote's travels across the land are a record of the natural laws our people learned in order to survive.

Learning and teaching the natural laws on the land is necessary for humans to live and to continue on. Humans don't have instinct to know how to live in nature's laws. They were given memory instead. Understanding the living land and teaching how to be part of that is the only way we, the syilx, have survived.<sup>35</sup>

John Borrows has explored how a fuller recognition and incorporation of oral traditions/Indigenous laws can be achieved within the Canadian legal system, identifying both possibilities and impediments<sup>36</sup> often engaging a "Trickster methodology" with reference to Nanabush, the trickster, creator, muse of the Anishnabe through which to investigate and examine the Canadian legal system's impact on Indigenous Peoples.<sup>37</sup> Borrows locates possibilities for the recognition of Indigenous laws in the Supreme Court's affirmation of the *sui generis* nature of Aboriginal and Treaty Rights, in combination with the direction that the Aboriginal perspective must be taken into account in considerations involving Indigenous Peoples rights.<sup>38</sup> Borrows has called for a change in perspective in Canadian courts' interpretation of oral traditions, arguing that if the courts were to

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2000) [Patrick and Fiske]; and, Joan Ryan, *Doing Things the Right Way: Dene Traditional Justice in Lac la Martre, N.W.T.* (Calgary: University of Calgary Press, 1995) [Ryan].

<sup>35</sup> Milk from the Land, *ibid.* at 1-2. (Note that the Okanagan words contained in the quote appear differently in the text, the font is not capable of being reproduced here).

<sup>36</sup> Borrows, 2001, *supra* note 8, Borrows, 1996 *supra* note 8.

<sup>37</sup> Borrows, 1997-98, *supra* note 8, Borrows, 1997(b), *supra* note 8.

<sup>38</sup> Borrows, 1996, *supra* note 8.

acknowledge the true nature of Indigenous Peoples' oral tradition this would include recognition of their status as laws. While there are possibilities, the fundamental constraint remains that the oral tradition presents a "competing jurisprudential narrative that potentially strain[s] Canada's claim to legal exclusivity in the area."<sup>39</sup>

Sakej Henderson has discussed "Aboriginal jurisprudences" contained within.

#### Indigenous oral traditions:

Aboriginal jurisprudences rely on performance and oral traditions rather than on political assemblies, written words, and documents. They stress the principle of totality and the importance of using a variety of means to disclose the teachings and to display the immanent legal order. They have always been consensual, interactive, and cumulative. They are intimately embedded in Aboriginal heritages, knowledges, and languages. They are intertwined and interpenetrated with worldviews, spirituality, ceremonies, and stories, and with the structure and style of Aboriginal music and art. They reveal robust and diverse legal orders based on a performance culture, a shared kinship stressing human dignity, an ecological integrity that demonstrates how Aboriginal peoples deliberately and communally resolved recurring problems.<sup>40</sup>

Indigenous oral traditions are contested legal grounds (and, are used legally to contest ground). The fact that oral traditions reflect and embody the living laws of Indigenous Peoples and are a shared medium in which cultures are created and maintained is obscured when oral traditions are reduced to evidence. When Indigenous Peoples bring their oral traditions before the courts, this is done in an effort to transform our existing realities, by presenting an alternate reality, and asking for its recognition. In this sense, the oral traditions of Indigenous Peoples are both the evidence offered, and the objective sought, when engaged within the Canadian legal process. This contradictory positioning has led to mixed results. Generally, the instances of where the receipt of oral traditions has been helpful is limited to individual Indigenous communities or nations where it has been accepted and has served to protect Indigenous Peoples' specific rights or interests. However, even when advanced for the protection of specific rights or interests, oral traditions are often devalued as a source of

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<sup>39</sup> Borrows, 2001, *supra* note 8 at 27.

<sup>40</sup> Sakej, 2004, *supra* note 8 at 71.

evidence and legally defined in a way that diminishes or denies their legal content.<sup>41</sup> There remains a lack of recognition of the legal content of oral traditions, and in these murky waters, Indigenous jurisprudences risk being subsumed and transformed when they are introduced as evidence in Canadian courts.

#### **D. Testing the Waters**

It is the goal of this thesis to test the waters and track the impacts and implications of using Indigenous oral traditions within Canadian courts as a source of evidence.

In seeking to protect and forward aspirations for a distinct legal and political space, Indigenous Peoples have framed these as Aboriginal Title, Rights or Treaty Rights within the ambit of s. 35. *Constructing the Constitutional Box: The Supreme Court's Section 35(1) Reasoning* (Chapter Two) investigates the impact of s. 35 on three areas identified as broadly encompassing Indigenous Peoples' aspirations: (1) Territory (both land and water) and recognition of our responsibility to manage, protect and benefit from that territory; (2) Recognition of the laws, traditions, languages and cultures of Indigenous Peoples which flow from, and are intricately tied to, our territories; and (3) Recognition of a right of self determination which ensures that we are able to survive into the future governed by, and accountable to, our own laws. This chapter looks at the way that the legal protection afforded Aboriginal Title, Rights and Treaty Rights through s. 35 has been defined through Supreme Court of Canada ("SCC") decisions, including *R. v. Sparrow*,<sup>42</sup> *R. v. Van der Peet*,<sup>43</sup> *R. v. Gladstone*,<sup>44</sup> *Delgamuukw v. B.C.*,<sup>45</sup> *R. v. Cote*,<sup>46</sup> *R. v. Adams*,<sup>47</sup> *Mitchell v. M.N.R.*<sup>48</sup>

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<sup>41</sup> See Chapter 4 (Little Weight or Heavy as Eagle Down: Legal Application of a Methodology of Suspicion to Indigenous Oral Traditions).

<sup>42</sup> [1990] 1 S.C.R. 1075 [*Sparrow*].

<sup>43</sup> [1996] 4 C.N.L.R. 177 [*Van der Peet*].

<sup>44</sup> [1996] 2 S.C.R. 723 [*Gladstone*].

*Haida Nation v. B.C. (Ministry of Forests)*,<sup>49</sup> *Taku River Tlingit First Nation v. B.C. (Project Assessment Director)*,<sup>50</sup> and *R. v. Bernard*.<sup>51</sup>

A discussion of the constitutional status of Aboriginal Title, Rights and Treaty Rights is important because the law guiding the receipt and weighing of Indigenous oral traditions as evidence has developed within s.35 constitutional law litigation. The SCC has developed a framework for interpreting Aboriginal Title, Rights and Treaty Rights cases which, in turn, has influenced the way that oral tradition evidence is defined and received. This chapter argues that s. 35 has been transformative in a number of ways, and has emerged not as a shield protecting Indigenous Peoples' rights, but rather as a scale weighing the rights of Indigenous Peoples against the interests of broader Canadian society.

The acceptance of Indigenous oral traditions into Canadian courts has been constrained by the ways in which oral traditions are viewed as "oral histories". In *Bundle of Sticks or a Living Tree: Legal Considerations of Indigenous Oral Traditions* (Chapter Three) it is argued that the discipline of history, by being one of the first academic disciplines to focus attention on Indigenous oral traditions, has impacted the subsequent legal examinations of those traditions in two important ways. First, by validating the use of oral traditions as a source for understanding historic facts. Second, by suggesting that all history is socially contingent and manufactured to suit present day needs and circumstances.

Viewing oral traditions as primarily oral documents, passed over generations, relies on an individualist premise. This conceptualization (forwarded by theorists such as

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<sup>45</sup> [1998] 1 C.N.L.R. 14 [*Delgamuukw*].

<sup>46</sup> [1996] 3 S.C.R. 139 [*Cote*].

<sup>47</sup> [1996] 3 S.C.R. 101 [*Adams*].

<sup>48</sup> [2001] 1 S.C.R. 911 [*Mitchell*].

<sup>49</sup> [2004] 3 S.C.R. 511 [*Haida*].

<sup>50</sup> [2004] 3 S.C.R. 550 [*Taku*].

<sup>51</sup> 2005 SCC 43 [*Bernard*].

Vansina<sup>52</sup> and von Gernet<sup>53</sup>) renders Indigenous oral traditions as a “bundle of sticks” vulnerable to being challenged and dismissed. Only when oral traditions are viewed as living traditions, reflecting more than historic content, can room be made for recognition of the Indigenous legal orders which they embody. While Canadian law has long recognized the concept of laws as alive and evolving to respond to changed circumstances (the living tree), this concept has not been applied to Indigenous oral traditions. Instead, this alive, legal, and dynamic element has been used to devalue Indigenous oral traditions as a source of evidence. This chapter also looks at the works of Indigenous scholars such as Archibald<sup>54</sup> and Sarris<sup>55</sup> to suggest some of the features of oral traditions which may operate to prevent them from being fully heard or understood in the forum afforded by Canadian courts.

Building upon the framework established in the previous chapter, *Little Weight, or as Heavy as Eagle Down? Applications of a Methodology of Suspicion to Indigenous Oral Traditions* (Chapter Four) examines Canadian court cases that have considered Indigenous oral traditions. The SCC, in cases such as *Van der Peet*<sup>56</sup> and *Delgamuukw*<sup>57</sup> has said that oral tradition evidence should be received on an equal footing with more traditional evidence forms. An examination of subsequent lower court decisions, however, suggests that a subtle racism continues to permeate legal considerations of Indigenous oral traditions. A “methodology of suspicion”, premised on the belief that Indigenous oral traditions are less than reliable or accurate, continues to be employed by courts in their consideration and interpretation of oral traditions.

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<sup>52</sup> *Supra*, note 26.

<sup>53</sup> *Supra*, note 30.

<sup>54</sup> *Supra*, note 18.

<sup>55</sup> *Supra*, note 19.

<sup>56</sup> *Supra*, note 43.

<sup>57</sup> *Supra*, note 45.

A review of the case law shows that by classifying their actions as necessary for either safety or conservation reasons, Canadian governments have been able to carve out of constitutional space an area where their actions are subject to less (or no) judicial scrutiny, despite that they violate Aboriginal Title, Rights and Treaty Rights. *Surely Controversial (Or, Necessary Controversies): Indigenous Safety Laws* (Chapter Five) explores the devaluation of Indigenous laws through an acceptance of the assumption that Canadian and provincial safety laws are both rational and necessary. This chapter examines night hunting to show the ways in which common sense assumptions (in this case, regarding hunting safety laws) continue to be a source for the devaluation and diminishment of Indigenous laws.

Impediments continue to exist preventing a true or meaningful recognition of Indigenous laws and legal orders. *Bringing Water to the Land: Re-cognize-ing Indigenous Laws* (Chapter Six) argues that recognition (or denial) of Indigenous laws is politically contingent. Despite the SCC's statements recognizing Indigenous Peoples' laws, these laws have yet to flow back onto the land, and are yet to be invigorated in Canadian law. The degree to which courts are willing to recognize the legal content of oral traditions depends not on an examination of the content or reliability of the oral traditions, but rather on the rights or issues at stake. Where the issues are primarily internal, then courts are far more willing to recognize the legal content of oral traditions (as "customary laws"). However, where the issues at stake generally impact more broadly on Canadian society, government jurisdiction, or the rights or interests of third parties the most common result is for Indigenous oral traditions to be limited. This chapter concludes by calling for the recognition of Indigenous laws and legal orders.

*Driving through the gate, lighting the fire, testing the water...*

## Chapter 2. Constructing the Constitutional Box: The Supreme Court's Section 35(1) Reasoning<sup>58</sup>

### A. Introduction

When the Canadian constitution was patriated in 1982, Indigenous Peoples fought for inclusion. Indigenous Peoples placed a great deal of reliance upon the promises made to them by the British Crown, reflected in the Royal Proclamation, 1763,<sup>59</sup> to honour a nation-to-nation relationship, and feared that patriation of the constitution without reference to Indigenous Peoples would sever trust obligations owed by the British Crown, and empower the Canadian government to act unilaterally to further restrict and weaken the position of Indigenous Peoples within Canada. Indigenous Peoples organized a sustained political lobby, both within Canada and internationally, to seek inclusion in a patriated constitution. These efforts included a "Constitutional Express" in 1980 where over one thousand Indigenous People, originating in B.C., chartered two trains to travel across the country to convene an Ottawa lobby, and the "European Express" in 1981-1982 where a delegation of over one hundred Indigenous People traveled to Europe.<sup>60</sup>

Indigenous Peoples demands for constitutional recognition challenged emerging Canadian sovereignty. Debate surrounding the incorporation of an Aboriginal and Treaty Rights clause mirrored the ambivalence of a Canadian state trying to legitimate its own sovereignty and existence when faced with the competing reality posed by Indigenous

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<sup>58</sup> An edited version of this paper (under the same title) appeared in Ardith Walkem and Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton: Theytus Books, 2003) 196.

<sup>59</sup> R.S.C., 1985, App. II, No 1.

<sup>60</sup> For further discussion of the Constitutional Express and European Express, see: Peter McFarlane, *Brotherhood to Nationhood: George Manuel and the Making of the Modern Indian Movement* (Toronto: Between the Lines, 1993) [McFarlane]; Doug Sanders, "The Indian Lobby" in K. Banting and R. Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983); and, Donald Purich, *Our Land: Native Rights in Canada* (Toronto: James Lorimer and Company Publishers, 1986.)

nations, with their own territories, laws and cultures, and independent claim for a right of international political recognition. Competing hopes and fears, rooted in the uncertainty of the role of Indigenous Peoples within Canada, were played out in the forum of constitutional negotiations.<sup>61</sup> The Canadian government feared that s. 35(1) might upset the established legal and political order, undermining the jurisdictional and legislative powers of Canadian governments, and result in the creation of a “special class” of citizens who had greater rights than ordinary Canadians. Indigenous Peoples hoped that s. 35(1) would create legal and political space within Canada and serve as a positive source of protection, including recognition of Aboriginal Title and the right of self determination. Ultimately, the *Constitution Act, 1982* included section 35(1):

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Much of the initial discussion surrounding s. 35(1) cast the constitutional provision as a “box”, the possibility and content of which remained uncertain. The provision itself recognized and affirmed Aboriginal and treaty rights, but did not define those rights.<sup>62</sup> The metaphor of a box was useful in illustrating the uncertainty about the provision. The borders

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<sup>61</sup> The legal landscape, prior to constitutional recognition in s. 35 (1), had been characterized by the denial of the existence of Aboriginal Title and rights. Thomas Berger, co-counsel for the Nisga'a in *Calder v. Attorney-General British Columbia*, [1973] S.C.R. 313 [*Calder*], wrote in 1982 of the difficulty of bringing aboriginal claims before courts, primarily in convincing the courts to take notions that Indigenous People have their own cultures, legal systems, and laws seriously (*Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto: Irwin Publishing, Inc., 1982) at 250. [Berger]. Douglas Sanders, reviewing aboriginal and treaty rights case law prior to 1982, concluded that there was no recognition of aboriginal rights, and only limited, contract-law based, recognition of treaty rights: “The country essentially functioned as if it had no Indigenous Peoples.” (“Pre-existing Rights: The Aboriginal Peoples of Canada” in Gerald-A. Beaudoin and Errol Mendes, eds., *The Canadian Charter of Rights and Freedoms* (3<sup>rd</sup>) (Toronto: Carswell, 1996)).

<sup>62</sup> While several constitutional conferences were scheduled, with Indigenous Peoples as participants, to explore further definition of aboriginal rights within the constitution (primarily self-government rights) these conferences were ultimately unsuccessful in achieving any further definition of the scope or content of the rights recognized and affirmed in s. 35(1): Bryan Schwartz, *First principles, second thoughts: aboriginal peoples, constitutional reform and Canadian statecraft* (Montreal: The Institute for Research on Public Policy, 1986) [Schwartz].

of the box were envisioned as the limits placed on Canadian government actions; while the content of the box was the distinct legal and political space created and protected for Indigenous Peoples.

Boxes contain many interesting possibilities, from restrictive to expansive, from gift-giving to freedom-taking. Things are put into and contained within boxes – possibly for safe-keeping, possibly for keeping the outside safe. Within Indigenous cultures there are alternative images of boxes which do not represent these restrictive formulations and notions. There are “Boxes of Treasures” and box-baskets woven from cedar root and cherry bark – boxes which give forth, and are capable of bringing life for the people. These boxes serve as a source of sustenance, providing wealth, food and cultural continuity, rather than as sites of restriction or containment.

Following the entrenchment of Aboriginal Rights, but before the courts had directed their attention towards them, Bryan Schwartz sets out varying theories about the content of s. 35(1). The section was alternatively: (1) merely “worthless symbolism” that acknowledged the existence of the rights but did not protect them; (2) an absolute protection of Aboriginal Rights that would severely restrict government action; or, (3) a “nihilist” idea that accorded some measure of protection, but allowed government infringement and would not unduly hinder government actions.<sup>63</sup> Aboriginal leader George Manuel, for example, dismissed s. 35(1) as an “empty box” which would not lead to the protection of Indigenous Peoples’ rights.<sup>64</sup> Former B.C. Supreme Court Justice Thomas Berger, on the other hand, forecast a full box, speculating that s.35(1) would “give the Native peoples the means to enforce their

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<sup>63</sup> *Ibid.* at 357-364.

<sup>64</sup> McFarlane, *supra* note 50 at 281.

right to a distinct place in Canadian life".<sup>65</sup> The restrictive possibilities of constitutionalization (and domestication under Canadian law) of Indigenous Peoples rights was largely unexplored. At worst, Indigenous Peoples feared the box would be empty.

Given its characterization as a box, s. 35(1) was perhaps an inauspicious place for Indigenous Peoples to place our hopes, dreams and aspirations. The question remained: "[W]hat kind of constitutional protection does s. 35(1) afford its contents? What kind of box is it? Cast iron? Wet card board?"<sup>66</sup> Would s. 35(1) be a Box of Treasures, giving forth hope and bringing sustenance and life to protect and nourish recognition of Indigenous Peoples aspirations for our continued existence as peoples? Or, would s. 35(1) be an iron box, capturing and containing Indigenous Peoples aspirations, serving to protect Canadian sovereignty and property interests from any competing Indigenous claims?

## **B. Construction of a Constitutional Box**

With the content of s. 35(1) left politically undefined, the task of constructing the scope of this provision has ultimately vested with the Supreme Court of Canada (SCC). The SCC has constructed the scope of constitutional protection afforded to Aboriginal Rights in s. 35(1) in a series of cases beginning with *Sparrow*,<sup>67</sup> and continuing through *Van der Peet*,<sup>68</sup> *Gladstone*,<sup>69</sup> *Delgamuukw*,<sup>70</sup> *Cote*,<sup>71</sup> *Adams*,<sup>72</sup> *Mitchell*,<sup>73</sup> *Haida*,<sup>74</sup> *Taku*,<sup>75</sup> and *Bernard*.<sup>76</sup>

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<sup>65</sup> Berger, *supra* note 51 at 250.

<sup>66</sup> Shwartz, *supra* note 52 at 356.

<sup>67</sup> *Sparrow*, *supra* note 42.

<sup>68</sup> *Van der Peet*, *supra* note 43.

<sup>69</sup> *Gladstone*, *supra* note 44.

<sup>70</sup> *Delgamuukw*, *supra* note 45.

<sup>71</sup> *Cote*, *supra* note 46.

<sup>72</sup> *Adams*, *supra* note 47.

<sup>73</sup> *Mitchell*, *supra* note 48.

<sup>74</sup> *Haida*, *supra* note 49.

<sup>75</sup> *Taku*, *supra* note 50.

<sup>76</sup> *Bernard*, *supra* note 51.

Additional cases have not directly considered s. 35(1) but nonetheless cast light on the course that the SCC has charted in interpreting the legal rights of Indigenous Peoples: *Nikal*,<sup>77</sup> *Lewis*,<sup>78</sup> and *Kitkátla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*.<sup>79</sup> The result has been the judicial construction of a constitutional box which has actively restricted the constitutional, political and legal space available to Indigenous Peoples within Canada.

In interpreting s. 35(1), the SCC is engaged in a process that, at the same time, reflects and defines the Canadian state and society.<sup>80</sup> The process of constitutional interpretation is an actively political process informed by cultural norms that influence, and are reflected in, the decisions made by the courts. In the context of Indigenous Peoples, Patrick Macklem has observed:

Constitutional law is an enterprise that actively distributes power, primarily in the form of rights and jurisdiction, among a variety of legal actors, including individuals, groups, institutions, and governments. By 'power,' I mean the constitutional authority not only to engage or not to engage in certain activities but also to mobilize what Joel Handler describes as 'the rules of the game – values, beliefs, rituals, as well as institutional procedures – which systematically benefit certain groups at the expense of others.' The fact that a legal actor possesses a measure of constitutional authority does not mean it possesses the material ability to accomplish what the constitution authorizes.<sup>81</sup>

In the twenty years since s. 35(1) was included in the Canadian constitution, Indigenous Peoples have sought to use Canadian courts to forward aspirations to have our separate way of life and continued existence as peoples preserved and protected. The legal construction of s.35(1) must be understood within the forum of a rights-based discourse. Attempts to advance political and social aspirations through the vehicle of rights entails an acceptance of the legal forum afforded by the courts and requires that the aspirations sought

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<sup>77</sup> [1996] 1 S.C.R. 1013 [*Nikal*].

<sup>78</sup> [1996] 1 S.C.R. 921 [*Lewis*].

<sup>79</sup> [2002] 2 S.C.R. 146 [*Kitkatla*].

<sup>80</sup> See e.g.: Merry Engle, 1991, *supra* note 11; Merry Engle, 1999 *supra* note 11; and, Nunn, *supra* note 11.

<sup>81</sup> Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 21 [Macklem] [References omitted].

to be protected are cast in a manner which fits into existing legal discourse.<sup>82</sup> For Indigenous Peoples engaging s. 35(1) in an attempt to forward our quest for protection of our existence as peoples has meant casting our aspirations for territorial recognition and self determination into the relatively narrow categories of “Aboriginal Title” and “Aboriginal Rights”, and making the decision to recognize the power and authority of the Canadian courts to decide upon the existence and scope of those rights.

When Indigenous Peoples speak of Aboriginal Title and rights, it is a much broader conception than that which has evolved under Canadian law. Indigenous Peoples are not seeking to have distinct practices protected, nor title recognized to small parcels of land. The reason that Indigenous Peoples engage in the court process stems from a simple desire and imperative: Our continued existence as peoples and maintenance of our ability to continue to exist and thrive on the territories on which the Creator placed us and according to the laws which bind us to the lands and waters and govern the relationships between all living things and the spiritual beings that also live within and through the lands and waters.

These elements, at a minimum, embrace fundamental aspects of Indigenous Peoples aspirations:

- (1) Territory (both land and water) and recognition of our responsibility to manage, protect and benefit from that territory;
- (2) Recognition of the laws, traditions, languages and cultures of Indigenous Peoples which flow from, and are intricately tied to, our territories; and
- (3) Recognition of a right of self determination which ensures that we are able to survive into the future governed by, and accountable to, our own laws.

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<sup>82</sup> Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) [Bakan]; Turpel, 1989-90, *supra* note 8; Turpel, 1989 *supra* note 8.

Seeking to advance these aspirations through the Canadian courts and s.35(1) has required that Indigenous Peoples transform our aspirations for protection and preservation of our distinct existence as peoples, into a quest for legal (and hence political) recognition of Aboriginal Title, rights and treaty rights:

'Aboriginal rights' are a category, primarily a category of law, in which most discussion about our historic claims and cultural differences are carried out in Canadian society. It is a category with severe limitations politically and legally ... [T]hey seem incompatible with Aboriginal ideas about land, family, social life, and spirituality. Yet somehow they are supposed to be helping us out, assisting us in our struggle to continue to practice our cultures.<sup>83</sup>

Joel Bakan has observed that a number of social movements seeking to advance their claims through a rights forum have had these aspirations transformed in the process. Failure to acknowledge that "[r]ights are rooted in material and ideological conditions ... may engender not only wasted efforts and resources but also the real possibility that rights strategies will backfire."<sup>84</sup> Bakan explores the operation of the transformative power of a rights discourse through the example of the Native Women's Association of Canada's [NWAC] participation in the constitutional reform discussions which lead up to the Charlottetown Accord.

NWAC sought recognition and protection of Indigenous women's rights, and their arguments were initially grounded in assertions of Indigenous Peoples inherent self-governance powers. In the end, the manner in which the aspirations of NWAC were recast eliminated the self-governance aspects. Instead, NWAC's aspirations were transformed into a demand for "equal rights" based on gender and ultimately used by Canada to undermine Indigenous Peoples claims for self-government, through the creation of an oppositional framework defining the individual equality rights of Indigenous women in opposition to

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<sup>83</sup> Turpel, 1989 *ibid.* at 151.

<sup>84</sup> Bakan, *supra* note 82 at 132.

inherent self-government claims. The perceived inequality of Indigenous women within Indigenous governments and communities was used to support arguments that Indigenous governments were not capable of providing for equal rights for Indigenous women, and therefore that the Canadian *Charter*, governments and courts should monitor the exercise of self-government to protect the equality rights of Indigenous women.<sup>85</sup>

The transformative power of a rights-based discourse involves the power of the courts to define rights, the interests embodied within those rights, the limitations they will sanction on those rights, and the degree to which they are willing to police the boundaries of those rights to protect other rights which they have identified as being in opposition.

Using litigation to forward Indigenous Peoples aspirations through Canadian courts requires some degree of recognition of the legitimacy of colonial power, as courts are instruments of colonial society and reflect colonial rules and aspirations. The legal process itself serves as “a reminder of the subordinate place of native societies within the larger settler societies in which they are embedded, and of their dependence on the courts that pronounce upon their rights in that larger society.”<sup>86</sup> Turpel has pointed to the danger of invoking a rights-based discourse, arising from western notions of property and individual rights, for forwarding Indigenous aspirations. Within Aboriginal Rights litigation it is a “fundamental problem...that everything has to be adjusted to fit the terms of the dominant system” including acceptance of the power of Canadian courts “to say ‘yes, we do have jurisdiction over you, and we will decide what is best for you under Canadian law.’”<sup>87</sup>

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<sup>85</sup> *Ibid.* at 117-133. For an examination of the self-government aspirations originally forwarded by the NWAC, see Turpel, 1989, *supra* note 8.

<sup>86</sup> Russell, *supra* note 13 at 247.

<sup>87</sup> Turpel, 1989, *supra* note 8 at 151 and 155.

The rejection of rights-based arguments for advancing the aspirations of Indigenous Peoples is not universal. Some scholars have argued that rights-based arguments can be a potentially positive source of protection for Indigenous Peoples, provided that Western notions of rights are adjusted to make space for Indigenous difference. Patrick Macklem has suggested that a rights discourse can operate to protect and foster space for Indigenous difference within Canada, and that an expanded recognition of s. 35(1) rights is necessary to achieve the substantive equality necessary to allow Indigenous Peoples the “ability to reproduce their cultures over time”. Distributive justice demands that the manner in which courts interpret, and governments address, Indigenous Peoples rights be fundamentally altered to make constitutional space for four features of Indigenous difference: (1) distinctive Indigenous cultures; (2) the fact that before settlers arrived Indigenous Peoples occupied, and had a territorial interest in, the land; (3) Indigenous Peoples’ sovereign authority over their own peoples and territories; and, (4) the need for recognition of the past and present treaty processes between Canada and Indigenous Peoples.<sup>88</sup>

In a similar vein, Leon Trakman suggests that a rights discourse can operate to protect Indigenous Peoples land and cultural interests, and proposes a broadened concept of rights which incorporates responsibilities, on all parties, as a mechanism for fuller recognition of Indigenous Peoples aspirations. Under Trakman’s model, for example, the rights of private property owners would not be construed solely as freedom from interference (i.e., freedom from competing Indigenous claims to use, manage and benefit from the property), but also as incorporating a responsibility to protect Indigenous Peoples relationship with the lands and resources.<sup>89</sup>

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<sup>88</sup> Macklem, *supra* note 81.

<sup>89</sup> “Native Cultures in a Rights Empire: Ending the Dominion” (1997) 45 *Buff. L. Rev.* 189 [Trakman].

Whether a rights-based approach to protecting Indigenous Peoples aspirations is viewed positively or negatively, viewed with regard to its actual impact or in light of its (though yet unrealized) protective potential, it is clear that s. 35(1) has transformed the lives of Indigenous Peoples.

The SCC has played an active and predominant role in this transformation by legally rendering Indigenous Peoples aspirations so as to minimize disruption on Canadian laws and citizens by allowing for a limited recognition of Aboriginal Title and rights which is not unduly disruptive of Canadian society. When Indigenous Peoples use the courts to forward calls for protection of Aboriginal Title and rights, a first step in the process is the characterization, or re-characterization by the courts, of the rights claimed. The manner in which a right claimed is defined identifies the rights and interests juxtaposed against it, and establishes the legal playing field that the court will negotiate in coming to a decision. Legal reasoning involves a balancing of interests by the courts, and the manner in which arguments are formulated often determines which will be successful.<sup>90</sup> With the earlier observation that the legal process is not neutral, but rather reproduces and enforces the organization, norms and values of larger society, to understand the way that s. 35(1) has evolved, it is necessary to examine the reflection of Canadian society, and Indigenous Peoples place within that society, that informs the SCC's reasoning.

The society that the SCC envisions, which forms the blue print for their constitutional construction of s. 35(1), allows for only one sovereignty – that of Canada. The society is also

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<sup>90</sup> Steve Sheppard, for example, outlines the “perfectionist doctrine” theory of legal decision-making which posits that courts are engaged first in determining what equates with the “good life” (the way things ought to be) and then applying laws and legal doctrines to the facts before them to achieve this result: “The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State” (1993) 45 *Hastings L.J.* 969. See especially, 971-993 and 1007-1022.

strongly founded on a notion of equal rights. While diversity may be allowed – such as is the case of recognition of Indigenous Peoples collective rights – it remains an overriding concern that no “group” rights be allowed to disadvantage the rights of Canadians generally. While the SCC has discussed the collective nature of Aboriginal Rights, these collective rights are nonetheless understood in the context of an individual-rights based society, and analyzed in the context of their possible impact on these broader societal rights. This particular position shadows, while not tracking exactly, a liberal rights theory based on individual equal rights which “encompasses no distinct cultural values or interests apart from the rights and duties of each individual within it. ...[T]he equal liberty of all individuals transcends class, culture and religion.”<sup>91</sup>

Fear colours the interpretation that the SCC brings to its analysis in Aboriginal Rights decisions: Fear that Indigenous Peoples’ rights are unlimited, armed - through constitutionalization in s. 35(1) - and dangerously capable of infringing upon the rights and interests of Canadian governments and citizens. To address this fear, SCC jurisprudence has laid the foundation for a constitutional box that guards Canadian sovereignty and third party interests, and ultimately limits what Indigenous Peoples can hope to achieve in litigation under s. 35(1).

### **C. *Sparrow*: Laying the Foundations for a Constitutional Box to Contain and Limit Aboriginal Rights**

The first case in which the SCC had the opportunity to consider s. 35(1) was *Sparrow* where the SCC addressed the question of whether or not Parliament’s power to regulate had been limited by s. 35(1). Although the SCC characterized the right claimed by the

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<sup>91</sup> Trakman, *supra* note 89 at 201-202.

Musqueam as an “aboriginal right to fish for food and social and ceremonial purposes”, the right asserted at trial was a commercial fishing right. Several commercial fishing organizations intervened and argued that the recognition of an Aboriginal commercial fishing right would endanger their own rights. In *Sparrow*, the SCC foreshadowed what would evolve into the use of s.35(1) as a forum for the reconciliation of interests between broader Canadian society and Indigenous Peoples, and the Court’s interpretation of its own role in mediating between these interests. The SCC defined the problem for which it must craft a judicial solution as the conflict over access to resources between Indigenous and non-Indigenous Peoples, noting: “We recognize the existence of this conflict and the probability of its intensification as fish availability drops, demand rises and tensions increase.”<sup>92</sup>

A compounding problem for the court was the Musqueam assertion of jurisdiction and law-making authority to regulate their own resource use, an express challenge to Canadian sovereignty. In implicitly rejecting the arguments put forward by the Musqueam, supported by the Assembly of First Nations/National Indian Brotherhood as an intervener, that “the right to regulate is part of the right to use the resource”,<sup>93</sup> the SCC affirmed Canadian sovereignty noting that “there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown”.<sup>94</sup>

The SCC dismissed, without serious consideration, Musqueam laws and instead grounded the need for the infringement/justification analysis of Aboriginal Rights it created on two competing scenarios it imagined could arise without absolute federal regulatory power: either an unworkable “patchwork” of regulations (reflecting varied levels of involvement of Indigenous laws); or, alternatively, what might be called chaos theory,

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<sup>92</sup> *Sparrow*, *supra* note 42 at 1100-1101.

<sup>93</sup> *Ibid.* at 1102.

<sup>94</sup> *Ibid.* at 1103.

“aboriginal rights in their original form unrestricted by subsequent regulation.”<sup>95</sup> With these characterizations, the SCC unduly restricted the horizon of possible outcomes by refusing to consider Indigenous laws as forming an alternate or coordinate legal authority and restricted the possibility for any distinct constitutional space for Indigenous Peoples’ legal orders.

Indigenous Peoples are not a monolithic conglomeration, but distinct Peoples with distinct territories, cultures and laws. By relying on a notion of a patchwork to reject Indigenous legal orders, the SCC has failed to account for the ways in which the Indigenous identity and cultures are shaped by, and in relation to, territory.<sup>96</sup> What the SCC dismissed as a “patchwork” is, in fact, the Indigenous reality and reflects the territorial boundaries of many distinct Indigenous Nations. In the context of the United States, Wilkins has argued that “Indian law” must account for the distinctness of Indian Nations:

If the tribal nations of North America had been organized into a monolithic unit, as the inaccurate but persistent term “Indian” implies, it might have been possible for the federal government to develop a coherent body of legal principles and relevant doctrines to deal with them. Such was not the case then, nor is such a code even remotely possible as we come to the end of the twentieth century. Today, there are over 550 “federally acknowledged tribal entities,” each of which has a unique history of cultural and political relations with the United States.<sup>97</sup>

The fear of a “patchwork” of regulations further fails to account for the ways in which Indigenous Nations developed joint mechanisms for managing migratory resources and otherwise worked cooperatively with each other. Resorting to patchwork arguments in the presence of clearly established and delineated Indigenous legal and political orders is not sustainable or viable.

The SCC concluded that government would be allowed to infringe upon constitutionally guaranteed Aboriginal Rights, provided that government justify this

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<sup>95</sup> *Ibid.* at 1109.

<sup>96</sup> See Harris, 2000 (*supra* note 11); Harris, 2003 (*supra* note 11); and, the discussion in Chapter 3.

<sup>97</sup> David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: the masking of justice* (Austin, Tx: University of Texas Press, 1997) at 1 [Wilkins].

infringement.<sup>98</sup> The constitutional nature of s.35(1) rights could be satisfied by affording aboriginal peoples priority access to the resource, after conservation needs had been met, which it concluded would not “undermine Parliament’s ability and responsibility” while still ensuring that the rights of Indigenous Peoples are taken seriously.<sup>99</sup> Aside from recognizing a priority to Indigenous Peoples, the Court identified further factors that must be taken into account in a manner showing “sensitivity” and “respect” when government seeks to justify an infringement of Aboriginal Rights:

These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and inter-dependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.<sup>100</sup>

The Indigenous claim for recognition of jurisdiction and law making authority fails in the face of the SCC’s concern about a multitude of competing interests, and the need to preserve the over-arching authority of the Canadian government. Instead, consultation emerged as a mechanism for the incorporation of Indigenous laws (reduced from laws to a mere perspective). The introduction of “fair compensation” in instances of government expropriation of rights set the foundations for a conversion of Aboriginal Title and rights to a

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<sup>98</sup> *Ibid.* at 1109. The constitution of Canada is structured to balance the individual rights guaranteed in the *Charter* with those of broader Canadian society. This balancing mechanism has been built into the constitution through the inclusion of sections 1 and 33. The combined impact of these sections is that the *Charter* requires “courts to balance the rights of the individual with the needs of government but also enable governments to override some of these rights”: Brian Dickson, “The Canadian Charter of Rights and Freedoms: Context and Evolution,” in Gerald-A. Beaudoin and Errol Mendes, eds., *The Canadian Charter of Rights and Freedoms* (3<sup>rd</sup>) (Toronto: Carswell, 1996) at 1-2.

Although s.35(1) was not made explicitly subject to the balancing mechanisms embodied in ss. 1 and 33 of the *Charter*, these balancing mechanisms were read into the interpretation of s. 35 rights in *Sparrow* and have informed the SCC’s definition of the scope and content of s. 35 rights. For further discussion of the SCC’s creation of a *Charter*-like justificatory test, see Dwight Newman, “The Limitation of Rights: A Comparative Evolution and Ideology of the *Oakes* and *Sparrow* Tests” (1999) 62 Sask. L. Rev. 543 [Newman]; and, Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, Inc., 1994) [Mandel].

<sup>99</sup> *Ibid.* at 1115-1119.

<sup>100</sup> *Ibid.* at 1119.

monetary form. The notion of fair compensation has evolved into a form of damage award, enabling government to act unilaterally to abrogate Indigenous Peoples interests in the land and resources, and weakened the argument that Indigenous Peoples could make on the basis that these infringements were unconstitutional. The constitution itself does not protect Indigenous Peoples from infringement of their Aboriginal Title and Rights, but does entitle Indigenous Peoples to compensation *in lieu* of protection.

In *Sparrow*, the SCC revealed the alchemy that would be used to transform and contain Indigenous Peoples' constitutional rights, and laid the foundation for a constitutional box which ultimately limits what Indigenous Peoples can currently hope to achieve in litigation under s. 35(1).<sup>101</sup> It may be argued that the SCC, in *Sparrow*, intended to build a bigger box with which to capture Aboriginal Rights, however, subsequent decisions have steadily confined the constitutional space left available for Indigenous Peoples aspirations.

#### **D. Building Upon the Foundations: The Construction of the Constitutional Box**

Constitutional construction of s. 35(1) has resulted in a body of jurisprudence, woven together by fear, which boxes Indigenous Peoples aspirations, and ultimately domesticates those aspirations by confining them within the limits of Canadian sovereignty. A number of themes emerge from a review of the SCC's s. 35(1) jurisprudence, revealing both what the SCC has chosen to protect (Canadian sovereignty and third party interests) and the particular

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<sup>101</sup> Michael Mandel proposes that the "recognition and affirmation" of aboriginal and treaty rights in section 35(1) has been treated as less than a "guarantee" by the Supreme Court, concluding that "despite its generosity in the rhetoric department, *Sparrow* was really a decision about how to bring aboriginal rights under constitutional *control*, not constitutional protection" and that "it is more realistic to view [s.35(1) as] having operated to *manage* aboriginal claims than as having operated to *promote* them" (*supra* note 98 at 368).

features of Indigenous Peoples aspirations which are re-constituted in order to achieve this protection. These themes include the following:

**Assumed State of Lawlessness and Protection of Third Party Interests:** An overriding concern to guard third party interests against the *special* constitutional rights held by Indigenous Peoples. The construction of Aboriginal Rights as “unlimited” (either in quantity of access to resources, or by any inherent laws) allows the SCC to construe s.35(1) as not being a provision intended to protect Aboriginal and Treaty Rights, but rather a mechanism through which the Courts and governments could contain, limit and regulate those rights.

**Canadian sovereignty.** Defining Indigenous aspirations as dovetailing with those of broader Canadian society allows the SCC to take the position of defining what is in the best interests of Indigenous Peoples, and of protecting overarching Canadian government jurisdiction by affirming that Canadian laws are, in essence, for the good of the Indigenous Peoples themselves.

**Transformation and Removal of Aboriginal Rights from the land.** Aboriginal Rights are defined as flowing from cultural practices and activities, but not from the land. Thus, activities are protected but the land is freed from Indigenous interests. Rights are rendered “compensable” and therefore capable of a form of expropriation.

**Removing Aboriginal Laws from the definition and content of Aboriginal Rights.** Aboriginal Rights are defined as discrete practices, apart from their regulation and law making aspects.

(i) Assumed State of Lawlessness and Protection of Third Party Interests:

The characterization of Aboriginal Rights in the *Van der Peet*<sup>102</sup> and *Gladstone*<sup>103</sup> decisions reveals a fear that Aboriginal Rights are an aggressive species of rights. Concern with limiting how Aboriginal Rights are exercised, and monitoring how they interact with, and impact upon, the interests of third parties (“non-aboriginal rights holders” in the language of the *Gladstone* decision) provides a cornerstone of the SCC’s constitutional construction of s.35(1). The SCC’s concern with protecting third party interests has reversed the protection function that s. 35(1) may have served, now offering protection (through the mechanisms of reconciliation and justification) *against* the operation of Aboriginal Rights, rather than protection for those rights: A legal sword, rather than a shield.

When Justice McEachern, at the trial phase of *Delgamuukw v. B.C.*<sup>104</sup> dismissed the pre-colonization lives of the Gitksan and Wet’suwet’en peoples as “nasty, brutish, and short” he was pilloried for this statement. The assertion that Indigenous Peoples, prior to colonization, had lived a savage, lawless existence, outside of the bounds of civilization, was found to be racist and unacceptable. Yet, a review of the SCC’s jurisprudence reveals that an assumed state of lawlessness underlies the SCC’s own reasoning in cases involving s. 35(1). The language used may not be so direct, but it is clear nonetheless. Characterizing Aboriginal Rights as “without internal limit” renders these rights renegades, outside the bounds of law, and enables the SCC to ground their expansive support for government infringement of those rights in the broader societal interest.<sup>105</sup> The rejection of Indigenous Peoples own laws (or claim that these laws are inadequate) affirms the need for Canadian

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<sup>102</sup> *Supra* note 43.

<sup>103</sup> *Supra* note 44.

<sup>104</sup> [1991] 3 W.W.R. 97 (B.C.S.C.) [*Delgamuukw*, (B.C.S.C.)].

<sup>105</sup> For further comment see: Borrows, 1997-98 *supra* note 8; and, Harris, 2000 *supra* note 11.

laws. The refusal to recognize and fully incorporate Indigenous Peoples laws into the definition of Aboriginal Rights creates both an artificial category of “unlimited” rights and a legal vacuum, and necessitates the need for the courts to impose limits through constitutional construction. The presumption of a state of lawlessness is particularly evident in the SCC’s rulings in *Gladstone*,<sup>106</sup> *Delgamuukw*,<sup>107</sup> *Nikal*<sup>108</sup> and *Lewis*.<sup>109</sup>

In *Gladstone*, Heiltsuk fishers were charged under the *Fisheries Act*<sup>110</sup> for illegally selling herring spawn on kelp, and defended themselves on the basis of a commercial right in the fishery. In its analysis, the majority cast the Aboriginal Right to a commercial fishery as without any “inherent limitation”. Unlike *Sparrow*, the right claimed in *Gladstone* is not for food, social and ceremonial purposes where “at a certain point the band will have sufficient fish to meet these needs”, but rather a commercial right, subject only to the “demand of the market and the availability of the resource.”<sup>111</sup>

In defining Aboriginal Rights claimed in broad terms, the SCC crafted a situation where affirmation of the broad regulatory powers of the Canadian government was required. The first step of this process is to unbound government from the “minimal impairment” restriction created by the SCC in *Sparrow* that required government to follow the least restrictive means possible to achieve their objectives. The justification test set out in *Sparrow* required that government show that it acted according to a valid legislative

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<sup>106</sup> *Supra* note 44.

<sup>107</sup> *Supra* note 45.

<sup>108</sup> *Supra* note 77.

<sup>109</sup> *Supra* note 78.

<sup>110</sup> R.S.C. 1970, c. B-14 [*Fisheries Act*].

<sup>111</sup> *Supra* note 44 at 763-764. The SCC’s concern with protecting third party interests also appeared in *Lewis* where the claim made by the Indigenous fishers (to fish without a federal licence, and under the purview of a band fisheries bylaw) was cast as a claim for an exclusive fishery which would have prevented public access. The SCC emphasized that the purposes of reserve creation included to “guarantee full public access to the fisheries, and to reject any exclusive claims to fishing grounds” while Indigenous Peoples had a right to fish, they were “not accord[ed] ... any special status” (*supra* note 78 at para. XXI).

objective, and “public interest” was explicitly rejected as an overarching objective that would satisfy this branch of its justification test, saying that “public interests” is “so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.”<sup>112</sup> Although the “minimal impairment” rule provided an integral part of the *Sparrow* test, it has been significantly reduced in subsequent case law, and replaced with “consultation and compensation” and other factors which amount to a “type of generalizable reasonableness weighing”.<sup>113</sup> Building on the foundations set in *Sparrow*, in *Gladstone* the SCC added strength and resiliency to the constitutional box. It reaffirmed the threat to third party interests, thus necessitating the need to confirm overarching Canadian sovereignty in order to constrain and monitor Aboriginal Rights.

In *Gladstone*, the court asserts instead that government is not bound to show that it took the “least drastic means” of achieving their objectives, but rather that it “acted reasonably” in taking into account “the existence and importance” of Aboriginal Rights.<sup>114</sup> To assess the reasonableness of government actions which infringe an Aboriginal Right, the court will consider factors such as: consultation; compensation; accommodation (which

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<sup>112</sup> *Sparrow*, *supra* note 42 at 1113.

<sup>113</sup> Newman, *supra* note 98 at 12. See *Taku* (*supra* note 50) and *Haida* (*supra* note 49) where the SCC assigned to government the task of weighing competing interests, noting that the constitutional status of Aboriginal Rights (and their *potential* for protection, should they ever be proven) mandates that government act in good faith and uphold the honour of the Crown in its relations with Indigenous Peoples. The SCC structured a procedural weighing of fairness as opposed to one that measures fairness based upon the outcome. Thus, as long as the Crown can show that it acted reasonably and in good faith, it is justified in proceeding with its activities, even though Indigenous Peoples may not agree or may have a remarkably different perception about what the impacts of those land and resource use activities are.

<sup>114</sup> *Gladstone*, *supra* note 44 at 767-768. Cory, J., writing for the majority in *Lewis*, affirms the concept of “reasonableness” as the correct standard for measuring a government infringement of an aboriginal right: “So long as the infringement was one which in the context of the circumstances presented could reasonably be considered to be as minimal as possible then it will meet the test” the fact that there were options that provided for a “lesser infringement” which government did not take would not undermine government’s justification arguments. Thus, government must only show that it acted reasonably, not that it minimally infringed the right (*supra* note 78 at para. CX).

could include lower licensing fees); priority given to Aboriginal peoples (where the right is for “food versus commercial rights”); and, a consideration of “the extent of the participation in the fishery of Aboriginal Rights holders relative to their percentage of the population”.<sup>115</sup>

In response to the assumed state of lawlessness – of the rights without limits that they imagine an Indigenous commercial fishery to represent – the majority significantly broadens the permissible grounds for government infringement of Aboriginal Rights. The result of this argument is that Indigenous Peoples do not have internal limitations on their rights; and it is therefore necessary for government to exercise this limiting authority.

Government infringement of Aboriginal Rights is sanctioned on the basis that governments have the difficult job of balancing not only between the various holders of Aboriginal Rights, but also “between aboriginal rights holders and those who do not enjoy such rights”.<sup>116</sup> *Gladstone* represents the high water mark of the SCC’s discussion of the tension between the rights of Aboriginal peoples and the general rights of Canadian citizens, and highlights the SCC’s willingness to police the borders of Aboriginal Rights, and find ways to legally constrain these rights, to protect the rights of Canadian citizens and perfect Canadian sovereignty.<sup>117</sup> The reconciliation envisioned by the SCC in *Gladstone* is almost entirely one sided.<sup>118</sup>

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<sup>115</sup> *Gladstone*, *supra* note 44 at 768. The incorporation of “percentage of the population” as a measure for assessing whether access to natural resources allowed to Indigenous Peoples mirrors the position of the B.C. provincial government in treaty negotiations where it has been proposed that Indigenous Peoples are entitled to a portion of the land mass roughly equal to their percentage of the population. The purposes are to deny “special rights” while still allowing for some acknowledgement of group rights. Such calculation can be seen as ensuring that no *individual* Indigenous person has any more or less entitlements than those available to non-Indigenous citizens, while allowing for Indigenous Peoples’ individual rights to be “bundled together” and the sum total of these individual rights tallied, calculated, and recognized collectively.

<sup>116</sup> *Ibid.* at 769.

<sup>117</sup> In her dissenting opinion, Justice McLachlin criticized the justification standard set down by the majority, claiming that it stemmed from the erroneous assumption that the rights asserted by the Indigenous Peoples, although for trade, were not internally limited. She read into the trading rights under consideration a “moderate livelihood” restriction, arguing that by defining the rights as having no internal limits, the majority “compensates by adopting a large view of justification which cuts back the right on the ground that this is

Casting the right claimed in *Gladstone* as without internal limits presents a challenge to both the legitimacy of Canadian laws and the ability of Canadian citizens to access or benefit from natural resources. The court clearly articulates the fear that drives this jurisprudence: that Aboriginal Rights might extinguish or deny the individual rights of Canadian citizens who were not so fortunate as to have their rights constitutionalized. It has been suggested that the *Gladstone* decision has had the impact of constitutionalizing a public private property right, at least against claims brought by Aboriginal peoples.<sup>119</sup>

In *Delgamuukw* the SCC was called to decide upon the highly contentious issue of the existence of Aboriginal Title in British Columbia. The Gitksan and Wet'sewet'en Nations sought a declaration of their Aboriginal Title to their traditional territories, comprising a significant portion of north-western British Columbia. One provincial argument was that Aboriginal Title, if it existed, had been superceded by Crown title and provincial issuances of interests in the lands, waters and resources. In its hearings in *Delgamuukw* the SCC heard from a considerable number of interveners who raised the spectre of innocent third parties, including land owners and tenure holders, who would be damaged, through no fault of their own, if Aboriginal Title were recognized.<sup>120</sup> Faced with these competing interests, the SCC

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required for reconciliation and social harmony" (*Van der Peet*, *supra* note 43 at 278. See also *Gladstone*, *ibid.* at paras 73-74).

<sup>118</sup> As John Borrows has observed, "reconciliation usually requires that each party to a relationship concede something to the other, and the majority's test [in *Gladstone*] does not require any relinquishment on the part of the Crown in accomplishing this objective" (Borrows, 1997-98, *supra* note 8 at 59).

<sup>119</sup> McLachlin, in *Van der Peet*, rejects the reconciliation test set down by the majority in *Gladstone* as too broad a net, and allowing the "Crown to require a judicially authorized transfer of the Aboriginal right to non-Aboriginals without the consent of the Aboriginal people, without treaty, and without compensation" allowing government to "cut down" aboriginal rights by reallocating them to the benefit of non-aboriginal citizens (*supra* note 43 at 281-283) She rejects the justification arguments put forward by the majority in *Gladstone* as "not required for the responsible exercise of the right, but rather limitation on the basis of the economic demands of non-Aboriginals." (*ibid.* at 279)

<sup>120</sup> Larissa Behrendt, commenting on the Australian High Court's recognition of native title in *Mabo v. Queensland (No. 2)*, (1992) 175 D.L.R. 1 [*Mabo*], and subsequent political and legal reaction to this decision, has observed that a "psychological *terra nullius*" persists, rooted in concerns that non-aboriginal property interests are threatened by native title. Australian Indigenous Peoples property (territorial) rights are

recognized the continued existence of Aboriginal Title, while granting to government a broad ability to justify its infringements of that Title. The list set forth by the SCC effectively defines the continuation of the colonial project as providing valid objectives that the courts, through the mechanism afforded by s.35(1), will protect:

In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of Aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.<sup>121</sup>

In *Delgamuukw* the SCC confirmed that s.35(1) is a balancing mechanism intended to reconcile the pre-existence of Aboriginal societies with the assertion of Crown sovereignty. A purposive approach to s. 35(1) requires that both the Aboriginal and non-aboriginal perspective must be assessed in weighing claims for Aboriginal Title. Reference to the public interest and overarching interests of Canadian society are often used to deny Indigenous Peoples rights. Harris has examined how this process occurred in the British Columbia fishery.<sup>122</sup> The purpose of s. 35(1) as revealed in the jurisprudence, is to provide for a limitation of Aboriginal Rights in recognition of broad public interests.

Aboriginal rights were placed in the Constitution and outside the *Charter* to protect them from the vagaries of political expediency, but by balancing the constitutional rights of Natives against the economic and social objectives of non-Natives, Lamer C.J. is vulnerable to McLachlin J.'s charge that his test is "indeterminate and ultimately more political than legal."<sup>123</sup>

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distinguished by three features: (1) "when aboriginal people lose a property right, it does not have a human aspect to it", (2) recognition of native title is seen as "gaining something" instead of "recog[nition] for something they already have", and (3) "threatening" other property holders ("White Picket Fences: Recognizing Aboriginal Property Rights in Australia's Psychological Terra Nullius" (1999) 10:2 Constitutional Forum 50).

<sup>121</sup> *Delgamuukw*, *supra* note 45 at 78. In a separate opinion, concurring with the result but not the complete reasoning of the majority, La Forest J. (L'Heureux-Dubé, J concurring) also adopt this list of broad legislative objectives (*ibid.* at 92) and affirm the requirement for government to "consider the economic well being of all Canadians" cautioning that "Aboriginal peoples must not be forgotten in this equation" (*ibid.* at 93)

<sup>122</sup> Harris, 2000, *supra* note 11 at 211-226.

<sup>123</sup> *Ibid.* at 232.

The reasoning in *Nikal* and *Lewis* confirms the SCC's concern that Aboriginal Rights are dangerously without limit. Both *Nikal* and *Lewis* involved charges brought against Indigenous fishers for fishing without federal licences, and were defended on the basis that the Indigenous Peoples were fishing according to band bylaws.<sup>124</sup> In rejecting the fishers' assertions that the band bylaws shielded them, the SCC equates governance by Indigenous laws (insofar as band bylaws can be said to be Indigenous, arising in the context of a delegated federal authority) with lawlessness and lack of regulation:

It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. The ability to exercise person or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a *Charter* or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. ...*Absolute freedom without any restriction necessarily infers a freedom to live without any laws.*<sup>125</sup>

This topic is explored further in Chapter 5 (Surely Controversial (or, Necessary Controversies): Conservation and Safety Laws) through a discussion of the common sense reliance on Canadian conservation and safety measures in overriding Indigenous laws.

(ii) Canadian Sovereignty

The reconciliation of Crown sovereignty with the fact of the existence of Indigenous Peoples entails that the aspirations of Indigenous Peoples be restrained in those areas which challenge Canadian sovereignty, or interests embodied within Canadian sovereignty. The primary challenge posed by Indigenous Peoples is the advancement of a separate legal authority and order, which must be *re-constituted*, or boxed, in order to fit within the existing legal and political structure of Canada. One of the primary ways that this has been done by

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<sup>124</sup> The SCC resolved the issues in both cases by invoking a restrictive geographic limitation to the band bylaw provisions of the *Indian Act* (holding that such bylaws could not apply off the reserve and then defining the reserve boundaries so that they did not include the waters adjacent to the reserves), to hold that the fishers were fishing outside of the band bylaws.

<sup>125</sup> *Lewis*, *supra* note 78 at para. XCII [Emphasis added].

the SCC is a form of legal assimilation which posits that the best interests of the Indigenous Peoples are, in fact, what is in the best interests of all Canadians. Indigenous Peoples aspirations are assimilated in their articulation by the SCC into the broader Canadian societal interest. Canadian laws are both for the good of Canadian citizens generally, but also for the good Indigenous Peoples. Thus, no separate stream of rights, or peoples, should fall outside of Canadian government jurisdiction.

In *Van der Peet* the SCC sought to answer the question of how the Aboriginal Rights recognized and affirmed in s. 35(1) were going to be defined, and set forth a purposive analysis of s. 35(1), rooted in tensions which the court identified between broader societal interests and Aboriginal Rights.<sup>126</sup> In response, the SCC structured a purposive interpretation of s. 35(1) based on the reconciliation of the assertion of Canadian sovereignty with the pre-existence of Indigenous Peoples and societies:

[W]hat s.35(1) does is provide the constitutional framework through which the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the Aboriginal rights recognized and affirmed by s.35(1) must be directed towards the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.<sup>127</sup>

The mechanism of reconciliation assumes the validity of Canadian sovereignty and then seeks to afford some protection for Aboriginal Rights within that sovereignty.

Reconciliation sets limits on Indigenous Peoples rights and protects space both for Canadian government jurisdiction and private property interests. Canadian sovereignty is not

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<sup>126</sup> The test the SCC set forth for defining the existence of an aboriginal right requires identification of particular features or practices of an Indigenous culture that were integral to the distinctive culture at the time of contact. There has been much commentary and debate about the ultimate impact and appropriateness of the "integral to" test, and it has received much criticism as being unduly restrictive, freezing Indigenous Peoples and cultures at a point in history, and defining into extinction any notion of real, evolving or substantive rights.

<sup>127</sup> *Van der Peet*, *supra* note 43 at 193.

questioned, nor an expanded definition of that sovereignty allowed which may have created separate space for Indigenous Peoples. While recognition of Aboriginal Rights is part of the purposes of s.35(1), “limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, *equally* a necessary part of that reconciliation”.<sup>128</sup> In consequence,

[O]bjectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. *In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.*<sup>129</sup>

Although ostensibly focused on protecting the rights of Indigenous Peoples, the overriding and continued concern reflected in the application of a purposive analysis to the legal construction of s. 35(1) is the protection of Canadian sovereignty. John Borrows has commented on the oddity of the protection of Crown sovereignty as one of the purposes for the inclusion of s.35(1):

It is ironic that this assertion of British sovereignty should form one of the principal bases and underlying purposes for the existence of Aboriginal rights. At its most simple level, one might have thought that the assertion of British sovereignty was the last thing that would inform the constitutionalized protection of Aboriginal rights, since it is almost always British sovereignty that most severely threatens these rights.<sup>130</sup>

In beginning its analysis of Aboriginal Rights in *Van der Peet*, the SCC discusses at considerable length, the “Aboriginal” nature of Aboriginal Rights, distinguishing Aboriginal Rights from rights generally (including those embodied in the *Charter*): “Section 35(1), it is true, recognizes and affirms existing Aboriginal *rights*, but it must not be forgotten that the

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<sup>128</sup> *Gladstone*, supra note 44 at 774.

<sup>129</sup> *Ibid.* at 774-775. Emphasis in original.

<sup>130</sup> Borrows, 1997-98, supra note 8 at 45 (note 48); Russell Barsh and James (Sakej) Henderson have suggested that the result of the reconciliation test crafted by the SCC “impl[ies] the circumscription of Aboriginal rights by the mere existence of settlers” (“The Supreme Court’s *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand” (1997) 43 McGill L.J. 993 [Barsh and Henderson]).

rights it recognizes and affirms are *Aboriginal*.”<sup>131</sup> The distinction demarcates areas the SCC is willing to protect and those that it feels it has to police. Rights, in general, “are held by all people in society because each person is entitled to dignity and respect”. Aboriginal rights, on the other hand, “are rights held only by Aboriginal members of Canadian society” and cannot be treated as rights alone, but must be characterized according to their “dual nature” both as rights and Aboriginal Rights. Aboriginal rights do not adhere to all members of Canadian society, they are a special species of right, which all members of Canadian society do not enjoy or benefit from. A purposive approach to s.35(1) must balance the special rights of Aboriginal peoples with the general rights of all Canadians.<sup>132</sup>

In *Mitchell*, the SCC directly addressed the challenge posed to Canadian sovereignty by Aboriginal Rights. The SCC’s characterization of the right claimed in *Mitchell* illustrates the nature of this case as not so much a trading case, but rather a challenge to Canadian sovereignty. McLachlin, C.J. writing for the majority states that the claim is for an “aboriginal right that ousts Canadian customs law”; Binnie, J, in dissent, states that the case involves a “sovereignty controversy” in which the Mohawks are seeking “autonomy within the broader framework of Canadian sovereignty” and attempting to use s.35(1) rights “as a shield against non-aboriginal laws.”<sup>133</sup>

In *Mitchell*, the federal Crown argued that the court should adopt a doctrine of “sovereign incompatibility” into the interpretation of s. 35(1) and incorporate the proposition that any Indigenous laws, customs and rights that were incompatible with Crown sovereignty did not survive the assertion of that sovereignty. The majority, dismissing the case on a lack

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<sup>131</sup> *Van der Peet*, *supra* note 43 at 190. For an excellent commentary on the Court’s focus on defining the “Aboriginal” nature of aboriginal rights see Borrows, 1997-98, *supra* note 8.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Mitchell*, *supra* note 48 at paras. 1, 113, and 118.

of evidence, did not find it necessary to rule on this point, stating that the established jurisprudence on s.35(1) has “affirmed the doctrines of extinguishment, infringement and justification for resolving disputes between aboriginal rights and competing claims, including claims based on Crown sovereignty”.<sup>134</sup> In their dissent, Binnie and Major accept that “sovereign incompatibility continues to be an element in the s.35(1) analysis, albeit a limitation that will be sparingly applied.”<sup>135</sup> Indigenous Peoples, in other words, are part of Canadian sovereignty, not subjugated by it.

The minority rejects the trade right claimed because it is “incompatible with the historical attributes of Canadian sovereignty”.<sup>136</sup> The claim of the Mohawk is characterized as seeking “the maximum degree of legal autonomy” within Canada, and the source of Mohawk legal autonomy is not inherent, and “does not presently flow from the ancient Iroquois legal order that is said to have created it, but from the *Constitution Act, 1982*.”<sup>137</sup> Aboriginal rights, for their very survival, require an affirmation of Canadian sovereignty:

[T]he respondent’s claim relates to national interests that all of us have in common rather than to distinctive interests that for some purposes differentiate an aboriginal community. In my view, reconciliation of these interests in this particular case favours an affirmation of our collective sovereignty.<sup>138</sup>

The SCC in *Mitchell*, indicates that they are about to embark upon the building of the final phase of the constitutional box: removing recognition of the fact that Aboriginal Rights

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<sup>134</sup> *Ibid.* at para. 63.

<sup>135</sup> *Ibid.* at para. 154.

<sup>136</sup> *Ibid.* at paras. 135 and 163.

<sup>137</sup> *Ibid.* at para 70.

<sup>138</sup> *Ibid.* at para. 164. In *Mitchell*, while affirming the external sovereignty of the Canadian state, the minority indicates that they neither endorse nor reject the model of “internal” self-government reflected in the “domestic dependent nation” concept of the American Marshall decisions (*ibid.* at paras. 165-170). Many commentators have discussed the possibility of importing the notion of “domestic dependent nations” into Canadian law. Bradford Morse, for example, argues that the Marshall decision provides a good example of the possible recognition and protection of political sovereignty and not merely cultural identity (“Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*,” (1997) 42 McGill L.J. 1011 at 5, 21-23 [Morse]).

flow from the inherent relationship of the Peoples with the land and their Creator, and substituting the constitution itself as the source of Indigenous Peoples rights. By claiming that Indigenous Peoples have been fully absorbed into the Canadian state, the SCC forecloses any legal challenges to Canadian sovereignty on the basis that Canadian governments, through their legislation, are not only acting in the best interests of broader Canadian society but are also acting to protect the interests of the Indigenous Peoples themselves. By appropriating to themselves the power to decide what is in the “best interests” of Indigenous Peoples, the Supreme Court affirms the removal of Indigenous Peoples laws and cultures from the definition of rights.<sup>139</sup>

The reasoning in *Kitkatla* highlights the “absorption” or “assimilation” arguments that the SCC uses to resolve tensions between the rights of Indigenous Peoples and Canadian citizens.<sup>140</sup> *Kitkatla* challenged the vires of the provincial heritage legislation because it specifically legislated regarding Aboriginal heritage objects which the *Kitkatla* argued were under exclusive federal jurisdiction per s.91(24) (Indians, and Lands reserved for the Indians) of the *Constitution Act, 1867*. The province argued that the Act was within its legislative powers under s. 92(13) (Property and Civil Rights in the Province). To resolve the conflict, the unanimous court characterized the Aboriginal cultural objects as belonging both “to the

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<sup>139</sup> In the context of child welfare, Marlee Kline observed that the “best interests” test considers individuals as “decontextualized” and treats their interests as “separate and distinct from those of their families, communities and cultures.” The result here is the same: Aboriginal Rights are decontextualized and removed from the lands, laws and cultures from which they flow ( “Child Welfare law, “the best interests of the child” ideology; and First Nations” (1992) 30 Osgoode Hall L.J. 375 [Kline, 1992]).

<sup>140</sup> *Kitkatla*, *supra* note 79. The decision itself is not a s. 35(1) case, although it does reveal the concerns which underlie the SCC’s reasoning in claims brought by Indigenous Peoples. The *Heritage Act* made provision, in s. 8, that it did not apply to objects in which a right had been established under s.35(1). In many respects *Kitkatla* appears to have been a case that should never have made its way to the SCC. It was characterized by a sparse evidentiary record (the court makes reference to only one affidavit having been filed supporting the importance of the culturally modified trees at issue in the case) and subject to an overlapping claim within the Tsimshian nation by another community who took an opposing position. An additional feature, weighted heavily by the Court, was that Canada intervened in support of the provincial legislation and so the *Kitkatla* plaintiffs were left in the position of arguing for the protection of federal jurisdiction when the federal government took the position that its jurisdiction was not challenged.

history and identity of First Nations, but also ...[to]... the shared heritage of all British Columbians”.<sup>141</sup> As these objects are shared by all citizens, the B.C. government has valid legislative authority. The SCC commends the *Heritage Act* for balancing “the need and desire to preserve Aboriginal heritage with the need and desire to promote the exploitation of British Columbia’s natural resources.”<sup>142</sup>

Controlling the source of Aboriginal Rights, controls the content and possibilities of the rights to bring any real or lasting sustenance to Indigenous People. Un(der) nourished rights cannot flourish in sterile legal ground, and the SCC has indicated that it is willing to diminish the inherent nature of Aboriginal Rights, legally replacing either Canadian sovereignty or s. 35(1) itself as the source of those rights.

(iii) Removing Aboriginal Laws from the definition and content of Aboriginal Rights:

The process of removing the law making aspects of Aboriginal Rights from the legal recognition of those rights had its genesis in the *Sparrow* case. With the *Sparrow* decision, the SCC distinguished between the exercise of Aboriginal Rights and the regulation of those rights, and so began the process of diminishing the sovereign aspects of Aboriginal Rights which flow from the laws, cultures and traditions of Indigenous Peoples. While the Musqueam argued for a recognition of their regulatory power in the fishery, the SCC (taking into account the threat to federal sovereignty presented) answered the Musqueam’s call for recognition of their laws with what evolved into a consultation process aimed at incorporating the “aboriginal perspective” and an expanded version of evidence law which

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<sup>141</sup> *Ibid.* at paras. 69-70.

<sup>142</sup> *Ibid.* at paras. 62-64. In a critique of a similar approach taken by the SCC in developing its justification tests in *Delgamuukw* and *Gladstone* Macklem has observed that the fact that Indigenous Peoples are also Canadians is not sufficient to ground a justification for the infringement of constitutional rights (Macklem, *supra* note 81 at 189-190).

makes room for the inclusion of the oral tradition of Indigenous Peoples in order to bring this perspective before the courts. However, the recognition of the Aboriginal perspective is limited by the constraint that this perspective is not allowed to challenge Canadian sovereignty or the established legal hierarchy.<sup>143</sup>

The SCC, in the framework of the purposive approach to interpreting s. 35(1) (aimed at reconciling Indigenous Peoples to Canadian sovereignty), sets out a test for defining Aboriginal Rights that is based on the identification of distinctive practices and activities of Indigenous Peoples. It is these essential, distinctive features (represented by particular practices) which are protected as Aboriginal Rights under s. 35(1).<sup>144</sup> Under this definition of Aboriginal Rights, s. 35(1) protects practices only, and not the rich body of Indigenous Peoples laws in which these activities are rooted. Defining Aboriginal Rights as specific customs or practices effectively severs the governance and law making aspects of those rights from which the true recognition of Indigenous Peoples, as distinct Peoples, may have emerged.

In the *Van der Peet* and *Delgamuukw* decisions, the SCC appeared to move, in some measure, toward identifying the impediment that existed in the absence of recognition of Indigenous legal orders in *Sparrow*. In *Van der Peet* the SCC referred to the reasoning of Justice Brennan of the Australia High Court in *Mabo*, and adopted reference to Indigenous laws as forming the basis for Aboriginal Rights:

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<sup>143</sup> Borrows, 1996 *supra* note 8; McNeil has observed that the very definition of the way that the court's are willing to consider the aboriginal perspective – as part of the balancing and reconciliation process – limits the impact that taking this perspective into account can have (*supra* note 13 at 69-70).

<sup>144</sup> Justice L'Heureux-Dube, in dissent, criticized this approach because it identified "only discrete parts of Aboriginal culture, separating them from the general culture in which they are rooted," and would have looked at the significance of particular activities rather than the activities themselves in deciding how to define Aboriginal Rights. This approach would have allowed for a fuller exploration and incorporation of the laws and traditions of Indigenous Peoples in the definition of Aboriginal Rights (*Van der Peet*, *supra* note 43 at 230-232).

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs...

This position is the same as that being adopted here. "Traditional laws" and "traditional customs" are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples. The very meaning of the word "tradition" -- that which is "handed down [from ancestors] to posterity", The Concise Oxford Dictionary (9th ed. 1995), -- implies these origins for the customs and laws that the Australian High Court in *Mabo* is asserting to be relevant for the determination of the existence of aboriginal title. To base aboriginal title in traditional laws and customs, as was done in *Mabo*, is, therefore, to base that title in the pre-existing societies of aboriginal peoples. This is the same basis as that asserted here for aboriginal rights.<sup>145</sup>

In *Delgamuukw* the SCC also incorporated Indigenous laws into the definition of Aboriginal Title, in the directive that Aboriginal Title is a *sui generis* interest in the land which combines both common law property doctrines and Indigenous legal systems and must be understood with reference to both.<sup>146</sup>

The court in *Van der Peet* discusses, at some length, the incorporation of Indigenous Peoples' traditional laws and customs into an analysis of the Aboriginal Rights, noting that to base an analysis on traditional laws and customs is to base it in the "pre-existing societies of Aboriginal peoples" and thus claims to adopt Indigenous laws into the definition of Aboriginal Rights, calling for an "inter-societal" law that incorporates both Aboriginal and common law legal perspectives.<sup>147</sup> However, the Aboriginal perspective "must be framed in terms cognizable to the Canadian legal and constitutional structure" because "Aboriginal rights exist within the general legal system of Canada".<sup>148</sup> The SCC affirmed the need to

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<sup>145</sup> *Van der Peet*, *supra* note 43 at para. 40.

<sup>146</sup> *Delgamuukw*, *supra* note 45 at paras. 112, 126, 147 and 148.

<sup>147</sup> *Ibid.* at 198-200.

<sup>148</sup> *Ibid.* at 202. Justice L'Heureux-Dube, in dissent, would not have placed an equal emphasis on the common law perspective, arguing that Aboriginal Rights must be defined in a way that gives "meaning" to Indigenous Peoples and concluding that it is not appropriate to place the common law perspective and Aboriginal perspective on equal footing (*ibid.* at 229 and 234).

take a precautionary approach in *Delgamuukw*, warning that inclusion of the Aboriginal perspective must not strain “the Canadian legal and constitutional structure”.<sup>149</sup>

Both *Van der Peet* and *Delgamuukw* contain internal inconsistencies: they recognize that Indigenous laws exist, while at the same time build barriers to their full recognition.<sup>150</sup> A tension continues in the amount of recognition that the courts are willing to allow of the oral tradition insofar as it embodies the laws of Indigenous Peoples. In part, this is because the SCC did not abandon the *Sparrow* “aboriginal perspective” entirely, but instead suggested alternatively that it was recognizing Indigenous laws and that these laws were useful for revealing the “aboriginal perspective”. The SCC’s discussion of the *adaawk* and *kungax* presented by the Gitksan and Wet’suwet’en peoples at trial is illustrative.

[T]he *adaawk* was relied on as a component of and, therefore, as proof of the existence of a system of land tenure law internal to the Gitksan, which covered the whole territory claimed by that appellant. In other words, it was offered as evidence of the Gitksan’s historical use and occupation of that territory. For the Wet’suwet’en, the *kungax* was offered as proof of the central significance of the claimed lands to their distinctive culture. As I shall explain later in these reasons, both use and occupation, and the central significance of the lands occupied, are relevant to proof of Aboriginal title.<sup>151</sup>

The Gitksan introduced their *adaawk* at trial as proof of their land tenure system, the Court however, said that the *adaawk* were essential to show the “central significance of lands occupied” (i.e., the existence of a Gitksan land tenure system was admitted to show the physical occupancy required by the common law, but was not considered as independent law). The SCC thus separates ownership (Aboriginal Title) and jurisdiction (Indigenous laws). Also troubling is the reference to both “pre-existing systems of aboriginal law” and “aboriginal perspectives on the land” which “includes, but is not limited to, their systems of

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<sup>149</sup> *Delgamuukw*, *supra* note 45 at 47-48.

<sup>150</sup> *Ibid.* at para. 175.

<sup>151</sup> *Ibid.* at para. 94.

law”.<sup>152</sup> The SCC read out of the definition of Aboriginal Rights those sovereign and law making aspects of the rights which could challenge Canadian sovereignty, and substituted the Aboriginal perspective. The Court in *Bernard* revisited this question, and appeared to offer an even more restrictive view, stating that while Aboriginal Title is defined by both sources of law, a court must “consider the pre-sovereignty practice from the *perspective* of Aboriginal people. But in translating it to a common law right, the Court must also consider the European perspective; *the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it.*”<sup>153</sup>

With regard to Aboriginal Title, the SCC said that it includes a “discretionary component” which includes the Indigenous Peoples right to choose to what uses their land can be put. However, despite recognizing Indigenous Peoples right to decide to what uses their Aboriginal Title lands may be put, there is no explicit recognition of Indigenous Peoples jurisdiction or law-making authorities which would allow Indigenous Peoples to exercise this feature of Aboriginal Title. Instead, consultation with government is the vehicle through which Indigenous Peoples must mediate their concerns. Consultation is identified as the mechanism for incorporating this Aboriginal perspective:

There is always a duty of consultation. Whether the Aboriginal group has been consulted is relevant to determining whether the infringement of Aboriginal title is justified... The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.<sup>154</sup>

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<sup>152</sup> *Ibid.* at paras. 114 and 147.

<sup>153</sup> *Bernard*, *supra* note 51 at para. 48 [Emphasis added]. LaBel J. (Fish J. concurring), in dissent, was critical of this approach fearing that it is “too narrowly focused on common law concepts” (*ibid.* at para. 110).

<sup>154</sup> *Ibid.* at 79. In the context of unproven Aboriginal Title and Rights the SCC in the decisions of *Haida* (*supra* note 49) and *Taku* (*supra* note 50) appeared to substitute “Aboriginal interests” for Aboriginal Rights. In the result, it framed the issue before it as outlining the scope of government’s duties when it is balancing these two competing sets of interests. It is arguable that (as Aboriginal Rights and Title are only recognized when an Indigenous group has gone to court to prove them – a process many Indigenous Peoples simply cannot afford;

The SCC's admonishments about the limits of Aboriginal Title, including that it cannot be put to a use which would undermine the traditional relationship of the Indigenous Peoples to the land appears to be an incorporation of Indigenous Peoples laws. However, recognition of these laws occurs only in the context of limiting the uses to which Indigenous Peoples can put their lands. Government prescribed uses of those same lands are not limited by Indigenous laws, and government, upon following the proper steps, can allow uses of lands which completely destroy the Indigenous Peoples use of the lands, and completely defy Indigenous laws.

(iv) Transforming and Removing Aboriginal Rights from the land:

Indigenous Peoples' laws, cultures and traditions all flow from the relationship between the people and the land. "Aboriginal rights" such as rights to hunt or fish, are all rooted in the land and reflect the peoples' relationship with the land. In *Delgamuukw*, *Adams* and *Cote*, the SCC has developed a line of reasoning holding that Aboriginal Rights can exist absent Aboriginal Title, thereby separating Aboriginal Rights from what Indigenous Peoples have always insisted is the source and sustenance of those rights, our relationship with the land.<sup>155</sup> In removing Aboriginal Title from the definition of Aboriginal Rights, the SCC has

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or alternatively, where they have been recognized by modern treaty, in which case they would have been converted to Treaty Rights) the SCC has effectively removed a large measure of protection that s. 35 may have afforded Aboriginal Title and Rights.

<sup>155</sup> Louise Mandell, "Native Culture on Trial" in K.E. Mahoney and S. Martin, eds., *Equality and Judicial Neutrality* (Agincourt, Ontario: Carswell Company Limited, 1987), summarizes the Indigenous view of the source of aboriginal rights in this fashion:

The Indian elders in British Columbia question why they must subject their relationship to the land to a non-Indian court's strict scrutiny; why they must explain their use of the land to obtain "rights" abstractly defined by others. They believe that the Indians have rights to their land because their people go back with the land for thousands of years. What they do not understand is how the Crown acquired its "rights" to their land.

signaled an intent to remove Indigenous Peoples interest and relationship to the land while preserving specific and discrete practices which might have less of an impact on Canadian society and interests.

In the companion cases of *Adams* and *Cote* the issue before the Court in both cases was “whether an aboriginal right may exist independently of a claim of aboriginal title”.<sup>156</sup> At trial the parties in both *Adams* and *Cote* had proceeded on the assumption that in order to make out an Aboriginal fishing right, it was first necessary to establish Aboriginal Title to the area where the fishing occurred. In both cases, the SCC rejected this formulation of Aboriginal Rights, concluding that “aboriginal rights may indeed exist independently of aboriginal title.”<sup>157</sup> Aboriginal Title, itself, is not the source of Aboriginal Rights:

[W]here an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition.<sup>158</sup>

The SCC points to the fact that “some aboriginal peoples were nomadic” and that “many of the practices, customs and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures”. With this statement, the SCC seems to indicate that the “nomadic” nature of the life-ways of these Indigenous Peoples will not be enough to establish Aboriginal Title.<sup>159</sup>

In *Delgamuukw*, the SCC further elaborated on the distinction between Aboriginal Rights generally and the special species of right that is Aboriginal Title: “aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. ... What aboriginal title

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<sup>156</sup> *Cote*, *supra* note 46 at 150.

<sup>157</sup> *Ibid.* at 166.

<sup>158</sup> *Adams*, *supra* note 47 at para. 26.

<sup>159</sup> *Ibid.* at para. 27.

confers is the right to the land itself.”<sup>160</sup> In their reasoning in *Bernard* the SCC seemed to suggest that the scope of Aboriginal Title that they are willing to recognize may be far less than that indicated by their earlier decision in *Delgamuukw*:

It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right.<sup>161</sup>

The SCC said that a situation where Indigenous Peoples are able to prove “ancestral utilization of particular sites for fishing and harvesting” where their “forebears had come back to the same place to fish or harvest each year since time immemorial” but “season over, they left, and the land could be traversed and used by anyone” would be a situation which may give rise to Aboriginal Rights but not Aboriginal Title.<sup>162</sup> This decision is particularly troubling, as it does appear to have fundamentally misunderstood the relationships of Indigenous Peoples to their territories. For example, many Indigenous Peoples utilize different parts of their territories more intensively depending on the season (sometimes referred to by anthropologists as a “seasonal round”) both to take advantage of the resources at any given point, but also to ensure that territories are not over utilized and so lose their ability to sustain life. This management practice, aimed at preserving territories, may be interpreted in courts as giving rise to less than Title, but more in the nature of episodic rights.<sup>163</sup>

In separating Aboriginal Title and Rights in their legal definition the SCC has fundamentally misunderstood the nature of Indigenous Peoples relationship with the lands

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<sup>160</sup> *Delgamuukw*, *supra* note 45 at para. 138.

<sup>161</sup> *Bernard*, *supra* note 51 at para. 58.

<sup>162</sup> *Ibid.*

<sup>163</sup> See e.g., Turner, *supra* note 5 and Enrique Salmon, “Kincentric Ecology: Indigenous Perceptions of the Human-Nature Relationship” (2000) 10(5) *Ecological Applications* 1327 [Salmon].

and waters that comprise our territories. This disconnection results in a fundamental legal weakening of Indigenous Peoples claims for territorial recognition. "Aboriginal rights" (including right to hunt, fish and trap) when understood as being grounded in and flowing from the land, carry with them recognition of inherent jurisdiction and self-determination. Aboriginal rights, as understood by Indigenous Peoples, are not a simple right of survival, rather they embody both a right and responsibility to draw sustenance from the lands and waters. More importantly, Aboriginal Rights reflect Indigenous Peoples position as embedded within a complex set of relationships between all living things and charged with responsibilities (reflected now in language such as jurisdiction or governmental authority) to maintain a balance in that ecosystem. Recognizing Aboriginal Rights as a form of discrete and specialized right to continue with particular practices, absent recognition of the laws that Indigenous Peoples have developed to maintain our relationship with the land, diminishes Indigenous Peoples larger relationship with, and responsibility to and for, our territories.

An additional feature of the separation of Indigenous Peoples from the land is found in the creation of a compensatory element to the definition of Aboriginal Title and Rights. The conversion of Aboriginal Rights to a monetary form renders them capable of being bought or sold. In *Delgamuukw* the court emphasized the economic nature of Aboriginal Title. While some have praised this inclusion as providing the basis for Indigenous Peoples to benefit from their lands, it conversely creates a means for government to extinguish the relationship of Indigenous Peoples with their lands. While it might be argued that the inclusion of the compensation elements posed some benefits for Indigenous Peoples, it was nonetheless not tied to consent and therefore is dangerous because it treats the rights as though they are, at base, economic in nature and therefore capable of being removed from the

people, at the right price.<sup>164</sup> The reconciliation envisioned in *Delgamuukw* is primarily economic and not aimed at an acknowledgement of Indigenous Peoples laws and traditions. The fiduciary duty on the part of the Crown, with respect to Aboriginal Title lands, need not be expressed through according a priority to the Indigenous Peoples but includes a level of consultation and recognition of the financial aspects of Aboriginal Title.

[F]air compensation will ordinarily be required when Aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular Aboriginal title affected and with the nature and severity of the infringement and the extent to which Aboriginal interests were accommodated.<sup>165</sup>

Compensation for government infringement of Aboriginal Title and rights is not tied to consent of Indigenous Peoples and therefore leaves open the possibility of a judicially created constitutional override to the promise of the Royal Proclamation, 1763 which requires the consent of Indigenous Peoples to the taking of their territories. In effect, the compensation element – absent the need to seek Indigenous Peoples consent – creates a judicially sanctioned form of expropriation, exercisable by government, in the broad public interest.

Removing the source of Aboriginal Rights (the land) allows courts to argue that the constitution itself, and not the land, is the source of those rights. Failure to understand the fundamental nature of Indigenous Peoples claims about the nature of Aboriginal Rights as flowing from, and intricately tied to and bound by land is one element of the SCC's denial of Indigenous Peoples sovereignty and law-making authority. The land base, Aboriginal Title territory, or traditional land base of Indigenous Peoples defines the jurisdiction of the Indigenous Peoples.<sup>166</sup> Harris argues that ignoring the "territoriality" of Indigenous Peoples

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<sup>164</sup> *Delgamuukw*, *supra* note 45 at 93. See also Newman, *supra* note 98 at 95.

<sup>165</sup> *Ibid.* at 79-80.

<sup>166</sup> Harris, 2000 *supra* note 11 at 196.

claims becomes a method of “suppressing competing legal orders” by imposing territorial unity (and jurisdictional unity) on the part of the Canadian government thereby ignoring competing legal claims which could challenge Canadian sovereignty and jurisdiction.<sup>167</sup>

### **E. Conclusion**

Even where Indigenous Peoples are victorious in court, these victories are often “bittersweet”,<sup>168</sup> allowing limited recognition for Indigenous Peoples, while upholding overarching state power. The construction of the constitutional box is reflected by a series of cases which are not always absolute legal losses for Indigenous Peoples. Aboriginal rights decisions are often couched in language of the protection and affirmation of Aboriginal Rights. *Sparrow*, for example, was hailed as a victory and yet opened the door for government infringement of Aboriginal Rights. *Gladstone* was a technical victory for the Heiltsuk defendants (their right to trade herring spawn on kelp for commercial purposes was affirmed), but broadly expanded the areas in which government would be permitted to infringe Aboriginal Rights. *Delgamuukw* was hailed as a victory, although no Aboriginal Title anywhere has been affirmed, and the SCC structured a test for proof of Aboriginal Title which suggests that any Aboriginal Title they ultimately recognize will be limited in geographic scope and subject to a very broad justification/infringement analysis with the purposes of protecting third party interests in the land, and government’s ability to regulate with regard to those lands. These decisions, taken together, have the ultimate impact of limiting, confining and ultimately domesticating Indigenous Peoples aspirations.

While there are many diverse opinions on the result of s.35(1), when measured against the aspirations of Indigenous Peoples, constitutionalization has served to formalize

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<sup>167</sup> *Ibid.* at 231.

<sup>168</sup> This phrase was used by Russell, *supra* note 13; See also: Bakan, *supra* note 82 at 132.

earlier colonial relationships. Section 35(1) has emerged not as a shield protecting Indigenous Peoples' rights, but rather as a scale weighing the rights of Indigenous Peoples against the interests of broader Canadian society. Section 35 is not an "empty box" but neither has it served to protect or nourish distinct legal and political space for Indigenous Peoples aspirations. Section 35(1) is not an effective mechanism for the protection of Indigenous Peoples, but rather a legal mechanism for the containment, limitation and ultimate domestication of Indigenous Peoples aspirations.

It is within this judicial framework that Indigenous Peoples introduce their oral traditions in court. And the key diagnostics of the SCC's jurisprudence identified here (the assumption that Indigenous Peoples are lawless and in need of regulation, particularly for the protection of third party interests; defining Indigenous Peoples as subsumed within Canadian sovereignty; removal of Aboriginal Rights from the land, such that practices are protected but Title and jurisdiction over territories is not; and, removing Indigenous laws from the definition of Aboriginal Title and Rights) actively influence the ways in which oral traditions are received and interpreted in Canadian courts.

## **Chapter 3. Bundle of Sticks or a Living Tree: History's Consideration of Indigenous Oral Traditions**

### **A. Introduction**

Compare the different possibilities that are either opened, or closed, if an oral tradition is viewed as historic text versus as a living body of laws and traditions. History, as a reflection of past practices, events and realities, grows away from itself in time. Oral histories are judged according to accuracy and are subject to suspicion. Law, on the other hand, is expected to evolve, to draw from the past to respond to the present, to envision and build a future. For law, the ability to respond to, and incorporate, evolving circumstance is viewed as a positive and essential feature. For oral traditions, stripped of their legal content, a similar adaptation to changed circumstances is seen as rendering the information contained within the tradition invalid. When Indigenous oral traditions are introduced in courts they are often either introduced (or received) primarily as "oral histories" and suffer from this classification.

Oral history suggests that the contents are rooted in the past, and reflect solely upon the past. The oral tradition reflects a living tradition, with place in both the past and future. Oral traditions encompass oral history, but are broader. Drawn from the past, guiding the present and the future, oral traditions are alive and give life.

History, as a discipline, has influenced the ways in which Indigenous oral traditions are received and interpreted by courts. This chapter explores some of the ways in which a primarily historical classification and consideration has limited and constrained Indigenous oral traditions by casting doubt on their credibility and reliability and obscuring their legal content. It also explores the importance and role of oral traditions within Indigenous cultures

and highlights ways in which differing worldviews may distort their meaning when they are shared across cultures.

## **B. Construction of a Lawless Frontier and Transforming Indigenous Laws to Evidence**

At various points in Canada's past, Indigenous Peoples were respected as Nations, with separate legal orders, by the newcomers. As the power balance shifted, the oral traditions which embody and hold Indigenous Peoples laws came to be seen, in judicial considerations, as evidence but no longer as laws. This de-legalization tracks a process which occurred in general as power balances shifted between Indigenous Peoples and newcomers, evolving from a recognition of mutual authorities and nationhood, toward a situation where colonial governments and populations consolidated their economic, social and political power, then staked claim of authority to regulate and control Indigenous Peoples.<sup>169</sup> The Royal Commission on Aboriginal Peoples has characterized the relationships of early contact and settlement as one of mutual recognition.

[Newcomers] did not interfere in a major way with long-standing Aboriginal patterns of pursuing their livelihood and actually tended to build on Aboriginal strengths – hunting, fishing, trapping, trading, canoeing, or transportation – rather than undermine them. It is clear that the newcomers badly need the co-operation of the indigenous inhabitants if they were to realize the objectives that had attracted them to North America.<sup>170</sup>

Joanne Fiske has explored how Indigenous laws were displaced during colonization, using the example of the early settlement and contact period within British Columbia. Fiske argues that Indigenous laws were initially recognized to be the appropriate legal order for

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<sup>169</sup> Fiske, *supra* note 11.

<sup>170</sup> Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996) at 101 [RCAP, v. 1]. See also: Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada, 1996) [RCAP, v.2].

determining disputes between Indigenous Peoples and newcomers.<sup>171</sup> In direct proportion to the growth of newcomer populations existing Indigenous legal orders and Indigenous societies came to be defined as “lawless” by newcomer society. Recognition of Indigenous laws abated, and “a frontier subject to Indian law was [defined as] a ‘lawless frontier’.

Anyone who operated within the principles of Indian law, whether to control murder or to protect traditional rights, was deemed an outlaw”.<sup>172</sup>

Fiske argues that the move away from recognition of Indigenous laws was driven by a settler recognition that Indigenous Peoples were grounding calls for recognition of land and territorial rights on these customary laws: “[L]aw was seen as a tool for economic development and ...settlers turned to it to protect their property from Aboriginal claims and to advance their corporate interests at the expense of Aboriginal economies.”<sup>173</sup> The retreat from recognition of Indigenous laws was marked by a recognition of the “oral tradition”<sup>174</sup> which “delegalized” and instead “anthropologized” Indigenous laws. No longer assessing them as laws, but rather as “myth, legend, and folklore”:

And so...what had formerly been understood as Indian law was reduced to myths collected by anthropologists bent on salvaging cultural survivals and capturing dying memories of ancestral tales. And there it remained, for all but the Aboriginal peoples themselves, until a new era of land claims emerged.<sup>175</sup>

Increasingly, Indigenous oral traditions have been defined as “oral history” and conscripted into service as evidence when Indigenous Peoples appear before Canadian courts. The dominance of an historical framework arises from the tests that the SCC has

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<sup>171</sup> Fiske, *supra* note 11 at 268-278.

<sup>172</sup> *Ibid.* at 278, and also 280-289.

<sup>173</sup> *Ibid.* at 269.

<sup>174</sup> *Ibid.* at 276. Note, I have chosen to use the term oral tradition because I believe it more adequately reflects all the elements of these traditions, which while certainly legal, are broader. Borrows, 2005 (*supra* note 8) and Sakej, 2004 (*supra*, note 8), commenting on the legal content of oral traditions, use the term Aboriginal or Indigenous “jurisprudences” which I have also adopted here at certain points.

<sup>175</sup> *Ibid.* at 285.

established in s. 35 litigation which protect only those continuing Title or Rights rooted in the past.<sup>176</sup> Historic tests call for evidence of history. The dominance of an historical legal analysis is reinforced in the ways in which Indigenous Peoples bring their cases forward. The process becomes circular: the SCC has set tests which ask Indigenous Peoples to establish past practices, and Indigenous Peoples introduce oral history evidence to meet this test.

### **C. Historical Considerations**

By being one of the first academic disciplines to seriously consider oral traditions, history has influenced the manner in which these traditions (in their discrete tellings or recitals) have been understood within society, and consequently, within the legal system. Considerations of oral traditions within the discipline of history reflect an evolving understanding of the knowledge base that constitutes “history” and shifting definitions of what is valid historical knowledge. Two trends in particular have influenced history’s considerations of the oral tradition: (1) Challenges arising from within the discipline of history itself questioning the written historical record as accurate or complete, thus making room for the competing narratives offered by Indigenous oral traditions; and, (2) increased reliance on oral histories (oral documents, or told histories) as a source for doing history in response to changing social norms and calls to explore the life experiences and histories of marginalized groups ordinarily not reflected in history books.

E.H. Carr was one of the earliest historians to challenge the view of history as capable of revealing “ultimate” truth, and advocated an evolving understanding of history as a

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<sup>176</sup> Aboriginal Rights at the time of contact (*Van der Peet*, *supra* note 43), Aboriginal Title at the time of sovereignty (*Delgamuukw*, *supra* note 45), and for Métis Aboriginal Rights, at the time of “effective imposition of European control” of a territory (*R. v. Powley*, [2003] 2 S.C.R. 207 at para. 17 [*Powley*]).

constant state of flux and flow, defined in each period, and perhaps at each moment, by those facts and experiences that the historian chooses to focus on.<sup>177</sup> Carr dismissed a positivist view of history as a “cult of facts”,<sup>178</sup> or “fetishism” of facts and documents which ignores the fact that the written record is itself “processed”.<sup>179</sup> Carr challenged the prevailing “common-sense” view of history as a knowable body of definitive facts, and argued that all history involves a selection process, driven both by the prevailing culture and individual historians, concluding that “facts are available to the historian in documents, inscriptions, and so on, like fish on the fishmonger’s slab. The historian collects them, takes them home, and cooks and serves them in whatever style appeals to him.”<sup>180</sup> Yet, Carr rejects even this analogy as not fully reflecting history’s selectivity:

The facts are really not at all like fish on the fishmonger’s slab. They are like fish swimming about in a vast and sometimes inaccessible ocean; and what the historian catches will depend partly on chance, but mainly on what part of the ocean he chooses to fish in and what tackle he chooses to use – these two factors being, of course, determined by the kind of fish he wants to catch.<sup>181</sup>

Paul Thompson describes increasing challenges to the validity of written history as a source for revealing absolute truth as carried through assertions that written history “lost its innocence” as it came to be “understood to have potential value as future propaganda.”<sup>182</sup> By interrogating history’s claim of being a science capable of revealing the truth, the work of Carr and others rendered prevailing views of Indigenous Peoples, and Indigenous/non-Indigenous relations, challengeable. It was now possible, for example, to challenge history’s

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<sup>177</sup> Carr, Edward Hallett, *What is History?* (New York: Alfred A Knopf, Inc., 1965) [Carr].

<sup>178</sup> *Ibid.* at 5.

<sup>179</sup> *Ibid.* at 15-16.

<sup>180</sup> *Ibid.* at 6.

<sup>181</sup> *Ibid.* at 26.

<sup>182</sup> Thompson, *supra* note 29 at 56.

accounting of Indigenous Peoples (pre-contact) as living in an uncivilized state, without benefit of laws or higher social organization.

At the same time that ways of doing history have been challenged from the perspective of whether a definitive view of history is possible, historians have advocated for the increased use of oral histories as a source for revealing the lived experiences of those outside of the mainstream whose experiences have not been reflected in history books. Starting with the premise that “[a]ll history depends ultimately on its social purpose”<sup>183</sup> Thompson argues for the use of history as part of an emancipatory social project, challenging the dichotomy that exists between oral and written histories by simultaneously arguing for increased recognition of the accuracy of the oral record, while challenging the accuracy of the written record by outlining instances in which written accounts are incomplete or inaccurate.<sup>184</sup>

This strand of modern history has validated and forwarded the experiences of women, labour and others through the use of oral histories to document experiences of those groups otherwise excluded from the historical record. A central claim of this new approach to history is that, by staking for itself the only rational and scientific ground for knowing the past, history has operated to politically marginalize different peoples and sectors of society.<sup>185</sup> This openness has resulted in the willingness to consider Indigenous oral traditions as yet another source for doing history. However, at the same time, these developments are not necessarily positive when considered from the standpoint of Indigenous Peoples’ reliance on their oral traditions in the Canadian legal system.

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<sup>183</sup> *Ibid.* at 1.

<sup>184</sup> *Ibid.* at 119.

<sup>185</sup> Thompson argues that, with the increased openness to oral traditions, “witnesses can ... be called from the under-classes, the underprivileged, and the defeated” (*ibid.* at 7).

Examinations of the social utility of history have given rise to legal suspicions that oral traditions are subject to a self-serving bias, and manufactured (or edited) to suit present evidentiary requirements. The shift of focus within the discipline of history from the ascertainment of historic facts towards an exploration of the social utility of history has led to the assumption that the recall of oral traditions is goal driven.<sup>186</sup> The assumption that all history is subjective suggests that all oral history or tradition is modified to serve modern purposes. The argument is not that Indigenous Peoples, *per se*, change their oral traditions, but rather that all peoples change their concepts of history to serve present day interests and objectives. The discipline of history has both cleared the way for an examination of Indigenous oral traditions as a valid historical source, and through this examination, sharpened the focus on the historical content of oral traditions, often to the exclusion of other (and arguably more definitive) elements, including social, legal, and spiritual content.

**D. Bundle of sticks or a Living Tree: Individual and collective concepts of oral traditions**

A distinction exists between viewing oral traditions as reliant upon individual memory and recall, and of reflecting (to varying and waning degrees of accuracy) an original event; or, alternatively, as a collective and shared medium which exists outside of any one individual. Debates about historical accuracy and the nature of knowledge (or, culture) as individual or collective inform interpretations of the reliability and accuracy of oral traditions. Viewed individually (as one amongst a bundle of sticks) oral traditions are

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<sup>186</sup> See e.g.: Vansina "[e]very traditional message has a particular purpose and fulfills a particular function, otherwise it would not survive" (*supra* note 26 at 100) and "all messages have some intent which has to do with the present" (*ibid.* at 92). Katherine Franke ("The Uses of History in Struggles for Justice: Colonizing the Past and Managing Memory" (1999-2000) 47 U.C.L.A. L. Rev. 1673) argues that the social construction of history is a process in which humans colonize the past through the tellings and re-tellings of memory.

vulnerable and easily devalued. Viewed collectively (as a living tree) oral traditions are strong and flexible, enjoying a vibrancy that does not depend upon individual renditions.

To simply say that Indigenous cultures are collective (and, consequently, so too are the “rights” courts will consider for constitutional protection) fails to account for the differing definitions of “collective”, or to identify how different conceptions of what “collective” means impact upon the legal considerations of Indigenous oral traditions.<sup>187</sup>

Marlee Kline has observed how an “individuation” process can render invisible the operation of dominant legal and social structures by locating problems as primarily individual rather than as a reflection of overarching power relations.<sup>188</sup> When Indigenous Peoples give oral tradition evidence this is in support of the collective aspirations of their People. Yet, this evidence is assessed individually. Collective aspirations are rendered vulnerable to individual frailties. Due to the nature of the legal system, it may be that the “right” (to gather, fish, hunt, and so forth) of an entire Peoples, both now and into the future, rests upon one judge’s assessment of the oral tradition evidence presented by individuals. The doctrine of *stare decisis* makes it very difficult for other members of an Indigenous Nation to challenge a finding that no right exists once this matter has been litigated.

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<sup>187</sup> See these references to the collective nature of Aboriginal Title, Rights and Treaty Rights: *Van der Peet*, (*supra* note 43 at para. 46. Emphasis added) “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal *group* claiming the right.” [the rights are] held by a collective and are in keeping with the culture and existence of that group.”; *Sundown* ([1999] 1 S.C.R. 393 at para 36 [*Sundown*]), “Any interest in the hunting cabin is a collective right that is derived from the treaty and the traditional expeditionary method of hunting. It belongs to the Band as a whole and not to ... any individual member”; and, *Delgamuukw*, (*supra* note 45 at para. 115) “A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation.”

<sup>188</sup> Marlee Kline, “Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women” (1993) 18 Queen’s L.J. 306 [Kline, 1993]. This observation is made in the context of child welfare law where mothers are assessed outside of their social context, thus justifying the removal of their children, based on their “individual” problems without a broader examination of the ways in which race and gender are implicated in these decisions. See also: Roland Chrisjohn, Sherri Young and Michael Maraun, *The Circle Game: Shadows and Substance in the Indian Residential School Experience in Canada* (Penticton: Theytus Books, 1997).

There are two primary definitions of the collective nature of knowledge or memory which impact upon the reception of Indigenous oral traditions in legal forums: (1) knowledge or memory as an aggregate of individual memories (“collected” memories, which rely on an individualist premise), and (2) *collective* knowledge and memory which exists independently of any one individual, and reflects upon entire cultures and societies. Jeffrey Olick summarizes the individualistic approach to memory as grounded in the belief that “only individuals remember, though they may do so alone or together” and thus shared features of a collective culture are “interpretable only to the degree to which they elicit a reaction in some group of individuals.”<sup>189</sup> In contrast, a collective definition of memory asserts that it “is not just that we remember as members of groups, but that we constitute those groups and their members simultaneously in the act (thus re-member-ing).”<sup>190</sup>

A conception of oral traditions as being carried by, or reliant upon, any one individual makes them suspect. Memories and knowledge, from an individualistic perspective, are vulnerable to charges of faultiness or bias and reflect one person’s interpretation and not the living cultural reality of a people. Viewing oral traditions as historical texts, held in different versions by different individuals, leads to a fundamentally different result than viewing oral traditions as constitutive of, and constituted by, a People.

A collective and societal formulation of memory suggests that Peoples are created and transformed in the very acts of the telling, recollecting and sharing, and offers more nuanced possibilities for engaging with Indigenous oral traditions. An understanding of the collective nature of oral traditions as an aggregate of individual memories posits the

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<sup>189</sup> Olick, Jeffrey, “Collective Memory: The Two Cultures” (1999) 17 *Sociological Theory* 333 at 338 [Olick].

<sup>190</sup> *Ibid.* at 342. See also Timothy Gongaware, “Collective Memories and Collective Identities: Maintaining Unity in Native American Educational Social Movements” (2003) 32:5 *J. of Contemporary Ethnography* 483 at 515 (“Collective identities are ongoing interactive processes that, through the conduits of collective memory creation and collective memory maintenance, forge and maintain a unity among movement members”).

collective as a bundle of sticks, composed of individual knowledges. While together the bundle may be strong, individual sticks are capable of being examined separately from the rest, and subject to the frailties of this individual premise. An understanding of the collective nature of oral traditions as living through and within the collective societies and peoples who carry them forward (who both create and are created by their engagement within the oral tradition) represents a living tree which continues to live, to evolve, and to remain relevant. Oral traditions, viewed as a living tree, remain deeply rooted in the living cultures of Peoples and are less vulnerable to individual changes and interpretations.

*(i) A Bundle of Sticks: Individualistic conceptions of Indigenous oral traditions*

The frailties of human memory are often referred to as a basis for diminishing and devaluing evidence offered in the Indigenous oral tradition.<sup>191</sup> Frailties of human memory arguments draw upon an individualized understanding of memory and fail to account for the collective aspects of Indigenous oral traditions. Viewing oral traditions as simply a “document” which is transmitted over generations (as a faulty photocopy which becomes fuzzy and loses details after multiple transmissions) negates the fact that the oral tradition lives amongst and within the culture of a people. As Robin Ridington has argued:

Human communication is more than the simple transfer of objective information between impartial and interchangeable intelligences. Humans do not just copy and transmit information in the way that one computer communicates with another. Human communication also creates a point of view or a context within which information become imbued meaning. Human communication is a cultural accomplishment and a means of defining cultural identity.<sup>192</sup>

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<sup>191</sup> See for example: *R. v. Dick*, [1989] 1 C.N.L.R. 132 (B.C. Prov. Ct.) (QL) [*Dick*] (“The history of the Indian people of the west central coast of Vancouver Island, in common with that of other Indian peoples of North America, is an oral history. It is consequently not known in detail and is subject to the frailty of human memory, but there is no disputing that these people have an ancient history.”); *Attorney-General for Ontario v. Bear Island Foundation et al.*, [1985] 1 C.N.L.R. 1 (Ont. S.C.) (QL) [*Bear Island*] (“while oral evidence must be weighed like other evidence, consideration must be given to the faultiness of human memory.”)

<sup>192</sup> Ridington, *supra* note 31 at 275. See also Borrows, 2001, *supra* note 8.

One of the earliest explorations of the use of oral traditions as a source for doing history is contained in the works of Jan Vansina who studied African oral traditions.<sup>193</sup> Vansina's conception of oral traditions is fundamentally, though not exclusively, based on an individualistic premise. Despite the fact that the conception of oral traditions offered by Vansina is primarily individualistic, he argues that a contextual analysis is necessary to even partially understand the information transmitted through oral traditions, noting that, even for those familiar with a language, "all sorts of cultural clues as to the meaning of the message remain unperceived" for those who attempt to hear and understand a message from outside of a culture.<sup>194</sup> Vansina discusses oral tradition as a series of oral "documents" and investigates whether or not these can be a useful source to give "evidence" (in an historical sense) of actual facts and events. Vansina describes the oral tradition as both process (rendering of messages over generations) and product (message at any given time in the chain of transmission). While oral traditions are historical in nature, they are nonetheless "but a rendering at one moment".<sup>195</sup> For Vansina, oral traditions

should be seen as a series of successive historical documents all lost except for the last one and usually interpreted by every link in the chain of transmission. It is therefore evidence at second, third, or nth remove, but it is still evidence unless it be shown that a message does not finally rest on a first statement made by an observer.<sup>196</sup>

Under this conception, oral traditions are essentially linear, and any assessment of their validity must be measured by each individual rendering. For Vansina, while oral

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<sup>193</sup> Very few studies have specifically considered Indigenous Peoples' oral traditions. As a result, assumptions drawn from studies of the oral tradition of other Peoples is often imported to Indigenous Peoples (e.g., studies which have drawn conclusions from the analysis of the oral traditions of African Peoples, or within different sectors of Western societies). Caution is necessary against the broad based incorporation of this research to Indigenous Peoples. By way of illustration, both British and Chinese cultures developed writing systems historically, and saying that these two cultures are similar would be just as facile as comparing Indigenous Peoples of the Americas with African Peoples, and would fail to explore the animating principles of their societies and cultures.

<sup>194</sup> Vansina, *supra* note 26 at 82-83.

<sup>195</sup> *Ibid.* at 3.

<sup>196</sup> *Ibid.* at 29. For a critique of this approach see Borrow, 2001, *supra* note 8.

traditions rely upon a shared cultural context, they are inescapably individual in that they are shared or transmitted by individuals and thus subject to the frailty of any given individual's memory. Memory itself, for Vansina, is an individual process that draws on a shared cultural pool, "most information relating to oral traditions is not available in discrete packages, but is drawn from a single pool – pool which exists only in memories".<sup>197</sup> Oral tradition, from this perspective, relies upon the memory of individual's to access the shared cultural pool to reveal facts that are contained within it.

Vansina concludes that there is difficulty in assessing the accuracy of historical facts contained within oral traditions, and identifies a number of limitations to historical accuracy including the collapsed sense of time, selectivity of interpretations, and "accumulat[ion of] interpretations as they are being transmitted."<sup>198</sup> Vansina ultimately concludes that while the information contained in the oral tradition may be of a "lower order of reliability, when there are no independent sources to cross-check,"<sup>199</sup> nonetheless "by and large they hold up well",<sup>200</sup> particularly where they reflect upon events in the more immediate or recent past. Understanding Indigenous oral traditions within this framework raises questions about the frailties of the traditions, primarily in the suggestion that with each new telling the faithfulness to the originating event grows weaker.

Another commentator who has considered Indigenous oral traditions from an individualistic perspective is Alexander von Gernet.<sup>201</sup> Two separate classifications of oral traditions emerge from von Gernet's work: "Oral traditions are narratives transmitted by

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<sup>197</sup> *Ibid.* at 147.

<sup>198</sup> *Ibid.* at 186-199.

<sup>199</sup> *Ibid.* at 199.

<sup>200</sup> *Ibid.* at 147.

<sup>201</sup> von Gernet, 2000 (*supra* note 30) and von Gernet, 1996 (*supra* note 30). John Borrows (Borrows, 2001, *supra* note 8) notes that von Gernet was hired to produce a report for the RCAP and that the definition of oral traditions contained in RCAP, in part, reflects attempts to dichotomize oral traditions and histories.

word of mouth over at least a generation. Oral histories are recollections of individuals who were eyewitnesses or had personal experience with events occurring within their lifetime.”<sup>202</sup>

Oral histories under this conceptualization are based on the individual life time recollections or fairly immediate (in an historical sense) generations, oral traditions, on the other hand, have traveled too far from the originating event and have thus lost reliability and are better viewed in a folkloric context, as revealing perspectives but not historic facts. Von Gernet shares the suspicion, raised by Vansina, that oral traditions provide a less than accurate source for revealing the past and that corroborating evidence (including archaeological data and written documents) is required before the information contained in oral traditions can be accepted.<sup>203</sup> Von Gernet’s work (insofar as oral traditions have been subject to legal examination) has influenced Canadian jurisprudence on the accuracy or reliability of Indigenous oral traditions, and is discussed further in the following chapter.<sup>204</sup>

The formulation of oral traditions forwarded by both Vansina and von Gernet as individuated – a series of oral texts recording original events, transmitted through a chain of tellings – has come to dominate legal considerations and is a central concern of courts in weighing and assessing Indigenous oral traditions. The SCC affirmed the concept of “oral histories” as a series of oral documents passed over the generations, with the observation in *Kruger v. The Queen* that oral history consists of “out of court statements, passed on through an unbroken chain across the generations of a particular aboriginal nation to the present

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<sup>202</sup> Von Gernet, 1996, *ibid.* at 7.

<sup>203</sup> For a contrary view, see Cruikshank (*supra*, note 32 at 22) who has observed that a “textual emphasis in legal and cultural studies still reinforces a century-old tendency to evaluate oral traditions as written words and to search for literal meanings that might be compared with competing forms of evidence.”

<sup>204</sup> This is because von Gernet is often called as a Crown witness in court proceedings where Indigenous Peoples seek to rely upon their oral traditions to establish legal claims, and his testimony has been very compelling for many courts. A fuller discussion follows in Chapter 5.

day.”<sup>205</sup> Assigned the characterization of individual texts, transmitted orally (losing their ability to clearly reflect on an initiating event over time) has rendered Indigenous oral traditions a suspect form of both history and evidence: The bundle of sticks can be opened, individually examined, broken and discarded.

(ii) *A Forest of Living Trees: Collective understandings of Indigenous oral traditions*<sup>206</sup>

Recognition of the fundamentally social aspects of oral traditions suggests profound possibilities for revealing ways in which oral traditions are more than individual recollections of a factual/historical nature but are living traditions, which retain the collective consciousness of the shared factual history of the People, but are far broader. Oral traditions in this conceptualization are akin to a living tree which stands today with its roots firmly planted in the past, nourishes the present, while reaching forward to the future. As Cruikshank has observed, the trend has been from investigations of oral traditions by historians and anthropologists “primarily with reference to questions about accuracy, objectivity, reliability, and verifiability” toward investigations of “how oral narratives intersect with social practice, how they continue to provide a framework for understanding contemporary issues, and how stories are inevitably part of larger social, historical, and political processes.”<sup>207</sup> In discussing her work with Yukon elders, Cruikshank notes that stories provide “pivotal philosophical, literary, and social frameworks essential for guiding

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<sup>205</sup> [1978] 1 S.C.R. 104 at 109 [*Kruger*].

<sup>206</sup> With thanks to the Peter Nabokov’s titling of his work on Indigenous oral traditions, *A Forest of Time* (*supra* note 25).

<sup>207</sup> Cruikshank, *supra* note 32 at 3.

young and not-so-young people, framing ways of thinking and how to live life appropriately. These narratives erased any distinction between 'story' and 'history'."<sup>208</sup>

Elizabeth Tonkin is an historian who has studied oral traditions and who offers a more nuanced view.<sup>209</sup> A key point of departure in Tonkin's work is a movement away from an individualized assessment of the oral tradition toward a societal view which sees information as being held within cultures and communities, rather than individually. The construction of a social self is important to Tonkin's understanding of the oral tradition and her central premise is that people cannot be seen as distinct from tradition. She attacks the division between individual and society, claiming that to view the memories reflected in the oral tradition as being "individual" expressions is part of a larger bias within Western society where "individuals appear as atoms, aggregated to form the mass."<sup>210</sup> She advocates, instead, for a conception of the oral tradition from a social perspective that acknowledges that "memory and cognition are partly constituted by social relations and thus are also constitutive of society. We are all simultaneously bears and makers of history".<sup>211</sup> Tonkin argues that oral traditions reflect collectively the past and present societies of people: "[W]e make ourselves and others, cumulatively, and build a directive consciousness as part of the socialization which humans have to experience if they are to become cultural beings."<sup>212</sup>

Peter Nabokov was one of the first historians to explore Indigenous Peoples' oral traditions directly. Nabokov advocates a historicity that draws from the field of anthropology to understand Indigenous oral traditions from an emic perspective (from within the cultures

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<sup>208</sup> *Ibid.* at 13.

<sup>209</sup> Tonkin, *supra* note 27. Tonkin, like Vansina, also studied African oral traditions, and so a similar note of caution is necessary in simply importing her work to the consideration of Indigenous Peoples of the Americas.

<sup>210</sup> *Ibid.* at 48.

<sup>211</sup> *Ibid.* at 97.

<sup>212</sup> *Ibid.* at 117.

that originate them) and with reference to the symbols and structures of the society itself “to grasp the meanings of the forms and contents of these [oral] texts in their own cultural terms.”<sup>213</sup> Historicity, as a methodology, does not merely seek to ascertain the facts, but rather to explore Indigenous Peoples’ ways of “doing” history by focusing on the importance of historical accounts within Indigenous societies. Historicity emphasizes the living nature of historical accounts and the way in which they actively engage and connect Indigenous Peoples to past and future generations. Nabokov claims that history’s objective has been to “establish chronologies [and] to sift historical fact from mythical fancy” – a process in which the meanings and truths of oral traditions are lost - and thus sets the goal of his work, “the elusive quarry: the underlying whys and wherefors for all expressions of American Indian historical thought, whether of the spoken, written, crafted, or danced varieties.”<sup>214</sup>

Historicity allows for some recognition of the broader aspects of the oral tradition, including that oral traditions must continue to evolve to remain relevant (applying ancient forms to new circumstances): “[G]iven their ‘presentist’ mandate, most Indian historical forms are forever ‘under construction’. What is deemed traditional, historical, or even sacred to one generation may subtly shift categories in the next, and Indians should not be penalized for keeping their histories pertinent.”<sup>215</sup> Nabokov’s notion of historicity hints at the legal aspects of Indigenous oral traditions, with the observation that “[k]eeping many versions of its primordial claims and cultural experiences fluid and available for discussion enables a society to check and adjust its course through uncertain times.”<sup>216</sup> For example, in his

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<sup>213</sup> Nabokov, *supra* note 25 at 21, citing Bernard S. Cohn, *Anthropologist Among the Historians and Other Essays* (New York: Oxford University Press, 1990) at 68-69.

<sup>214</sup> *Ibid.*

<sup>215</sup> *Ibid.* at 26. Compare this analysis of history (invalid because it possibly shifts) versus an analysis of law (which is expected to shift to contain and respond to new social situations).

<sup>216</sup> *Ibid.* at 47.

discussion of the potlatch system of the North West Coast, Nabokov recognizes that the oral tradition, tied as it is to the land, has legal implications for Indigenous Peoples: "On the Northwest Coast, public recitations of such narratives still function as Native America's most legalistic hybrid of history and geography, lending approximations of the non-Indian practices of posting a 'land deed' and registering a 'historical copyright'."<sup>217</sup>

Nabokov claims that there is a fluid nature to Indigenous oral tradition, which he identifies as the "pragmatics of Indian mythology", and argues that this "mythic revisioning" does not diminish oral traditions but rather "enriches its power as a sacralizing, truth-decreeing strategy."<sup>218</sup> While Nabokov defends the fluidity of oral traditions from an historical perspective (arguing for a continued recognition of the validity of the factual record) it is easily approachable and understood from a legal one, where it is commonly accepted that while core justice values of a society remain stable, their expression across generations may evolve. Different possibilities emerge when oral traditions are seen to embody and hold laws and values, as opposed to mere historic content.

(iii) Oral Traditions: Rooted in the Land

Many commentators on Indigenous oral traditions have observed the importance of land and territory as the bedrock of Indigenous oral traditions, and suggested that oral traditions cannot be understood without reference to territory. Nabokov's work is very conscious of the *dimensional* sense of Indigenous Peoples' oral traditions, tied to the land,

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<sup>217</sup> *Ibid.* at 140. For further information on the idea of the oral traditions of the Pacific Northwest Nations as a form of land deed see also: Philip Drucker, *Cultures of the North Pacific Coast* (San Francisco: Chandler Publishing Co., 1965) and *Potlatch: A Strict Law Bids Us Dance* (video recording) (Alert Bay: U'Mista Cultural Centre, 1975).

<sup>218</sup> *Ibid.* at 92. An illustration of the need to keep Indigenous oral traditions alive and fluid is found in the debate which occurs in the Indigenous community about whether or not to reduce oral traditions and the laws located within them, to writing, to "codify" those laws. A strong argument against codification is the fear that this would translate the laws from a living and evolving tradition to words on pages.

where “the places themselves talk back.”<sup>219</sup> The land, within Indigenous oral traditions, is a living presence, rather than an inanimate object: “Mountains, canyons, springs, rivers, and trees often enjoyed the capacity for volition and intentionality. They demanded allegiance to and remembrance of their significance as full players in tribal passages through time.”<sup>220</sup>

Deloria refers to the way that land is reflected in Indigenous oral traditions, and how the diversity of oral traditions stems from the diversity of the territories which gave rise to them: “People believed that each tribe had its own special relationship to the superior spiritual forces which governed the universe and that the job of each set of tribal beliefs was to fulfill its own tasks without worrying about what others were doing.”<sup>221</sup> Along similar lines, Howe has observed that “when lands and peoples are both chosen and matched together in a cosmic plan, the attachment to the land by the people becomes something extraordinary and involves a sense of identity and corresponding feeling of responsibility.”<sup>222</sup> Ridington articulates the relationship between Indigenous oral traditions and the land as a discourse connecting the people to the land:

The oral traditions of people who are native to this land are a form of discourse that connects them to the land and to the generations that have gone before. Their discourse has given them a highly developed form of government that is different from our own. Their discourse honours individual intelligence rather than that of the state. Their discourse also demands a responsibility to past generations, to the land, and to generations as yet unborn. Their discourse honours and enables both individuality and social responsibility.<sup>223</sup>

Weaver has commented on the importance of lands in Indigenous cultures, and the costs to Indigenous Peoples and cultures of a denial of that relationship, as follows:

When Natives are removed from their traditional lands, they are robbed of more than territory; they are deprived of numinous landscapes that are central to their faith and their identity, lands populated by

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<sup>219</sup> *Ibid.* at 1.

<sup>220</sup> *Ibid.* at 133.

<sup>221</sup> Deloria, *supra* note 21 at 51.

<sup>222</sup> Howe, *supra* note 7 at 165-166.

<sup>223</sup> Ridington, *supra* note 31 at 276.

their blood relations, ancestors, animals and beings both physical and mythological. A kind of psychic homicide is committed.<sup>224</sup>

The living nature of the land, the personality of the land, and Indigenous oral traditions are inextricably linked. The connection, from an Okanagan perspective has been described in these terms:

The land forms in the stories are teachings and are reminders to each generation, that the land is at the centre of how we are to behave. The destruction of the story land marks and natural land forms are like tearing pages out of a history book to the syilx. Without land knowledge we are endangered as a life form on that land and we in turn endanger other life forms there.<sup>225</sup>

Consider, also, this list of different forms of oral traditions that teach people how to live with water, and to honour the relationship between water and human beings:

There are stories that tell of Supernatural beings that live beneath the oceans, and beneath the seemingly calm surfaces of mountain lakes.

There are dances that celebrate the coming of Water to the dry and parched desert lands, bringing sustenance yet again for the people.

There are prayers that recognize Water as the first living thing on this earth, calling forth all other life.

There are songs that celebrate the sharing of the wealth of the Water to bring life for the people.

There are stories that remind us that our ancestors live in, and through, Water and that Water connects us with our past and our futures, flowing through time, sustaining us today as it sustained our great-great grandmothers.<sup>226</sup>

My own understanding is that the land taught the people how to live upon it, that people were placed at particular areas of the land and given the laws and teachings that would help them to live peaceably and properly upon the land. In this sense, Indigenous laws and legal orders arose from and continue to be sustained by the land. This fact explains the plurality of Indigenous laws and of our need, when traveling upon the territories of other nations, to respect their laws. Indigenous Nations, who live on oceans, prairie plains, or arctic tundra, have need for different laws and different social organizations, because it is the

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<sup>224</sup> Weaver, *supra* note 17 at 42-43.

<sup>225</sup> Milk from the Land, *supra* note 34 at 4.

<sup>226</sup> Ardith Walkem, (ed.), *Lifeblood of the Land: Aboriginal People's Water Rights in British Columbia*. Environmental-Aboriginal Guardianship through Law and Education (E.A.G.L.E.): Vancouver, 2003) at 1-2.

goal of laws to teach people to live together with other life, and the land that supports that life. Turner offered this description of the connection between Indigenous oral traditions and land:

Ownership, in the Indigenous context, involves understanding Indigenous peoples' profound connection to their homelands. The notion of a "homeland: is not simply lands, but everything around one's world: land, air, water, stars, people, animals, and especially the spirit world. Understanding the balance in one's world takes a long time, and one cannot hope to learn these relationships without being guided by people who possess, and practice, these forms of knowledge. This knowledge is passed on by the oral traditions of the community, and virtually every Indigenous community practices the oral traditions in one form or other. The knowledge gained from the oral traditions shapes one's understanding of the world, it gives the world meaning.<sup>227</sup>

As this discussion has shown, understanding the ways in which oral traditions are alive requires recognizing that they are rooted in the land, and their underlying structures and messages often involve a discourse which connects and reaffirms Peoples' relationships with the land. Nabokov has suggested that this understanding might help to explain different notions of time between Indigenous and Western society. Nabokov suggests that "the preeminence of topography over chronology remains a key diagnostic of Indian historicity in general" and that it is relationships with the land which guides and constructs Indigenous oral traditions (a situation he contrasts to Western notions of history or knowledge, which most often structure knowledges according to "time").<sup>228</sup>

(iv) Differing Worldviews (Sticks obscuring the Trees)

One might be forgiven for thinking that these divergent discussions are about completely different phenomenon.<sup>229</sup> The trouble, of course, is that when Indigenous

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<sup>227</sup> Turner, 2004, *supra* note 9 at 236. See also Salmon's description of the notion of kincentric ecology underlying Indigenous Peoples' relationships with their territories and all life that shares that territory (Salmon, *supra* note 163).

<sup>228</sup> Nabokov, *supra* note 25 at 131, citing Vine Deloria Jr. for this proposition in *God is Red: A Native View of Religion* (Golden, Colo: Fulcrum Publishing, 1994).

<sup>229</sup> For an interesting exploration of the debate about the accuracy or reliability of oral traditions see the following three sources: (1) the oral account: Rigoberta Menchu, *I, Rigoberta Menchu, an Indian woman in Guatemala* (London: Verso, 1984); (2) the skeptical response (similar to the methodology employed by von

Peoples seek to rely upon their oral traditions in court they are subject to weighing and assessments by judges and counsel who often have no (or very little) idea of what oral traditions are. In the context of his analysis of the *Delgamuukw* (B.C.S.C.) decision, Fortune suggests that one reason the trial judge came to the decision he did was his inability to conceive of “historical knowledge that challenged his own so fundamentally” and that without a willingness and commitment for making space for different ways of knowing and historical knowledge, “the law is likely to do no more than entrench its own historicity and all the inequities of the past that it tries so hard to escape.”<sup>230</sup> Understanding oral traditions as part of a living culture has been particularly difficult for courts to do and has lead many to simply dismiss these traditions. From this very cursory review of differing ways of conceptualizing oral traditions, it is clear that cultural prescriptions and presumptions remain at the core of all attempts to either engage with, or understand, Indigenous oral traditions. Further, that a primarily historic analysis of oral traditions is fundamentally impoverished.

Many commentators have explored the ways in which different ways of seeing and understanding the world can prevent non-Indigenous People from understanding (or even seeing) the content of oral traditions. Jo-ann Archibald is an educator who has examined the oral traditions of the Coast Salish (and primarily of her own Sto:lo People), asking whether, and how, Indigenous oral traditions can be incorporated into education curriculum.

Archibald’s work poses larger questions about the remove which can exist between the context in which oral traditions exist and the mediums in which they are shared, while still

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Gernet) which claims to give an objective assessment: David Stoll, *Rigoberta Menchu and the story of all poor Guatemalans* (Boulder, Co: Westview Press, 1999); and, (3) questioning the objectivity of the objective assessment: Nelly Stromquist, “On truth, voice, and qualitative research” (2000) 13:2 Int’l J. of Qualitative Studies in Education 139.

<sup>230</sup> Joel Fortune, “Constructing *Delgamuukw*: Legal Arguments, Historical Argumentation, and the Philosophy of History” (1993) 51 Univ. Fac. L. Rev. 80 at 114 [Fortune]. See also Russell Binch, “Speaking for Themselves? Historical Determinism and Cultural Relativity in *Sui Generis* Aboriginal and Treaty Rights Litigation” (2002) 13 N.J.C.L. 245 [Binch].

retaining meaning, and engages the question of whether oral traditions can be understood outside of the cultures that gave rise to them.

Archibald identifies Indigenous oral traditions as a process that one must be engaged in to glean its meanings or structures, and rejects the idea that oral traditions can exist as a subject of study cognizable from the outside. Archibald utilizes a concept of “storywork” to frame her discussion of the Coast Salish oral tradition.<sup>231</sup> Storywork is not a process where only one person (storyteller/witness in court) gives and the other (listener/finder of fact in court) passively receives, it is an active and reciprocal process which requires mutual efforts and actions to proceed. Understanding oral traditions requires a form of immersion and an engagement extending beyond and deeper than an honest desire to learn and understand.

The definition that Archibald offers of the oral tradition suggests this conclusion: understanding and participating in the oral tradition is “work”, the oral tradition does not exist outside of this process, it is the shared process of dialogue. Passive reception is impossible, understanding requires an active engagement within the varied oral traditions or Indigenous Peoples:

Each Aboriginal Nation has particular traditions, protocols, and rules concerning stories and the way that stories are to be told for teaching and learning purposes. The types of stories can vary from the sacred to the historical; from the development and perpetuation of the social/political/cultural ways to the personal life experiences and testimonials. ...The power of storywork creates a synergistic effect among the story, the context in which the story is used, the way the story is told, and how one listens to make meaning.<sup>232</sup>

In Western societies and courts information or knowledge is transmitted in a linear fashion, traveling neatly from point A to point B to point C. To some Indigenous Peoples, this may seem illogical and bare (facts without context), and possibly even intrusive, or

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<sup>231</sup> Archibald, *supra* note 18 at 3 (note 3). Storywork refers to “orality and oral tradition” referring to “First nations traditional cultural and life experience stories” as well as “speechmaking, verbal instruction, song, and dance.”

<sup>232</sup> *Ibid.* at 92.

worse, ineffectual. Learning within Indigenous societies, and within the oral tradition is an involved process which does not neatly package and deliver meanings, but invites the listener to explore, to think, to follow pathways leading to the conclusions. Evidence offered in the oral tradition may reflect this style of learning and communication, and thus may be dismissed as lacking specificity or failing to get to the point.<sup>233</sup>

Archibald's conclusion that storywork requires immersion is illustrated in her unease with the written works of ethnographers who have attempted to capture and reflect Indigenous oral traditions in written form. She emphasizes that her point is not intended as criticism of ethnographers, but

“that, at most, the reader can glean an introduction to Aboriginal culture and oral tradition through ethnography, even if presented...well. If the reader wants to begin the process of understanding the oral tradition, she/he cannot be a passive observer or reader. ...[T]he oral tradition “implicates the ‘listener’ [reader] into becoming an active participant in the experience of the story”<sup>234</sup>

Ultimately, she concludes that: “Neither ethnographic detail, no matter how ‘rich and thick,’ nor ethnographic interpretation no matter how close to ‘truth’ can replace living with the people and being “initiated” into their cultural community.”<sup>235</sup> Oral traditions can become orphaned of meaning when presented out of context.

Archibald's observation that both listener and teller invigorate and give meaning and content to oral traditions is also expressed in the work of Greg Sarris.<sup>236</sup> Sarris is a Coast Miwok/Pomo man who explores the oral tradition of the Cache Creek Pomo Peoples to explain why and how oral traditions are read in different cultural contexts. Sarris argues that both the teller and listener are active participants in jointly constructing a story. Sarris

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<sup>233</sup> *Ibid.* at 10. I have also heard this process described as akin to a shared journey whereby the teller deposits small stones or pebbles along the journey. The listener's job is to follow carefully along and to gather those stones and pebbles, to examine each, and to make sense of their collective meaning.

<sup>234</sup> *Ibid.* at 164. (Citing Armand Ruffo “Inside looking out: Reading Tracks from a Native perspective” in Jeanette Armstrong, ed., *Looking at the words of our people: First Nations analysis of literature* (Penticton: Theytus Books, 1993)).

<sup>235</sup> *Ibid.* at 40.

<sup>236</sup> Sarris, *supra* note 19.

highlights the need to ask “how does the reader understand and use his or her own knowledge to frame or make sense of elements in a text?”<sup>237</sup> One of the features that Sarris identifies in the transmission of oral texts is the fact that a large part of the understanding gleaned by the listener results from an “unconscious composition” in which the worldview and expectations of the listener are read into, and structure, the way that the story is understood.<sup>238</sup> Sarris describes this process as fundamental to all human communication, noting that “critical discourse and any activity that predicates interpretive acts depend largely on the thinker’s tie to a given knowledge base and belief system and on the linguistic features associated with the belief system”.<sup>239</sup>

Referring to a linguist study of Kashaya stories, Sarris notes the problems a particular academic had in merely recording stories, as discrete occurrences, outside of the cultural context which renders them meaningful: “[He got] the story but no content beyond the story in which to understand it. He has information, but it is not engaged with the world from which the information comes.”<sup>240</sup> For Sarris, the context in which a story is told and the worldview of both the teller and listener are an important part of the construction of the meaning of any story. The unspoken understandings (or misunderstandings), perspectives of listening and speaking, as well as the personal histories of the teller/listener(s), imbue meaning in the context of the oral tradition.

Sarris’ discussion about the display of Pomo basketry in museums offers insight about the possible repercussions to Indigenous Peoples of introducing

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<sup>237</sup> *Ibid.* at 91.

<sup>238</sup> *Ibid.* at 92.

<sup>239</sup> *Ibid.* at 153.

<sup>240</sup> *Ibid.* at 21.

elements of Indigenous oral traditions into the courts.<sup>241</sup> Sarris argues that Pomo baskets were originally produced for “utilitarian, social, and sacred purposes” and that the introduction of the cash economy (e.g., the sale of baskets, or the purchase of baskets for artistic or museum display) “displaces the basket’s historical testimony and subsequent authority” and “precipitates a closed cycle of presentation and discussion about the basketry itself.”<sup>242</sup> Loss of context results in the loss of observation of the importance of the basket within the Indigenous culture that produced it, and also of its connection to that culture (loss of recognition of the fact that the oral tradition is simultaneously produced by, and producing Indigenous cultures). This leads to a result where “Viewing a Pomo basket in a museum is like viewing a movie frame depicting a close-up of water; it could be water anywhere, or nowhere.”<sup>243</sup>

Robin Ridington has identified that oral traditions are composed of a complex set of communications that may be inaccessible – beyond a superficial level – to others.

Because people share knowledge of one another’s lives, they code information about their world differently from those of us whose discourse is conditioned by written documents. They know their world as a totality. They know it through the authority of experience. They live within a community of shared knowledge about the resource potential of a shared environment. They communicate knowledge through oral tradition. They organize information through the metaphors of a mythic language. They reference experience to mutually understood information. They communicate with considerable subtlety and economy.<sup>244</sup>

Indigenous oral traditions arise and are carried forward within peoples who have histories intertwined with their lands, mythical beings and each other. Meanings, built upon meanings. Ridington identifies a wide distribution of knowledge among members of society, resulting in a discourse that is “highly contextual and based on complex mutually understood

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<sup>241</sup> *Ibid.* at 51-62.

<sup>242</sup> *Ibid.* at 52-54.

<sup>243</sup> *Ibid.* at 56.

<sup>244</sup> Ridington, *supra* note 31 at 277.

(but often unstated) knowledge”<sup>245</sup> which includes “complementary knowledge of [a] mythic world” and a “common responsibility to the land and its government”.<sup>246</sup> Ridington, discussing the introduction of Indigenous oral traditions as evidence, cautions that when “we attempt discourse with people who are unwilling to listen to our words, to understand our experiences...we find ourselves talking at cross purposes” and concludes that this may lead to “conflict, ambiguity, even oppression.”<sup>247</sup>

One example of differing worldviews is reflected in differing ways of understanding time, and relating when events occurred. Indigenous notions of time are different from the linear concept that guides Western notions, and these divergent concepts of time may lead to Indigenous oral traditions being dismissed. Indigenous Peoples conceptions of time reflect a relational form of ordering which locates people in relationship to their territories, other Peoples and life.<sup>248</sup> Nabokov identifies the conception of time within Indigenous oral traditions as fundamentally different from western notions of both history and time. Rather than the “thin thread” connecting present generations to the past predominant within Western cultures, “American Indians oral traditions would maintain that it is really more like a thick rope, a long ladder, or a wide corridor, which also allows for two-way traffic.”<sup>249</sup>

Time is not as necessary to record when events happened, what is important is understanding the repercussions of these events and the ways in which they dictate present day relationships and responsibilities. When Indigenous Peoples talk about events that occurred a long time ago, this may reflect one of the purposes of oral traditions - to share

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<sup>245</sup> *Ibid.* at 277.

<sup>246</sup> *Ibid.* at 276.

<sup>247</sup> *Ibid.* at 278. See also Clay McLeod (“The Oral Histories of Canada’s Northern Peoples, Anglo-Canadian Evidence Law, and Canada’s Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past” (1992) 30 *Alta. L. Rev.* 1276) [McLeod] who argues that evidence laws have been a tool of oppression and have operated to deny recognition of Indigenous Peoples’ rights.

<sup>248</sup> See generally Fixico (*supra* note 20), Deloria (*supra* note 21) and Cajete (*supra* note 23).

<sup>249</sup> Nabokov, *supra* note 25 at 74.

knowledges and situate the present day participants as part of the same flow of tradition. The point is not to talk about what our ancestors did, which allows for a great remove between our present day responsibilities and past events or actions, but rather to transmit collective identities, experiences or responsibilities. Without a precise dating mechanism that allows the court to assess information in comparison to other information and to construct a linear narrative, the information offered in the oral traditions may be received as nebulous, unsettled, and ultimately unreliable. These different styles of communicating may be reflected in legal decisions as a failure to perceive the evidence offered, or a complete failure to understand the import of the oral traditions shared.

By way of illustration, Nlaka'pamux oral traditions talk about a time when salmon disappeared from the rivers, and how they returned to nourish the people yet again. What is important in this tradition is not to identify with exactitude how far into the past the events happened, but rather how these events dictate our present relationship with and obligations to the salmon. I, as an individual, was not actually present when the salmon were gone and when they returned; I, as an Nlaka'pamux, was. I share in the obligations that the Nlaka'pamux people have to safeguard the salmon. I do not only remember the obligations, I share in them. As illustrated in this example, oral traditions can reflect a form of representation, which involves present generations. The original people who were there were representatives of the collective Nlaka'pamux people, we continue to share in that experience.<sup>250</sup> If, however, I was ever called to testify, the likelihood is that the testimony

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<sup>250</sup> Contrast this to the conception which has emerged and is increasingly talked about within Canadian society of people who assert that they were not here when terrible injustices were inflicted upon Indigenous Peoples and so bear no responsibility for them. They are able to freely argue "that was what my grandfather/grandmother did, but I should not have to be responsible for their actions." A linear concept of history allows this disconnect from the past, allows for a failure to take responsibility, and an ability to refuse to be responsible for future generations.

would be suspect. I do not know *when* these events occurred (and stating, as some Nlaka'pamux people are want to do, "in time out of/before mind" is unlikely to bolster my credibility).<sup>251</sup> A court searching only for historic facts, for dates, for specificity, and, finding none, may entirely miss the legal content of this example and wonder why it had been presented at all.

### **E. Conclusion**

Searching through oral traditions to sift out the alive and dynamic elements, the legal aspects, means sifting through to find the dead leaves that have fallen off the tree, rather than looking at the totality of all that they represent. There is no need to apologize for, or explain, an evolution of laws within a living tradition. Yet, when Indigenous oral traditions are viewed as merely oral histories they are viewed as suspect because they are not frozen in the past.

The idea that laws and legal institutions are organic and capable of growth is not foreign to Canadian law. Canadian courts readily understand and embrace the concept in the context of constitutional interpretation, drawing upon the words of Lord Sankey in *Edwards v. Attorney-General for Canada*, that the constitution is a "living tree capable of growth and expansion within its natural limits."<sup>252</sup> Justice McLachlin, as she then was, outlined the living tree doctrine in *Reference Re Provincial Electoral Boundaries (Sask.)*:

The doctrine of the constitution as a living tree mandates that narrow technical approaches are to be eschewed ... It also suggests that the past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the *Charter*. The tree is rooted in past and present institutions, but must be capable of growth to meet the future...<sup>253</sup>

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<sup>251</sup> Mentioning that we upheld the obligations we acquired here by carrying the salmon over the Hell's Gate slide (see Bruce and Walkem, *supra* note 3 at 352) or the fact that my mom prays for the returning salmon each year, are similarly unlikely to be helpful, to a Canadian court. However, within a Nlaka'pamux tradition, these instances and examples would bolster the seriousness and importance of the credibility of account and emphasize the importance of the laws contained within it.

<sup>252</sup> [1930] A.C. 124 at 136.

<sup>253</sup> [1991] 2 S.C.R. 158 at para. 42.

In applying the living tree doctrine to an analysis of different voting arrangements, Justice McLachlin noted that “[t]he right to vote, which is rooted in and hence to some extent defined by historical and existing practices, cannot be viewed as frozen by particular historical anomalies. What must be sought is the broader philosophy underlying the historical development of the right to vote – a philosophy which is capable of explaining the past and animating the future.”<sup>254</sup> In *Hunter v. Southam Inc.*, Justice Dickson elaborated on the differences between statute law (more amenable to dry formulations) and constitutional provisions in the *Charter*:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts “not to read the provisions of the Constitution like a last will and testament lest it become one”.<sup>255</sup>

The living tree principle of constitutional interpretation reveals that Canadian courts are able to appreciate the manner in which unwritten principles “dictate major elements of the architecture of the Constitution itself and are as such its lifeblood,”<sup>256</sup> and provides a framework within which Canadian courts have the ability to understand and embrace a concept of laws as fluid and organic. It has been argued that a similar concept should be

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<sup>254</sup> *Ibid.* See also *British Columbia (Attorney General) v. Ellett Estate*, [1980] 2 S.C.R. 466.

<sup>255</sup> [1984] 2 S.C.R. 145 at 155 [*Hunter*]. The reference is to Paul Freund, *On Understanding the Supreme Court* (Boston: Little, Brown, 1949) [Freund].

<sup>256</sup> *Reference re Secession of Quebec*, [1996] 2 S.C.R. 217.

applied to the constitutional relationship between Indigenous Peoples and Canada, such that constitutional room is made for the recognition of Indigenous jurisdictions.<sup>257</sup>

Laws retain their power, strength and authority precisely because they continue to grow with the people, remaining firmly rooted in animating principles, while finding new and evolving expression. The living tree doctrine more closely accords with the role of Indigenous oral traditions and their diverse ways of holding and transmitting laws and values than does a dry and static view of oral traditions as oral histories. Oral traditions are living trees, rooted in the land, and continuing to draw sustenance from the land.

Freund's caution in the context of constitutional interpretation (that courts not read the provisions of the Constitution like a last will and testament lest it become one),<sup>258</sup> has particular poignancy in the consideration of Indigenous oral tradition evidence within the Canadian legal system. Indigenous Peoples should not introduce, nor courts selectively interpret, oral traditions as merely oral history, lest historic examination render oral traditions (and all of the alive, legal and dynamic elements that they embody) an artifact of the past, of societies and cultures that *used to be* alive.

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<sup>257</sup> See e.g.: Brian Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34 Osgoode Hall L. J. 101 [Slattery]; and, Michael Jackson, "Indigenous Laws, Legal Pluralism and Reconciliation" (Paper presented to the Joint Conference of the CBA's National Aboriginal Law Section & the Indigenous Bar Association, March 2005) [unpublished] [Jackson].

<sup>258</sup> *Supra* note 255.

## Chapter 4. Little Weight or Heavy as Eagle Down: Legal Application of a Methodology of Suspicion to Indigenous Oral Traditions

### A. Introduction

In the trial phase of *Delgamuukw v. B.C.*,<sup>259</sup> the Gitksan-Wet'suwet'en introduced evidence of their laws and land tenure systems, including how the spreading of eagle down was used to signal the weight and sacredness of an agreement.<sup>260</sup> In considering this evidence Justice McEachern held that it was "highly equivocal"<sup>261</sup> noting that he had "serious doubts" about its reliability as "evidence of detailed history or land ownership, use or occupation."<sup>262</sup> Justice McEachern accepted the assertion that "tribal societies have little interest in conserving an accurate knowledge of the past over long periods of time" and was unable to find any circumstantial guarantees of trustworthiness in the evidence which would allow him to give it any weight.<sup>263</sup> While he was not "troubled" with *admitting* the evidence, he assigned no *weight* to the oral tradition evidence unless it was corroborated by other evidence (such as a written record, or expert testimony).<sup>264</sup> This assessment of Indigenous oral tradition evidence was not new or unique, but had long characterized Canadian courts'

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<sup>259</sup> *Delgamuukw*, (B.C.S.C.), *supra* note 104.

<sup>260</sup> Antonia Mills, *Eagle Down is Our Law: Witsewit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994) at 150-155 [Mills]; Gisday Wa and Delgam Uukw, *The Spirit in the Land: statements of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia 1987 - 1990* (Gabriola, B.C.: Reflections, 1992) [Gisday Wa and Delgam Uukw].

<sup>261</sup> *Delgamuukw*, (BCSC), *supra* note 104 at 180. Here, the trial judge referred to the adaawk and kungax oral traditions, although this assessment was similar for all aspects of the oral traditions presented.

<sup>262</sup> *Ibid.* For criticism of this judgment see e.g. Dara Culhane, *The Pleasure of the Crown* (Burnaby: Talon Books, 1998) [Culhane] and Leslie Hall Pinder, *The Carriers of No: After the Land Claims Trial* (Vancouver: Lazara Press, 1991).

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.* However, even where the oral tradition evidence was corroborated by the expert testimony of anthropologists, it was subject to dismissal on the findings that the experts were biased (see the discussion below).

reception of Indigenous oral traditions,<sup>265</sup> and, notwithstanding the SCC's call for a fair and balanced approach to assessing Indigenous oral traditions, continues today.

The purpose of evidence law is to establish the "facts" so that the law can be applied to those facts. When Indigenous Peoples introduce oral tradition evidence, this evidence falls within the general rubric of hearsay (out-of-court statements introduced as proof of the facts they assert)<sup>266</sup> and this positioning has rendered them suspect. The law of hearsay was traditionally characterized by a blanket exclusion, with rules or exceptions being created to allow for the admittance of certain evidence in a limited number of circumstances.<sup>267</sup> Oral tradition evidence may have been admissible under an exception to the hearsay rule as reputation evidence of public or general rights; historical facts; or, family genealogy.<sup>268</sup> For example, in *R. v. Simon* the SCC referenced the necessity requirement in calling for the need for a flexible approach in deciding whether the Mi'kmaq hunter was entitled to the benefits of the Treaty of 1752: "The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render

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<sup>265</sup> See e.g. Ridington (*supra* note 31) who discusses his own experiences in *Apsassin v. Canada*, [1988] 1 C.N.L.R. 73 (QL)(F.C.T.D.) [*Apsassin*]; British Columbia, *Report on the Cariboo-Chilcotin Justice Inquiry (B.C.)* (Victoria: Crown Publications, 1993) which cites the following provision of the *B.C. Evidence Act* S.B.C. 13 Vic., c. 2, s. 5 (Repealed, SBC, 1968, c.16, s. 2) which allowed Indigenous Peoples to testify, despite that it was felt that they could not swear an oath:

...it shall be lawful for any Court...in the discretion of such Court...to receive the evidence of any Aboriginal Native, or Native of the half-blood, of the Continent of North America, or the Islands adjacent thereto, being an uncivilized person, destitute of the knowledge of God, and of any fixed and clear belief in religion or in a future state of rewards and punishments, without administering the usual form of oath to any such Aboriginal Native or Native of the half-blood...

(See Borrows, 2001, *supra* note 8 at 20-21 for a discussion of these provisions of the Act.)

<sup>266</sup> *R. v. Evans*, [1993] 3 S.C.R. 653.

<sup>267</sup> For example, where it met the requirements of necessity and circumstantial guarantees of trustworthiness. For a discussion of the history and evolution of hearsay and evidence laws, see Bruce Archibald, "The Canadian Hearsay Revolution: Is Half a Loaf Better than No Loaf at All?" (1995) 25 Queen's L.J. 1 [Archibald, 1995]; David Paciocco and Lee Stuesser, *Law of Evidence* (Toronto: Irwin Law, 2002) [Paciocco and Stuesser]; and, David Tanovich, "Starr Gazing: Looking into the Future of Hearsay" (2003) 28 Queen's L.J. 371 [Tanovich].

<sup>268</sup> Brian J. Gover and Mary Locke Macaulay, "Snow Houses Leave No Ruins': Unique Evidence Issues in Aboriginal and Treaty Rights Cases," (1996), 60 Sask. L. Rev. 47 [Gover and Macaulay].

nugatory any right to hunt that a present-day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this Treaty.”<sup>269</sup>

In cases such as *R. v. Khan*,<sup>270</sup> *R. v. Mohan*<sup>271</sup> and *R. v. Levogiannis*<sup>272</sup> the SCC moved from strict categories of exceptions to the hearsay rule, to an approach which assesses evidence on a case-by-case basis according to the criteria of necessity and reliability.<sup>273</sup> A “purposive and principled case-by case approach to determining admissibility” creates greater discretion with trial judges to assess and measure evidence, including categories of evidence (such as Indigenous oral traditions) customarily dismissed as hearsay.<sup>274</sup> In the words of Justice L’Heureux-Dube, the “trend...has been to remove barriers to the truth-seeking process.”<sup>275</sup> Paciocco and Stuesser identify this process as having been driven by the incorporation of the *Charter* into the *Constitution Act, 1982* and a greater concern for individual rights within the trial process.<sup>276</sup> The principled approach has influenced the receipt of Indigenous oral tradition evidence.<sup>277</sup> A modified form of the principled approach to hearsay evidence was adopted by the SCC in *Van der Peet*:

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

<sup>269</sup> [1985] 2 S.C.R. 387 at para. 44 [*Simon*]. For further examples see e.g.: *Dick*, *supra* note 191; and, *Uukw v. R.*, [1987] 6 W.W.R. 155 (B.C.S.C.).

<sup>270</sup> [1990] 2 S.C.R. 531 [*Khan*].

<sup>271</sup> [1994] 2 S.C.R. 9 [*Mohan*].

<sup>272</sup> (1993) 25 C.P. (4<sup>th</sup>) 325 (S.C.C.) [*Levogiannis*]. More recently, see *R. v. Starr*, [2000] 2 S.C.R. 144.

<sup>273</sup> Necessity has been defined as the need to place all relevant and reliable evidence before the court (Archibald, 1995, *supra* note 267 at 32-33). The question of reliability involves two separate areas of consideration. First threshold reliability applies to the question of admissibility, determined on a case-by-case basis, with a consideration of factors such as spontaneity of the statement, naturalness of the statement, that the statement was made reasonably contemporaneously and an examination of a person’s motives. Ultimate reliability concerns the weighing of the evidence that is given (see e.g. Paciocco and Stuesser, *supra* note 267 at 100).

<sup>274</sup> Paciocco and Stuesser, *ibid.* at 4.

<sup>275</sup> *Levogiannis*, *supra* note 272 at 334.

<sup>276</sup> Paciocco and Stuesser, *supra* note 267 at 4-5; See also Tanovich, *supra* note 267.

<sup>277</sup> Paciocco and Stuesser (*ibid.* at 5) argue that within aboriginal rights litigation “even more flexibility has been injected” as a result of these evolving trends in evidence law.

simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.<sup>278</sup>

In *Delgamuukw* Lamer, C.J.C., affirmed that “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.”<sup>279</sup> In *Mitchell* the SCC referred to the “unique and inherent evidentiary difficulties” posed by Indigenous cases (“[c]laimants are called upon to demonstrate features of their pre-contact society, across a gulf of centuries and without the aid of written records”) and cautioned that “the rights protected under s. 35(1) should not be rendered illusory by imposing an impossible burden of proof on those claiming this protection.”<sup>280</sup>

Chief Justice Lamer, responding to Justice McEachern’s dismissal of oral tradition evidence in *Delgamuukw*, (*B.C.S.C.*), set out the considerations for the admission of oral tradition testimony as follows:

Many features of oral histories would count against both their admissibility and their weight as evidence of prior events in a court that took a traditional approach to the rules of evidence. The most fundamental of these is their broad social role not only “as a repository of historical knowledge for a culture” but also as an expression of “the values and mores of ... [that] culture”... Dickson J. (as he was then) recognized as much when he stated in *Kruger v. The Queen*, ... that “[c]laims to aboriginal title are woven with history, legend, politics and moral obligations”. The difficulty with these features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial - the determination of the historical truth. Another feature of oral histories which creates difficulty is that they largely consist of out-of-court statements, passed on through an unbroken chain across the generations of a particular Aboriginal nation to the present-day. These out-of-court statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay.<sup>281</sup>

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<sup>278</sup> *Van der Peet*, supra note 43 at para. 68.

<sup>279</sup> *Delgamuukw*, supra note 45 at para. 87, the Chief Justice continued, “given that most aboriginal societies “did not keep written records”, the failure to do so [accept oral tradition evidence] would “impose an impossible burden of proof” on aboriginal peoples, and “render nugatory” any rights that they have...” [References omitted].

<sup>280</sup> *Mitchell*, supra note 48 at para. 27.

<sup>281</sup> *Delgamuukw*, supra note 45 at para. 86 [References omitted].

In considering the trial judge's assessment of the oral tradition evidence, Lamer, C.J.C., opined that "the trial judge *expected too much* of the oral history of the appellants... He expected that evidence to provide *definitive and precise* evidence of pre-contact Aboriginal activities on the territory in question", and this standard was found to be an "almost an impossible burden to meet."<sup>282</sup> The admonishment that to expect oral traditions to accurately portray historic events is to expect too much has influenced subsequent judicial considerations. Oral traditions, it is suggested, must be approached with caution, there are inherent difficulties, and it is part of the very fabric of oral traditions that they are less reliable or specific than other forms of evidence. This language portends the ways in which oral traditions may be devalued in the very act of admission.

The SCC has set out a rationale for the receipt of oral tradition evidence based on the acknowledgment that, absent this special consideration, Indigenous Peoples would be unable to adduce any evidence in support of their claims. While the necessity requirement accords well with the rules of evidence, it provides an inauspicious beginning to legal considerations of Indigenous oral traditions: This evidence is not admissible of its own force and effect, it is admissible because there is no other evidence.

### **B: Methodology of Suspicion**

A survey of cases that have considered Indigenous oral tradition evidence reveals that it continues to be systematically misunderstood, devalued and subject to an analytical framework that naturalizes suspicion about its ability to accurately or reliably relay information. A curious bifurcation results: an openness to admitting oral tradition evidence

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<sup>282</sup> *Ibid.* at para. 101 [Emphasis added].

on the one hand, coupled with the dominance of a “methodology of suspicion”<sup>283</sup> in assessing that evidence on the other, such that it is often given “no independent weight at all.”<sup>284</sup>

Some courts have attempted to exempt themselves from the necessity of even applying these principles by framing the issue before them as too “specific” to benefit from the increased use of Indigenous oral tradition evidence and suggesting that the principles set down by the SCC addressed general rights, while they would ask more of the oral tradition in order to support the specific claims made by the Indigenous claimants. In *Squamish Indian Band v. Canada*, Justice Simpson was asked to consider competing claims to a reserve between Indigenous groups.<sup>285</sup> Justice Simpson made a connection between the nature of the proceeding and the degree to which oral tradition evidence would be admissible or reliable, reasoning that oral tradition evidence is acceptable in cases such as *Delgamuukw* where “the truths sought were answers to questions about which bands used and occupied lands, about the internal boundaries between the bands’ lands, and about the Indians’ land tenure practices prior to and at the assertion of British sovereignty” and in cases such as *Marshall and Badger* where “the truth sought was information about the historical or cultural context in which treaties were negotiated and signed.” However, “[h]ere the evidence described as oral

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<sup>283</sup> This phrase is an adaptation of the “school of suspicion” used by Nabokov (*supra*, note 25 at 13) to describe historic examinations of Indigenous oral traditions. The school of suspicion questions the accuracy or relevance of oral traditions, suspicious that their contents are inaccurate or imagined. An empathetic perspective, in contrast, does not examine the historical content of oral traditions, preferring instead to record anthropological or psychological elements assessing oral traditions as myth or folklore. The school of suspicion held that there was no accurate information that could be gleaned from Indigenous Peoples oral traditions, and is now held to be largely academically discredited. Nonetheless, the school of suspicion, as a methodology for the legal assessment of Indigenous oral traditions, continues to dominate.

<sup>284</sup> To borrow the phrase of the majority of the SCC in *Delgamuukw* (*supra* note 45 at para. 96) in assessing the trial judge’s consideration of oral tradition evidence offered at trial.

<sup>285</sup> [2000] F.C.J. No. 1568 (F.C.T.D.) at paras. 32-34 [*Squamish*]. In *Newfoundland (Minister of Government Services and Lands) v. Drew* ([2003] N.J. No. 177 (QL) (Nfld & Ldrd SC) at para. 676 [*Drew*]) the court in *obiter* considered, but did not consider it necessary to decide, that in certain cases (referring to the reasons of Madame Justice Simpson in *Squamish*) whether a “more historically precise type of evidence may be required in determining if a group hunted and trapped in a small portion of the Island than would be required to demonstrate that an aboriginal group engaged in a practice such as potlatches.” Justice Gibson applied this distinction in *Kingfisher v. Canada*, [2001] F.C.J. 1229 (F.C.T.D.).

history was tendered for...very specific purposes". These decisions indicate that there may be a trend emerging where courts risk establishing a hierarchy of oral tradition evidence, based not on the quality of the evidence but rather on the interests that may be impacted by the legal proceedings. The problem is that Indigenous Peoples are just as likely to not have a written record, or other evidence, available in a "specific" case as they are with a general one. Taken to its logical conclusion, this type of exclusionary consideration of oral tradition evidence would establish a class of cases that Indigenous Peoples could never win, or even fully or fairly litigate.

Despite that the SCC has issued cautions against the devaluation of Indigenous Peoples evidence ("judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and tradition")<sup>286</sup> trial courts remain suspicious of the reliability or value of Indigenous oral traditions. The SCC has created a dangerous circularity: constructing historical tests which necessitate admission of oral *history* evidence (to reveal past practices) while simultaneously cautioning against inherent difficulties with the accuracy or reliability of Indigenous oral traditions.

Marlee Kline observed that in its operation in child welfare matters, courts use a "best interests of the child" ideology such that their decisions to remove Indigenous children from their families and communities is seen as "natural, necessary, and legitimate, rather than coercive and destructive."<sup>287</sup> A similar process operates in the assessment of Indigenous Peoples' oral traditions, and a methodology of suspicion has rendered the diminishment of

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<sup>286</sup> *Mitchell supra* note 48 at para 34, and further:

Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective. Thus, *Delgamuukw* cautions against facilely rejecting oral histories simply because they do not convey "historical" truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted.

<sup>287</sup> Kline, 1992 *supra* note 139 at 389.

Indigenous oral traditions as normal, rational and common place, and possibly even necessary for the sake of fairness. The methodology that courts employ in their considerations of Indigenous oral tradition evidence “structures and constrains judicial decision making”<sup>288</sup> such that it appears to be balanced, benevolent and fair rather than transformative and exclusionary.

In practice, courts often reiterate inclusive and expansive language regarding the necessity of receiving oral tradition evidence, but then individuate the testimony before them, identifying the ways it falls prey to what the SCC has identified as “inherent difficulties” with Indigenous oral tradition evidence. Reasons offered in support of affording little or no weight to Indigenous Peoples oral traditions are varied, and find many forms of expression. The operation of a methodology of suspicion is well illustrated by this sweeping list of reasons given by the Federal Court of Appeal for devaluing the oral tradition evidence offered in *Benoit v. Canada*,<sup>289</sup> including assessments that the testimony of various witnesses was “rambling, repetitive and far, far from definitive”,<sup>290</sup> “contradictory”, “sparse, doubtful and equivocal” and “deserving of no weight”,<sup>291</sup> and “vague and equivocal, and...anything but conclusive”.<sup>292</sup>

Appeal courts are reluctant to overturn or question a trial judge’s factual finding absent a “palpable and overriding error”.<sup>293</sup> This deference to the trier of fact makes Indigenous Peoples vulnerable where the findings of fact are influenced by underlying

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<sup>288</sup> *Ibid.*, at 375.

<sup>289</sup> [2003] 3 C.N.L.R. 20 (F.C.A.) [*Benoit*].

<sup>290</sup> *Ibid.* at para. 60.

<sup>291</sup> *Ibid.* at para. 69. The same points were raised for a different witness at paras. 97-98.

<sup>292</sup> *Ibid.* at para. 72.

<sup>293</sup> *Delgamuukw*, *supra* note 45 at para. 78: “As a general rule, this Court has been extremely reluctant to interfere with the findings of fact made at trial, especially when those findings of fact are based on an assessment of the testimony and credibility of witnesses. Unless there is a “palpable and overriding error”, appellate courts should not substitute their own findings of fact for those of the trial judge”.

assumptions regarding the reliability or credibility of oral tradition evidence. Once findings of fact are made, they are difficult to overturn and remain with the case through all appeal levels. Commenting on the practical implications of the admission of Indigenous oral histories (his focus, as opposed to oral traditions generally), Rush identifies one problem with the broad ambit of the SCC's recognition of oral history as being the fact that it is received and interpreted by trial courts. Trial courts, he argues, tend to narrowly construe what is a "fact" and "tend to be suspicious of oral history because it does not meet conventional standards of objectivity dictated by the rules of evidence."<sup>294</sup>

This chapter tracks the way that a methodology of suspicion operates to dismiss or devalue Indigenous oral tradition evidence in a number of ways, including on the assessment that it: (i) is lacking in specificity; (ii) fails to meet the necessity requirement (where there are more traditional evidence forms available); (iii) is only a modern recollection and fails to meet the historic tests established by the SCC (genealogy of evidence); (iv) is subject to self-serving bias (contrasted with a bias in favour of Crown witnesses against Indigenous Peoples); (v) lacks unanimity or is contradictory; and (vi) does not accord with forms of oral tradition evidence previously recognized (e.g., *adaawk* and *kungax*) or is found to be *internally* invalid. Additionally, courts may devalue oral tradition evidence due to their concerns about not allowing "special" evidentiary rights.<sup>295</sup> While this list is not exhaustive, nor do all courts employ a methodology of suspicion, a review of cases shows that

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<sup>294</sup> Stuart Rush, "Use of oral history evidence in aboriginal rights litigation," (Vancouver: Continuing Legal Education Society, 2002) (Accessed online at [www.cle.bc.ca](http://www.cle.bc.ca) (06/27/2003)) at 8 [Rush]). Rush concludes that oral tradition evidence continues to be afforded little weight: "It is fair to conclude that debates about the effects of oral history evidence will be over issues of interpretation and weight – not admissibility". The weight that a trial court decides to assign to oral evidence is "subjective and personal" and will depend upon a judge's "biases and world-view".

<sup>295</sup> For a discussion of the SCC's concerns about the special nature of Aboriginal Rights see Chapter 2.

Indigenous oral traditions continue to be subject to suspicions about their accuracy and reliability which prevent them from being fully weighed or considered in Canadian courts.

*(i) Lack of Specificity*

Courts may determine that the evidence lacks specificity, and so, while the evidence is not found to be unreliable *per se*, it is found to fail to divulge anything of factual or legal relevance to the issue before the courts (i.e., that it fails to get to the point). Justice Sarich offered a partial explanation for this phenomenon when he noted that although the Cariboo-Chilcotin Inquiry was addressing issues arising within the justice system, and not “the issues of land claims, protection and preservation of resources on traditional lands, nor the apportionment and preservation of fish and wildlife,” nonetheless many Indigenous witnesses talked about these issues “either directly or indirectly at almost every sitting...*To the native people, justice is global – not divisible into neat categories.*”<sup>296</sup>

Concerns about the lack of specificity may be articulated through language which asserts that the “evidence was so general as to be of very little value with respect to the claims being advanced...”;<sup>297</sup> “long on generalities” but “short...on specifics”;<sup>298</sup> or, lacking in “specificity” and “temporal depth”.<sup>299</sup> Oftentimes, a finding about the lack of specificity of evidence allows the court to not consider the evidence at all through the assertion that there was, in fact, no evidence presented. A finding that the evidence failed to address the factual and legal issues before the court, or did not do so in sufficient detail to be of use,

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<sup>296</sup> Cariboo-Chilcotin Inquiry, *supra* note 265 at 29 [Emphasis added].

<sup>297</sup> *R. v Castonguay*, [2002] N.B.J. No. 362 (QL) (NB Prov. Ct.) at paras. 29-30 [*Castonguay*] (where an elder was qualified as an expert “with respect to territory, culture, custom and practice of the Mi’Kmags” but the court ultimately found that “his evidence was so general as to be of very little value with respect to the claims being advanced...”)

<sup>298</sup> *Wasauksing First Nation v. Wasauksing Lands Inc* [2002] 3 C.N.L.R. 287 (Ont. Sup. Ct. J.) at paras. 304-05 [*Wasauksing*]. In *Squamish* (*supra* note 285 at para. 229) the oral tradition evidence of the Musqueam was evaluated by Justice Simpson as “generally not date-specific. Rather, it included broad statements about where Musqueam people lived and how they behaved.”

<sup>299</sup> *Jeddore v. Canada*, [2004] 1 C.N.L.R. 131 (F.C.A.) at para. 92 [*Jeddore, FCA*].

enables a court to refuse to consider or weigh the evidence, while avoiding casting doubt on the personal integrity or truthfulness of a witness.<sup>300</sup> In *R. v. Catarat* witnesses gave oral tradition evidence as to their Peoples' understanding of Treaty No. 10. Justice Nightingale considered this evidence to be less than helpful given its lack of specificity:

[M]any of these [witnesses] had only sketchy memories of the actual background to, negotiation of and agreement to the Treaty. Most simply emphasized their main understanding of what was guaranteed by the Treaty, and repeated it from memory - that as long as the sun shines, the river flows, the grass grows and the rocks remain, the right to hunt, fish and trap would go undisturbed. This is what the grandmothers and grandfathers assured the witnesses from childhood would be their birthright. Most witnesses knew little more than that about the Treaty. For them, it was all they needed to know.<sup>301</sup>

This benevolent dismissal can be contrasted with Justice Nightingale's consideration of the evidence of two particular witness (whose evidence was found to have the requisite degree of specificity), where the trial judge noted that "[t]here was about their testimony a richness of detail, a vividness which left me with the strong impression that the informant they had come from a source or sources very close to the events. Put in other words, there was a authenticity about their oral history evidence which allows me to rely upon it, and I have".<sup>302</sup> The SCC also employed this approach in its consideration of the testimony of Grand Chief Mike Mitchell noting that his evidence "was especially useful because he was trained from an early age in the history of his community" but then, having reframed the right claimed, decided that this evidence did not address the actual point in dispute (thus allowing them to accept and even praise the evidence, while completely eliminating it from their reasoning).<sup>303</sup>

Questions about specificity may arise where Indigenous Peoples are giving evidence about their own laws, traditions and customs when the court is seeking "just the facts" – oral

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<sup>300</sup> In *Drew* (*supra* note 285 at para. 205) the court observed that the oral tradition evidence was "certainly deserving of respect...[but] more biographical in nature, and not in the nature of an oral tradition handed down from earlier times".

<sup>301</sup> [1998] S.J. No. 601 (Sask. Prov. Ct.) at para. 86 [*Catarat*].

<sup>302</sup> *Ibid.* at para. 87.

<sup>303</sup> *Mitchell*, *supra* note 48 at para. 35.

history evidence. The different kind or degree of specificity reflected in oral traditions may be used to diminish the weight afforded this evidence. While a lack of specificity may reflect upon individual witnesses or counsel (i.e., the examinations in court may not have asked for this level of specificity), it also reflects different styles of communicating.<sup>304</sup> In many instances, it appears as though courts are simply unable to hear or discern the evidence Indigenous witnesses offer.<sup>305</sup>

(ii) Lack of Necessity

Following its general trend for admitting evidence which might otherwise be considered as hearsay, the SCC has said that Indigenous oral tradition evidence is admissible where it is both reliable and necessary (due to the lack of other evidentiary sources for Indigenous Peoples to rely upon to forward Aboriginal Title, Rights and Treaty Rights claims). In some circumstances, lower courts have mistakenly interpreted the necessity rationale as a restriction, and rejected oral tradition evidence where a written record (either actually or purportedly reflecting an Indigenous perspective) is available.

In *Benoit* the Court found it instructive that the relevant time under discussion was not pre-contact (originating “in times where there were no written records of the practices, customs and traditions engaged in”<sup>306</sup>) but rather at the time when the treaty was signed.<sup>307</sup> Hence, in deciding to devalue the oral tradition evidence offered, the Court observed that

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<sup>304</sup> See the discussion of the difficulties associated with sharing or communicating Indigenous oral traditions across cultural divides in Chapter 3. The works of Archibald (*supra* note 18), Sarris (*supra* note 19), Ridington (*supra* note 31) and Borrows (*supra* note 8) are particularly helpful in understanding this issue.

<sup>305</sup> Andie Diane Palmer (“Evidence ‘Not in a Form Familiar to Common Law Courts’: Assessing Oral Histories in Land Claims Testimony After *Delgamuukw v. B.C.*” (2001) 38 Alta. L. Rev. 1040 at 1041) has suggested the SCC’s consideration of the oral tradition in *Delgamuukw* reveals “the lack of shared understanding between the appellants and the judiciary of the direct referents and social meanings of the presented oral histories”.

<sup>306</sup> In the words of Chief Justice Lamer in *Van der Peet* (*supra* note 43 at para. 68).

<sup>307</sup> *Benoit*, *supra* note 289 at para. 115.

“there exists a voluminous documentary record concerning Treaty 8”.<sup>308</sup> In the context of a treaty case, this decision is particularly troubling and risks rewriting treaties in legal consideration so that only the perspective of the Crown is considered. The SCC has clearly indicated that Treaty cases must involve an examination of the joint intentions of the parties at the time a treaty was entered into to give effect to the agreement made among the parties, and that Indigenous oral tradition evidence is critical for revealing the understanding of the Indigenous parties to the treaty.<sup>309</sup>

Similar reasoning was followed in *Jeddore, FCA* where there was conflicting evidence about whether or not a reserve had been established for the Conne River Mikmaq. Although elders told of a crown agent creating a reserve, there was no written record of a reserve having been created.<sup>310</sup> The court dismissed the oral tradition evidence noting that the “documentary evidence inevitably diminishes the weight to be given to the oral tradition evidence on this point.”<sup>311</sup> This is reasoning is skewed: the Indigenous applicants brought a legal proceeding precisely *because there was no written record* of a reserve having been set aside, and the reasoning in this case treats the alleged breach (absence of a written record creating a reserve) as *proof* that no breach occurred.

A further gloss that lack “lack of necessity” arguments can take is where oral traditions are dismissed due to the presence of conflicting (or absence of corroborating)

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<sup>308</sup> *Ibid.*

<sup>309</sup> *R. v. Sioui*, [1990] 1 S.C.R. 1025 [*Sioui*]; *R. v. Marshall*, [1999] 3 S.C.R. 456 [*Marshall (I)*]; *Sundown*, *supra* note 187). The Ontario Court of Appeal outlined issue in this way in *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 227 at 232 (Ont. C.A.):

Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect. Although it is not possible to remedy all of what we now perceive as past wrongs in view of the passage of time, nevertheless it is essential and in keeping with established and accepted principles that the courts not create, by a remote, isolated current view of past events, new grievances.

<sup>310</sup> *Jeddore, FCA* *supra* note 299 at para. 94.

<sup>311</sup> *Ibid.* at para. 98.

evidence. Oral traditions are admissible because they “may offer evidence of ancestral practices and their significance that would not otherwise be available. No other means of obtaining the same evidence may exist, given the absence of contemporaneous records.”<sup>312</sup> A refusal to admit Indigenous oral traditions, due to the existence of more traditional evidence forms, diminishes Indigenous oral tradition evidence, and fails to accord with the SCC’s caution against an approach which places oral tradition evidence below more traditional forms of evidence in judicial valuations.<sup>313</sup> Oral tradition evidence should be assessed as having independent weight, and not merely as confirmatory of other evidence, such as the testimony of anthropological or historical experts.<sup>314</sup> Trial courts have tended to ignore the spirit and intent of these instructions, and have proceeded to weigh expert evidence, particularly when it is offered in challenge to the information contained within oral traditions, as overriding the evidence offered by Indigenous Peoples.<sup>315</sup>

Deloria observes that it is common for scientific notions of objectivity to conclude that an Indigenous person “cannot be an accurate observer of his or her own traditions because that individual is personally involved” and instead primacy is given to the experience of people who do not know Indigenous languages, have never lived in the community and may only visit sporadically.<sup>316</sup> The works of Archibald and Sarris, discussed earlier, also highlight the ways in which it may be impossible for someone to apprehend the content or meanings of Indigenous oral traditions from an outsider perspective.

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<sup>312</sup> *Mitchell*, *supra* note 48 at para 32 [References omitted]. Note that this definition refers to oral histories as opposed more generally to oral traditions.

<sup>313</sup> *Delgamuukw*, *supra* note 45 at para. 87.

<sup>314</sup> *Ibid.* at para. 98.

<sup>315</sup> In *R. v. Frank* ([1999] A.J. 1074 (QL) (Alta. Prov. Ct.) [*Frank*]), for example, the evidence adduced included the oral testimony of Mr. Frank, the Chief of the Band, three elders, as well as three “expert” witnesses. In written reasons, the oral tradition evidence of four Indigenous Peoples is dealt with in six short paragraphs (*ibid.* at paras. 46-50) while the expert testimony is covered at considerable length.

<sup>316</sup> Deloria, *supra* note 21 at 49.

The case for dismissing Indigenous oral traditions because they fail to meet the necessity requirement, due to the presence of alternate evidence (for example, an archaeological record) was made out by von Gernet as follows:

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...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.<sup>317</sup>

Von Gernet argues that it is wrong to characterize Indigenous societies as "oral" claiming that physical ways of recording history used by Indigenous Peoples (e.g., wampum or pictographs) are a form of writing and that therefore (1) special rules of interpretation are not necessary for Indigenous oral traditions, and (2) experts, including himself, can translate the messages contained in these physical records (of which he would include archaeological artifacts) perhaps better, and more accurately, than Indigenous Peoples themselves. This reasoning reflects the belief that Indigenous Peoples provide only a source (in a physical sense) of doing history, so that the history can be owned, manipulated and presented by others.

The art of interpretation is inherent in the production of archeological information and a failure to consider the fact that modern interpretations of the physical record may be biased or prone to misinterpretation and speculation has lead some courts to devalue Indigenous Peoples oral tradition evidence because of what they determined to be the *weight* of the archaeological evidence. For example, in *Drew*, Justice Barry accepted the assertion that

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<sup>317</sup> Von Gernet, 2002 *supra* note 30 at 115. This accords as well with the approach taken by the SCC in *Kitkatla* (*supra*, note 79).

archeological evidence should be evaluated as more accurate than oral history evidence, suggesting that it is preferable because it was "created" (in a physical sense) by Indigenous Peoples and concluded that the archeological evidence "unlike European records presents an "aboriginal voice"". <sup>318</sup> The difficulty with these interpretations is that they fail to account for the fact that archaeology is an interpretive science.

There is considerable scholarship that questions the objectivity and selectivity of archaeology. Feminist scholars, for example, have examined how archaeology is gendered and how the interpretation of the physical record can serve to reinforce and validate existing stereotypes. <sup>319</sup> Others have directly questioned how the discipline of archaeology has been a political force, both in what it searches for and how it interprets what it finds, in the context of Indigenous Peoples. A Joe Watkins, Indigenous archeologist, has noted that "Archaeology as a discipline has continued to practice the scientific colonialism that its roots are so deeply buried within". <sup>320</sup>

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<sup>318</sup> Drew, *supra* note 285 at para. 54. And further (*ibid.*, at para. 225, references omitted):

Unlike oral history, which is generated in the post-contact period and projected into the past, the archaeological record was actually created in the past. ... It is, therefore, direct evidence against which other sources of information might be corroborated. Dr. von Gernet noted archaeology is the only discipline that allows us to reach far back into the mists of antiquity to grasp some understanding of cultures that pre-date written history. Also, because the archaeological record was created by the aboriginal people themselves, it is not as inherently biased as many of the early documents that were written by people who quite often did not understand or appreciate the strange "savage" cultures that inhabited the new world.

<sup>319</sup> See e.g. Joan Gero and Margaret Conkey, eds., *Engendering Archaeology: Women and Prehistory* (New York: Basil Blackwell, 1991) and Sarah Milledge Nelson, *Gender in Archaeology* (London: Altamira Press, 1997).

<sup>320</sup> "Marginal Native, Marginal Archaeologist: Ethnic Disparity in American Archaeology" (2002) 2:4 SAA Archaeological Record 36 at 36). See also Larry Zimmerman, "Usurping American Indian Voice," in Tamara Bray, ed., *The Future of the Past: Archaeologists, Native Americans and Repatriation* (New York: Garland Publishing, 2001); Thomas Biolsi and Larry Zimmerman, *Indians and Anthropologists: Vine Deloria, Jr. and the Critique of Anthropology* (Tucson: University of Arizona Press, 1997); Vine Deloria, Jr., "Indians, Archaeologists, and the Future." (1992) 57:4 *American Antiquity* 595; and, Maria Luisa de Paoli, *Beyond Tokenism: Aboriginal Involvement in Archaeological Resource Management in British Columbia* (MA Thesis, University of British Columbia, 1999) [unpublished] (who argues that archaeology is an interpretive science, and outlines the ways in which it promotes itself as objective and scientific, often to serve the interests of dominant society).

An interesting example of the selectivity of the archaeological record can be found in the experiences of the Seton Lake People. The province hired an archaeologist to do an archaeology/heritage site assessment of an area where they proposed to allow logging on Seton (Stl'atl'imx) territory. The heritage report recorded no sites of historic occupation or use. In response, the Seton people (who knew where their ancestors had lived) conducted their own survey and were able to confirm a myriad of habitation sites.<sup>321</sup> This example illustrates that we may add the selectivity of the information actually found to the selectivity of interpretations offered when assessing archaeological evidence.

That other evidence may be available, in either written or archeological form, is an insufficient basis from which to refuse to consider Indigenous oral tradition evidence. Reference solely to non-oral tradition sources (where available) could operate completely to eliminate Indigenous Peoples from consideration, or, lead to a situation where Indigenous Peoples' constitutionally protected rights are litigated only with reference to records created (or interpreted) by others.<sup>322</sup>

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<sup>321</sup> Environmental-Aboriginal Guardianship through Law and Education (E.A.G.L.E.). *The Nature and Scope of the Crown's Fiduciary and Constitutional Obligations to Consult with Aboriginal Peoples*, Workshop Materials. (1999).

<sup>322</sup> *Wasauksing*, *supra* note 298 at para. 300, see also para. 306. In *Prince v. Duncan*, ([2000] 4 C.N.L.R. 249 (B.C.S.C.) at para. 43 [*Prince*]) the court observed that "evidence of custom before me in this case does not include the testimony of persons of particular standing in the community, or of any experts." See also *Benoit*, *supra* note 289 at para. 113 ("depending on the nature of the oral history at issue, corroboration may well be necessary to render it reliable."). Binch (*supra* note 230 at 269) argues that "the unthinking application of rules relating to the admissibility and probative value of evidence, and in particular the manner in which courts interpret history as an evidentiary tool, obscures an appreciation of what reconciliation entails, and obscures the construction of distinct Aboriginal perspectives."

(iii) Genealogy of Evidence

Genealogy of evidence refers to the process of setting out where the evidence came from, including the individual sources from whom the person gained the knowledge.<sup>323</sup> The “genealogy of evidence” can be an important factor in determining how courts assess and weigh that evidence, and establishing the genealogy of evidence can help to situate witnesses within their cultures and traditions. However, establishing the genealogy of evidence appears to be one area where courts remain conflicted between viewing oral tradition evidence either as “oral texts” (losing their validity and ability to accurately convey information over time and multiple transmission)<sup>324</sup> versus as part of a living tradition. In some instances, courts properly assess this information as a means of situating witnesses within their cultures and societies and connect the oral tradition evidence offered by individuals, to the collective knowledge of Indigenous Nations. For example, in *R. v. Jacobs* Justice Macaulay set out his understanding of the source of oral histories in this fashion:

I must look back 170 years to the time of European contact and ascribe meaning to shapes of events barely visible in the grey past. There are, of course, no aboriginal people alive today who directly experienced pre-contact aboriginal life. Instead, I have heard testimony from Elders who were raised by and learned from their own grandparents, and in some instances, great grandparents. With the very old teaching others, including the very young, it has thus been possible for information respecting pre-contact culture to be handed down in the form of oral history. This occurred directly and indirectly, as well as formally and informally. It included the opportunity to observe the continuation of traditional activities that originated in pre-contact society.<sup>325</sup>

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<sup>323</sup> See for example *R. v. Haines* ([2003] 1 C.N.L.R. 191 (B.C. Prov. Ct) [*Haines*]) where Justice Point observed that if the person offering the oral tradition evidence is able to show how, and by whom, they were taught this helps to establish the reliability of the evidence and to tie this evidence to the traditions of the People.

<sup>324</sup> Von Gernet, 1996 (*supra*, note 30 at 11) suggests that a problem with oral traditions is that the “primary or ‘original’ version (if such existed to begin with) is lost to modern scrutiny since it is replaced by later versions. What is left may be multiple layers of interpretations which have accumulated over time and a content that may only vaguely resemble an ‘original’ oration”. And further that “Oral traditions are essentially memories of memories. Unfortunately, experimental work has shown that significant changes take place during the transmission of oral information between humans.” (*ibid.* at 16).

<sup>325</sup> [1998] B.C.J. No. 3144 (QL) (B.C.S.C.) at para. 8 [*Jacobs*]. See also *Haines*, *supra* note 323, and *Tsilhqot'in Nation v. British Columbia* [2004] B.C.J. No. 252 (B.C.S.C.) [*Tsilhqot'in (1)*].

This is the appropriate approach and reflects the one advocated by the S.C.C. in *Van der Peet, Delgamuukw, Simon and Mitchell*.

All too often (and against the express instructions of the SCC) lower courts fall prey to an assessment which reflects an individualistic conception of oral traditions as documents passed over generations, through particular, identifiable, individuals, losing both accuracy and reliability in the journey through time. While the SCC has expressly rejected a “frozen rights” approach, some trial courts appear to be enforcing this approach through their examination of the genealogy of oral traditions. It is not uncommon for courts to find that the oral tradition evidence presented by Indigenous elders and others in the community is merely personal or family information, which does not reveal the collective experiences or traditions of their peoples, but rather only establishes “facts” within the lived lifetime of the source (parents, grandparents, etc.).<sup>326</sup>

The assumption reflected in this individualized understanding of oral traditions is that Indigenous Peoples can only testify to their own personal beliefs, or the beliefs/experiences of themselves and their immediate family, but have little to offer by way of information which reflects more generally upon their community beyond a determinate (and fairly immediate) time period. Establishing the validity of this information to the time of proof required to meet the particular legal test can be a near impossible challenge and embarking on the examination of the genealogy of evidence in this fashion places Indigenous Peoples in a particularly vulnerable position.

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<sup>326</sup> This is the approach advocated by von Gernet. In *R. v. Quinney* ([2003] A.J. No. 313 (QL) (Alta. Prov. Ct) at paras. 26, 45-47 [*Quinney*]) Justice Maher concluded that the evidence of an elder was “unreliable” and that no weight should be attached to it reasoning that it was not “an “oral history” but only a current understanding.”

One example was the weighing of the genealogy of the evidence of Elder Mary Thomas of the Secwepemc people in *Neskonlith Band v. Canada (A.G.)*.<sup>327</sup> Elder Thomas testified when she was 80 years old that she had learned her “knowledge of native culture and tradition...from her mother and her aunt who both lived more than 100 years.”<sup>328</sup>

Mary Thomas' evidence does not relate to practices antedating contact between her people and white society. One might infer that her knowledge of traditions and practices, gleaned from her mother and her aunt could be traced to pre-contact times through their having learned those traditions and practices from a prior generation of her people, but in my opinion much more specific evidence of the Neskonlith fishing for coho at the time of contact in the rivers here specified is required, to establish an aboriginal right under [s.] 35(1), than is provided by her evidence.<sup>329</sup>

Despite that the court does not appear to doubt her evidence, it is held nonetheless insufficient to establish traditions which dated to a pre-contact time. Given the relatively recent contact dates of the Interior Nations of B.C. this is a particularly troubling decision given the age of the witness, and those that taught her. If a witness in these circumstances is unable to establish the genealogy of evidence that a court requires to meet the legal tests set out by the SCC, the task is likely to be next to impossible for Indigenous Peoples where the dates are far earlier.

(iv) Bias

**Self-Serving Bias (assessing Indigenous Peoples' evidence)**

The very fact that Indigenous Peoples are involved in litigation asserting Aboriginal Title, Rights or Treaty Rights has long been used as a justification for devaluing this evidence and there have been many instances where oral tradition testimony of Indigenous witnesses was dismissed on the basis that it is subject to a self-serving bias.

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<sup>327</sup> [1997] F.C.J. No. 1218 (F.C.T.D.) [*Neskonlith*].

<sup>328</sup> *Ibid.* at para. 21.

<sup>329</sup> *Ibid.* at para. 24. See also *Jeddore, FCA* (*supra* note 299 at 95) the Federal Court of Appeal found it instructive that “[n]either witness [of the Mi’kmaq oral tradition] traced the source of the Mi’kmaq belief to a person who was alive in 1869.”

The argument for devaluing Indigenous oral traditions because they may be subject to a self-serving bias was set out in this fashion by von Gernet:

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. Members of any given culture are not inherently better qualified to give an accurate representation of themselves and their history<sup>330</sup>

An example of this reasoning is found in *Sawridge Band v. Canada* where Justice Muldoon opined, "In no time at all historical stories, if ever accurate, soon become mortally skewed propaganda, without objective verity".<sup>331</sup> A further example is found in the reasons of Justice Addy in *Apsassin*, who, in dismissing the evidence of elders that had appeared before him, concluded that, "I am forced to the conclusion that their testimony was founded (and, in most cases, perhaps unconsciously,) on the fact that oil was discovered on the reserve...rather than on a true recollection and description of what actually took place..."<sup>332</sup>

The tendency to regard Indigenous oral tradition evidence as self-serving was cautioned against by the SCC in *Delgamuukw* in their consideration of Justice McEachern's refusal to admit the territorial affidavits filed by the Gitksan-Wet'suwet'en. The SCC rejected the reasons of the trial judge for dismissing the evidence including on the basis that the "independence and objectivity" of the evidence was questionable "because the appellants and their ancestors "have been actively discussing land claims for many years"<sup>333</sup>

Excluding the territorial affidavits because the claims to which they relate are disputed does not acknowledge that claims to Aboriginal rights, and Aboriginal title in particular, are almost always disputed and contested. Indeed, if those claims were uncontroversial, there would be

<sup>330</sup> von Gernet, 2000, *supra* note 30 at 107.

<sup>331</sup> [1996] 1 F.C. 3 (F.C.T.D.) at para. 109. [*Sawridge*]; Overturned: [1997] 3 F.C. 580 (F.C.A.) [*Sawridge, FCA*].

<sup>332</sup> *Apsassin*, *supra* note 265 at 122. For a fuller discussion of the evidence adduced in this case see Ridington, *supra* note 31.

<sup>333</sup> *Delgamuukw*, *supra* note 45 at para. 104 [References omitted].

no need to bring them to the courts for resolution. Casting doubt on the reliability of the territorial affidavits because land claims had been actively discussed for many years also fails to take account of the special context surrounding Aboriginal claims, in two ways. First, those claims have been discussed for so long because of British Columbia's persistent refusal to acknowledge the existence of Aboriginal title in that province until relatively recently, .... It would be perverse, to say the least, to use the refusal of the province to acknowledge the rights of its Aboriginal inhabitants as a reason for excluding evidence which may prove the existence of those rights. Second, this rationale for exclusion places Aboriginal claimants whose societies record their past through oral history in a grave dilemma. In order for the oral history of a community to amount to a form of reputation, and to be admissible in court, it must remain alive through the discussions of members of that community; those discussions are the very basis of that reputation. But if those histories are discussed too much, and too close to the date of litigation, they may be discounted as being suspect, and may be held to be inadmissible. The net effect may be that a society with such an oral tradition would never be able to establish a historical claim through the use of oral history in court.<sup>334</sup>

Despite this caution, Indigenous oral tradition evidence is still routinely devalued on the suspicion that it is subject to a self-serving bias or manufactured to meet the present day requirements of the legal proceeding. For example, in *R. v. Breriton*, Justice Norheim considered the degree of detail provided in an elder's testimony and concluded that it was political motivation, rather than the accuracy of the oral tradition, which produced the detailed evidence, "there is an element of politically influenced reconstruction. It is not the kind of evidence which [I] consider to be reliable and could best be described as political mythology."<sup>335</sup> In *Lac La Ronge Indian Band v. Canada*<sup>336</sup> the Saskatchewan Court of Appeal affirmed the trial judge's weighing of the evidence adduced at trial, including the decision to assess the evidence with caution due to the possibility of bias, on the basis that "the individuals who testified on behalf of the Band have been actively involved in the

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<sup>334</sup> *Ibid.* at para. 106.

<sup>335</sup> [1997] A.J. No. 715 at para. 14 (Alta. Prov. Ct) [*Breriton*]; confirmed by the Alta. QB [1998] 3 C.N.L.R. 122. See also *Catarat* (*supra* note 301 at para. 82) where Justice Nightingale summarized the argument advanced by the Crown that the oral tradition evidence should have little value or weight placed upon it, due to the potential existence of a self-serving bias:

[O]ral history evidence ought generally to be viewed and accepted with considerable skepticism, ... [O]ral history is fraught with pitfalls, including a tendency towards politicization, revisionism and plain self-service, and therefore does not meet the test of reliability such as to bring it within the principled exception to the hearsay rule.

<sup>336</sup> [2001] S.J. No. 619 (QL) (Sask. C.A.) [*Lac La Ronge*]. See also *Prince* (*supra* note 322 at para. 43) where the judge noted that the applicants (seeking recognition that a customary adoption had taken place such that they were entitled to be considered beneficiaries of an estate) had a "potent self-interest".

"pursuit of Indian rights" and there was a chance that their personal opinions may have coloured their testimony regarding the history of the negotiations."<sup>337</sup>

The fact that active involvement with an Indigenous community's political life continues to be used to justify devaluing oral tradition evidence is dangerous. In all likelihood, the Indigenous individuals who become actively involved in seeking to protect Aboriginal Title, Rights or Treaty Rights are those most familiar with the customs and traditions of their people.<sup>338</sup> The tendency toward finding a self-serving bias in Indigenous oral tradition evidence reflects the dangerous circularity referred to earlier. The legal tests require information about an Indigenous community or Nation asserting Aboriginal Title, Rights, or Treaty Rights. Conversely, the very fact that these witnesses are part of and reflect the shared knowledge and cultures of their community or Nation is used to devalue their evidence. An unassailable Indigenous witness would be impossible to find, as the information required by the legal tests to establish Aboriginal Title, Rights or Treaty Rights call for a degree of knowledge and involvement which both renders the evidence suspect at the same time that it qualifies it for admission in the legal proceeding.

A sub-species of self-serving bias arguments is found in the assumption that Indigenous Peoples construct false utopias of idyllic societies when testifying as to their Peoples' social organization and history. In *Canada (Minister of National Revenue – M.N.R.) v. Ochapowace Ski Resort Inc.* Justice Rathberger summarized the evidence of the elders as follows: "Life prior to the arrival of the Europeans was ... idyllic. Life was long with little or no crime, few wars, no disease, plenty of food, respectful, honest and religious

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<sup>337</sup> *Lac La Ronge*, *supra* note 336 at para. 37 [Emphasis added].

<sup>338</sup> Rush (*supra*, note 294) claims that trial courts are often reluctant to admit oral evidence because it is "considered by many judges to be self-serving" a decision he questions because, "on the ground, it is often the case that the activists are the people with knowledge."

people, suffering none of the problems we now think of as normal.”<sup>339</sup> Justice Muldoon, in *Sawridge* expressed considerable displeasure at the “idyllic” pre-contact life that witnesses spoke of, noting that “[t]o say the Indians “lived in peace on this land before the white man arrived” is to say that which is not at all accurate” and “[t]hat surely is the trouble with oral history. It just does not lie easily in the mouth of the folk who transmit oral history to relate that their ancestors were ever venal, criminal, cruel, mean-spirited, unjust, cowardly, perfidious, bigoted or indeed, aught but noble, brave, fair and generous, etc. etc.”<sup>340</sup>

As Culhane has observed in her critique of the Crown’s attack on the plaintiff’s expert evidence in *Delgamuukw* (B.C.S.C.):

The Crown’s “critique of romanticism,” however, seems to be based on the simplistic idea that any evidence that the Gitksan and Wet’suwet’en peoples were NOT war-like, naked, slave-owning cannibals at the time Europeans arrived in the late eighteenth century, is romantic and therefore not believable. End of conversation: facts are a nuisance in this monologue.<sup>341</sup>

While it is most certainly the case that pre-contact Indigenous societies had their difficulties, many major problems now facing Indigenous Peoples are the result of the colonial experience (particularly loss of territories, the ability to be self sufficient upon those territories, and attacks on culture and social organization). This easy dismissal misses the fact that the subject matter of legal cases is usually conflicts which have arisen between Indigenous Peoples and newcomer societies, and thus the evidence will likely focus on the changes wrought by contact and settlement. Problems within Indigenous societies (both pre- and post-contact) most likely are not the subject matter, or relevant, to the legal proceedings.

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<sup>339</sup> [2002] S.J. No. 526 (QL) (Sask. Prov. Ct) at para. 25 [*Ochapowace*].

<sup>340</sup> *Sawridge*, *supra* note 331 at paras. 17 and 109.

<sup>341</sup> Culhane, *supra* note 261 at 133. Justice McEachern accepted the Crown’s view and described the “romantic” view presented by the plaintiffs *Delgamuukw*, (B.C.S.C.) *supra* note 104 at 168.

### **Absence of Bias (assessment of Crown witnesses)**

A curious contrast is found in the assessment of witnesses (particularly experts) called to give evidence refuting Indigenous Peoples' claims. Missing from considerations of possible bias, at least in Indigenous cases, is the concomitant willingness to examine whether and how present social goals of dominant Canadian society inform the conflicting historic accounts offered *against* Indigenous Peoples' interests. Courts, with few exceptions, assess the testimony of Indigenous Peoples or the experts called by Indigenous litigants, with a view toward examining the ways in which this evidence is constructed to serve social purposes (supporting Indigenous claims) and therefore biased. On the other hand, experts introduced by the Crown (challenging the validity of Indigenous claims) are determined to be reliable, objective and rational, and possible biases are rarely explored.<sup>342</sup> One possible explanation for what appears to be a pervasive bias in favour of expert witnesses called by the Crown against Indigenous litigants is that the views they forward more generally reflect the worldview of the court. Psychologists have studied a phenomenon called "confirmation bias" through which people selectively interpret information to confirm their existing biases and beliefs (confirmation bias suggests that people see or hear what they believe).<sup>343</sup> Trial courts appear to be experiencing this phenomenon when they consider Indigenous oral tradition evidence.

Experts or other evidence introduced in *favour* of Indigenous claimants is often viewed as tainted because it is "sympathetic" or "favourable" to the Indigenous claimant.

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<sup>342</sup> An interesting contrast to the self-serving or appearance of bias arguments can be found in the decisions of *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 and *Sawridge, FCA* (*supra*, note 331) where courts appear to go out of their way to avoid finding bias on the part of judges who have considered Indigenous cases. (In *Sawridge*, despite incendiary comments of the trial judge, the FCA only found the *appearance* of bias, but not *actual* bias.)

<sup>343</sup> See e.g. P.C. Wason "Reasoning About A Rule" (1968) 20 Quarterly Journal of Experimental Psychology 273 and M. Jones and R. Sugden "Positive Confirmation Bias in the Acquisition of Information" (2001) 50 Theory and Decision 59.

Similar allegations are rarely leveled against the Crown witnesses in proceedings against Indigenous Peoples. This point is illuminated by the assessment of the anthropologists, Drs. Daly and Mills, called to give evidence in *Delgamuukw* (B.C.S.C.).<sup>344</sup> The court found it was “abundantly plain that [Dr. Daly] was very much on the side of the plaintiffs. He was, in fact, more an advocate than a witness.”<sup>345</sup> Dr. Mills was found to be “very much on the side of the plaintiffs.”<sup>346</sup> Given the perceived bias of these witnesses, their evidence was given little or no weight. The treatment of Drs. Daly and Mills illustrates that experts called to provide evidence that corroborates Indigenous claims are characterized as “advocates”, their work depicted as not possessing the requisite degree of neutrality or scientific vigor (particularly if they have spent an extensive period of time in Indigenous communities conducting fieldwork) or if their methodology is based on an emic perspective.

In contrasting the assessment of Drs. Daly and Mills with that of Justice McEachern’s assessment of the principle Crown anthropologist (Dr. Robinson) Dara Culhane observed that it was equally arguable that she was biased:

Sheila Robinson has lived her entire life, received her education, and practiced her career among and within the cultural group to which she and her employers belong. And, she has chosen to professionally align herself with those particular political factions of that cultural group most actively opposed to Aboriginal rights. Both her short term and her long term livelihood depend, in many ways, upon the outcome of the cases in which she testifies. What did the judge not appear to have been concerned about the possibility that Robinson could have been “urging the almost total acceptance” of euro-Canadian cultural values?<sup>347</sup>

An exploration of various courts’ assessment of the expert testimony offered by Dr.

Alexander von Gernet provides illumination of a widespread phenomenon involving the

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<sup>344</sup> *Delgamuukw*, (B.C.S.C.), *supra* note 104 at 169–172. For further commentary on the evidence presented at trial and the valuation of expert evidence see: Culhane, *supra* note 261; Richard Daly, *Our Box was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005); and, A. J. Ray, “Creating the Image of the Savage in Defense of the Crown: The Ethnohistorian in Court” (1990) Special Issue, 6 *Native Studies Review* 13, “Native History on Trial: Confessions of an Expert Witness,” (2003) 84 *Canadian Historical Review* 253.

<sup>345</sup> *Ibid.* at 169-170.

<sup>346</sup> *Ibid.* at 172.

<sup>347</sup> Culhane, *supra* note 261 at 271.

differential treatment of experts called on behalf of Indigenous Peoples and the Crown.<sup>348</sup>

Von Gernet stakes claim to a rational, reasonable, and neutral (fair) middle ground, and from this self-asserted position of objectivity, questions the ability of Indigenous oral traditions to accurately reflect the past. He identifies two ends of a historical spectrum of consideration of the Indigenous oral traditions as “historical objectivism” and a “postmodernist critique”. He rejects the postmodernist critique for what he identifies as the assertion that:

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 is 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>349</sup>

In contrast, von Gernet claims that the process he follows is one which follows the “rigour of positivism” which

[A]ssumes 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 .... [I]t 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. This 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. Ultimately, the perspective is in accord with [the] belief that public wrongs cannot be atoned by abandoning scientific standards in the historical study of relations between Aboriginal and non-Aboriginal people.<sup>350</sup>

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<sup>348</sup> While a personal attack on von Gernet is not the goal of this paper, various courts’ assessments of von Gernet’s testimony warrant closer examination as he is often called as an expert in support of the Crown to refute Indigenous Peoples’ claims, and the acceptance of his theories has significantly influenced the legal consideration of Indigenous oral traditions. As of September 2004, von Gernet had testified as a Crown expert in at least sixteen different legal proceedings (*Sawridge v. Canada* (F.C.T.D., T-66-86A) Transcript of Proceedings, examination of Dr. Alexander von Gernet), involving many diverse Indigenous Nations, including the Mohawk (*Mitchell*, *supra* note 48), Mi’kmaq (*Drew*, *supra* note 285; *Jeddore*, *supra* note 299), Blackfoot (*Frank*, *supra* note 315), Cree (*Sawridge*, *supra* note 331; *Benoit*, *supra* note 289).

<sup>349</sup> Von Gernet, 2000, *supra* note 30 at 104. While he acknowledges that anthropology and archaeology have been Eurocentric and racist, he argues that this was in the past, and that “this bias was confronted internally, in the absence of trendy postcolonial theory and without recourse to oral traditions” and therefore asserts that current works (his included) have been expunged of this racism (*ibid.* at 105).

<sup>350</sup> *Ibid.* at 116.

Von Gernet's work is influenced by the goal of revealing instances where "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."<sup>351</sup> Despite what might be argued a noticeable bias in his opinions about Indigenous Peoples (and concern with the "special" nature of Aboriginal Rights) von Gernet's testimony is routinely valued as being objective, rational and scientific in court. To return to Culhane's earlier call to examine the ways in which Crown experts are also biased, consider that von Gernet has made significant amounts of money through his work devaluing Indigenous oral traditions, and it is unlikely that the Crown would continue to use him as an expert if his testimony did not conform to their legal arguments.<sup>352</sup>

A review of the cases reveals that von Gernet presents his testimony in a formulaic fashion. First, listing the "admirable" qualities of the Indigenous group in question, even going so far as to affirm the validity of "oral histories" (for very immediate time periods, including the present and possibly one immediate generation). This step appears to be a necessary pre-condition to the second step, as it allows the court to disavow any racism or bias in their consideration of the oral tradition evidence presented, and allows the subsequent devaluation of oral tradition evidence to be cloaked in neutrality or rationality. The second step then involves an attack on the accuracy or reliability of "oral traditions" as being more in

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<sup>351</sup> *Ibid.* at 105.

<sup>352</sup> For example, Public Works and Government Services of Canada records show that the Department of Indian and Northern Affairs paid von Gernet \$176,684 in 2002-2003 and \$158,667 in 2001-2002 for special and professional services (Public Accounts Canada).

the nature of belief, opinion or mythology, but not generally factually accurate.<sup>353</sup> For practical purposes, a court's acceptance of this distinction can be fatal to Indigenous Peoples' claims. The SCC has established historic tests for the proof of Aboriginal Title and Rights (contact; assertion of sovereignty; assertion of effective control) that are beyond the limited span that von Gernet claims oral histories are accurate or reliable. Thus, once the distinction is accepted, this acceptance acts to automatically devalue and preclude consideration of Indigenous Peoples oral traditions.

In *Frank*, Justice Stevens-Guille was presented with two witnesses (Dr. Hall and Mr. Lane) called by the Blackfoot defendant, and one called by the Crown (Dr. von Gernet).<sup>354</sup> The court dismissed the evidence of the expert witnesses for the Indigenous litigant as "undoubtedly ardent in its presentation" but ultimately too general to establish the right claimed.<sup>355</sup> Dr. von Gernet, on the other hand, was found to have "impressive" credentials and his "opinions on the historical matters...[are] scholarly in approach, well documented, and painstakingly objective".<sup>356</sup> Despite (or, perhaps, because of) the fact that von Gernet's evidence was drawn principally from written sources, and not "personal contact with the Blackfoot people" he was found to be the more credible and knowledgeable witness.<sup>357</sup> A similar assessment was given in *Sawridge*, where Dr. von Gernet's testimony was found to be "scholarly" in contrast to the expert evidence of Professor Moore introduced in support of the Indigenous Peoples, of which the court was left with a "most unfavourable impression and assessment of his ... credibility in terms of professional objectivity and professional

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<sup>353</sup> In *Drew*, *supra* note 285 at para 203, Justice Barry accepted the distinction made between the oral history and oral tradition by von Gernet: "Oral histories are defined as recollections of individuals who were eye-witnesses or had person experience with events occurring within their lifetime. Oral traditions, on the other hand, are the transmission of past events by word of mouth over at least a generation."

<sup>354</sup> *Frank*, *supra* note 315. Note that his name is misspelled in the judgment as "von Guernet".

<sup>355</sup> *Ibid.* at para. 54.

<sup>356</sup> *Ibid.* at paras. 55 and 58.

<sup>357</sup> *Ibid.* at para. 56.

competence. ... Professor Moore's field work and conclusions left much to be desired in the Court's view of his work.”<sup>358</sup> Von Gernet was found to be “the more impressive witness, the more careful and organized professional”<sup>359</sup> and the Court was particularly impressed with von Gernet’s extensive footnoting: “[His written report] is thoroughly bolstered by end-note references to support all its own internal quotations and virtually all its assertions.”<sup>360</sup>

This reasoning reflects a willingness to accept the evidence of experts with the assumption that they are better able to provide evidence about Indigenous Peoples and societies. The decision to devalue Indigenous oral traditions may not be done directly, but instead reflected in reasoning which deals with Indigenous oral traditions in short order and then appears to decide the case primarily on the basis of expert evidence presented. In *Drew*, Justice Barry relied heavily upon the expert testimony offered by von Gernet which attacked the oral tradition evidence of the Mi’kmaq, and which the trial judge assessed as a “rationalist approach to the law of evidence which emphasizes a search for truth, justice and reason. ... [He] places a premium on using a balanced approach which combines a respect for aboriginal traditions along with a rigorous and scientific-methodology.”<sup>361</sup>

It is clear from an examination of the cases in which von Gernet has been called as an expert that his methodology is very persuasive to the courts. Where expert evidence resonates with the inherent beliefs or values of the court (here, a suspicion about the reliability or accuracy of oral traditions) it is more readily cognizable and easily accepted,

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<sup>358</sup> *Sawridge*, *supra* note 331 at para. 140.

<sup>359</sup> *Ibid.* at para. 142.

<sup>360</sup> *Ibid.* at para. 149. See also: *Jeddore v. Canada* ([2001] 1 T.C.J. No. 750 (Tax Ct) [*Jeddore*]) where Bell, T.C.J., concluded that “von Gernet’s view [was] a logical and reasonable interpretation of the events under review” and cited the Expert Report provided by von Gernet rather extensively in the judgment.

<sup>361</sup> *Drew*, *supra* note 285 at para. 669.

presenting a “professional discourse [which] likely has particularly persuasive value with the judges” because it reinforces existing beliefs and ideologies.<sup>362</sup>

Von Gernet’s methodology is suspect, as he rarely actually works with people but draws conclusions on the basis of a review of written materials, yet his evidence is treated as “credible” and “unbiased”. Indigenous Peoples who have studied oral traditions conclude that it is impossible to truly know or understand the content or meanings of these traditions outside of the cultures that gave rise to them.<sup>363</sup> The approach taken by the courts in their assessment of von Gernet’s testimony suggests precisely the opposite conclusion. That von Gernet has been qualified as an expert to testify against so many vastly divergent Indigenous Peoples is particularly troubling. Indigenous peoples are required to present “specific” evidence to prove the existence of rights; Yet, evidence against these traditions is presented in a broad based generalized form (i.e., not that there are problems with the particular oral tradition under consideration, but that there are problems with all oral traditions).

An interesting exploration of the biases inherent here would be to posit what the result would be if Indigenous Peoples attempted to introduce expert testimony of someone who had never met, studied in depth (or at all) the Indigenous group, and attempted to have them qualified as an expert to validate the oral tradition evidence that they were presenting. Conversely, when an expert witness actually spends time with Indigenous Peoples, their credibility is often attacked and they are found to be biased.

It is important to note that there are some instances in which courts also question the credibility of witnesses called against Indigenous People. For example, in *Jacobs Justice*

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<sup>362</sup> Kline, 1993 (*supra* note 188 at 320) offers this analysis in the context of First Nation child welfare cases and notes that the protection workers both construct cases and offer evidence which is seen as more convincing than that offered by Indigenous mothers.

<sup>363</sup> The works of Archibald (*supra*, note 18), Sarris (*supra*, note 19) and Deloria (*supra*, note 21) are particularly useful in providing a discussion of this issue. See also Chapter 2.

Macaulay expressed concerns about the lack of objectivity of the Crown witness, Ms. Kennedy who “appeared, at times, to inflate the value of her own experiences to the point of puffery and was unwilling to concede that any opinion different from hers could have value” and “acted as an advocate for her views rather than an expert assisting the court.”<sup>364</sup> The approach that the court criticized in *Jacobs* is the same one that is followed by von Gernet who seldom actually has worked with, or has any personal knowledge of, the Indigenous Peoples about whom he offers an expert opinion.

Nonetheless, an examination of a significant number of cases reveals that it is far more likely for courts to dismiss expert testimony offered in favour of Indigenous litigants, than those offered by the Crown challenging the reliability of the oral tradition. Expert testimony is always subject to weighing by the trial judge. The actual or perceived bias by the courts against experts called by Indigenous Peoples (or, in favour of experts called by the Crown) is problematic, as the assessment of an expert’s credibility is not a determination that appeal courts are usually willing to question (“findings of credibility, including the credibility of expert witnesses, are for the trial judge to make, and should warrant considerable deference from appellate courts.”)<sup>365</sup>

(v) Lack of Unanimity

In cases where there is not an exact unanimity of oral tradition evidence, the evidence is often dismissed, despite the fact that taken as a collective it is very similar. Taken as

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<sup>364</sup> *Jacobs*, *supra* note 325 at para. 82. And also at para. 73:

Ms. Kennedy had limited direct experience with the Sto:lo people and, in particular, did not interview Elders before formulating her opinions in this matter. Instead, she relied on her general knowledge of native cultures in British Columbia and on her review of the historical and ethnographic record as it relates to the Sto:lo people. Although Ms. Kennedy also reviewed the evidence of the Elders in this matter she did not alter her opinions.

<sup>365</sup> *Delgamuukw*, *supra* note 45 at para. 91.

discrete parcels or historic texts, oral tradition evidence may seem contradictory or incomplete. One of the difficulties is the forum afforded by legal proceedings. Many Indigenous oral traditions are shared in groups, or social settings, and reflect a collaborative telling amongst all present. Others present are given the opportunity to question and contribute, and thereby build upon the teller's rendition. Thus, the content of the oral tradition shared is not found solely or completely in individual tellings, but rather in the collected narrative. Additionally, oral traditions are often shared over longer periods of time, and in more than one telling. This collective and on-going process allows for gaps to be filled in, for the divergent strands to be reconciled and braided together into a cohesive whole.

This process, as a method of teaching, is common in the Nlaka'pamux oral tradition. It is driven by the person who wants to teach something (who decides the content), and continues for years. As a youth, I was privileged to enjoy many instances of this teaching style. One summer while I was working as a summer student at our community office, several elder ladies would make it a daily practice to come by at around 11 o'clock. They would drink tea, sit and tell stories on the couches arrayed in front of my desk. One story might assert itself amongst them, and I would carefully track its progress and the transitions it made as each elder added a piece, corrected a piece, or added her own particular spin.

A story might, for example, involve why the loon sings. (This story more broadly talks about our responsibilities to care take our children, and the repercussions if we fail to do so, but to illustrate the content of the laws embodied within this story is not my objective here.) The next day they would arrive, and after settling down with their tea, might pretend to talk amongst themselves, they might say "I bet she does not remember why the loon

sings”. Then they would wait until I offered, “yes, I do” at which point (depending upon their moods and if they were feeling playful or not) they might feign surprise, or simply wait. I would then recount what I had learned. They might then correct the story, or add additional elements. We would repeat this process until they considered the story done, for now. Often, they would revisit the same story after several weeks, checking again, or seeing if the connections were properly made to subsequent stories.<sup>366</sup>

These opportunities are not available in a courtroom setting, and often result in situations where courts will embark upon individual examinations of each discrete piece of evidence (the sticks, instead of the tree) to the detriment of seeing the body of evidence as a whole. Compounding the problem is the fact that courts (or counsel) do not often investigate reasons for the differences, which may be easily ascertainable and allow for seemingly diverse or contradictory evidence to be reconciled.

One example of this can be found in *Hwiltsum First Nation v. Canada (Minister of Fisheries and Oceans)* a proceeding where the Tsawwassen First Nation sought leave to intervene in a fisheries dispute between Hwiltsum and Canada.<sup>367</sup> Tsawwassen intended to rely upon their oral traditions (rendered in affidavit form) of their management and control of

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<sup>366</sup> A similar process is reflected in this excerpt of this poem about my Uncle Bill, and how we continued with this process long after I was into adulthood:

I look at your eyes, and we look away from the charts and bedpans  
Look together and see the hillsides rolling with Sagebrush, and in your  
Mind you quiz, “And what’s the name of that mountain? I bet you can’t remember the name of that  
mountain” And in my eagerness, which you’ve taught me, I answer from a four year old memory, “Its  
Skeniken’mek, its Skeniken’mek...I can remember Uncle Bill, I can remember.”

We both wait in anticipation, as you’ve pretended not to hear me. But your eyes shine. “Well,” you  
say finally, “I forget why they call it that. I bet you don’t know that either.” You’ve taught me how to  
learn, and the naming game is one of our favourites. Still, after decades of teaching, I am small again  
and excited when I can remember, “It’s because of the sounds they made when they started to sing,  
after bathing in the icy cold water at the foot of the mountain. Ska...ska...ska....and then when the  
song starts, it sounds like they sing the name of the mountain.”

“Oh? That’s right, that’s right.”

<sup>367</sup> [2001] F.C.J. No. 1308 (F.C.T.D.) [*Hwiltsum*].

the Fraser River fishery. The Crown highlighted seemingly contradictory statements of an elder between an affidavit filed in the proceeding and an earlier unsworn document tendered in the process of treaty negotiations to challenge the validity of oral tradition evidence. The sworn affidavit claimed that "the Fraser River, was occupied by the Tsawwassen First Nation, who thoroughly utilized the resources in the area, for "thousands of years" as an "exclusive fishing grounds of the Tsawwassen People."...[And] that "historically, the Tsawwassen People had exclusive jurisdiction over the fisheries at Canoe Pass to the exclusion of all other aboriginal groups."<sup>368</sup> This evidence appeared to be contradicted by earlier statements made by the elder that the Tsawwassen had not been *permitted* to fish until the early 1960s ("Prior to 1962 or '63, there was no Tsawwassen native food fishery at all. The elders at that time could not recall when they had been permitted to fish. I am under the assumption that a permit was available but we, the Indians, were not made aware of it.").<sup>369</sup> In the end, although Tsawwassen's application for intervenor status was successful, they were prevented from presenting any oral history evidence.<sup>370</sup>

Here, although the record does not indicate whether the point was raised, it appears as though the problem could have been easily resolved by reference to the fact that the Indigenous Peoples were *prevented* from fishing by federal regulation, and not that they had never fished. The term "native food fishery" is understood within Indigenous communities as referring to a particular class or category of federal licences, and the absence of a "native

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<sup>368</sup> *Ibid.* at para. 8.

<sup>369</sup> *Ibid.* at para 20.

<sup>370</sup> *Ibid.* at para. 11:

[C]ounsel for the Tsawwassen First Nation was unable to satisfactorily reconcile the present affidavit evidence of the elder with that same person's recollections of a year earlier, apparently part oral history and part personal evidence. Thus the oral historical evidence tendered not only fails a reasonably reliable test, but is clearly, on its face, completely unreliable. As such it would not be useful. Moreover, any probative value is overshadowed by the potential prejudice to the Applicants. Such oral evidence would hinder the search for truth, more than help it.

food fishery” is not equivalent to saying that the people never fished.<sup>371</sup> As river and-ocean peoples, living directly adjacent to the water courses of the Fraser River and Pacific Ocean, it makes little sense to assume that the Tsawwassen Peoples did not have a fishing tradition which included management of the fishery, and instead, never fished at all.

In *Benoit* the issue before the court was whether or not adherents to Treaty 8 were entitled to a tax exemption, and if this was the understanding of the Indigenous People when they entered into the treaty.<sup>372</sup> The Crown sought to introduce written transcripts of interviews conducted by the Indian Association of Alberta’s Treaty and Aboriginal Rights Research program (the “TARR transcripts”) with approximately two hundred elders in the 1970s.<sup>373</sup> The Trial Judge refused to admit all but one of the transcripts, because only one directly referred to taxation. The Federal Court of Appeal disagreed with the decision to exclude the transcripts, finding that the fact that most TARR transcripts did not mention taxation “does not render them irrelevant. On the contrary, the fact that over 100 elders made no mention of taxation is an indication...that those interviewed may not have understood that a tax promise had been made.”<sup>374</sup>

While there may have been varying levels of reliability or usefulness of the oral tradition evidence presented, the broad dismissal of the testimony is troubling, particularly in light of the fact that rather than questioning the reasons for the apparent discrepancies, the court assessed the oral tradition testimony as fabricated. A minimal investigation may have revealed possible reasons for the discrepancies, including (i) the methodology of the

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<sup>371</sup> For a fuller discussion on “native food fishery” as a category of both law and social understanding see Harris, 2000 *supra* note 11.

<sup>372</sup> *Benoit*, *supra* note 289. Findings regarding the individual assessment of the evidence presented by the witnesses is set out earlier, *supra* notes 289 to 292.

<sup>373</sup> *Ibid.* paras. 28-33.

<sup>374</sup> *Ibid.* at para. 30. The F.C.A. overturned the Trial Judge’s finding on the basis that he had made a palpable and overriding error of law by accepting all of the oral tradition evidence that he did.

interviews (for example, if taxation was not a subject of the questioning, or if the interviewers employed a closed-question format), (ii) whether the people interviewed had always enjoyed tax exempt status and so it might simply have been something that they took for granted and did not identify as a live issue (unlike hunting, for example, where Indigenous hunters continued to be routinely charged despite the existence of treaty promises),<sup>375</sup> or, (iii) some Indigenous Peoples refer to the tax exempt status as being part of their Nation-to-Nation treaty relationship with Canada and embodied within their status as Indigenous Nations (reflecting the belief that one Nation – Canada – should not tax the citizens of another Nation – Indigenous).<sup>376</sup> While none, or all, of these alternate explanations may have been relevant to the case, it does not appear that these investigations were embarked upon; instead, the discrepancies were taken on a surface level and used to justify a wide-scale dismissal of the oral tradition evidence offered.

(vi) Assessing credibility (Or, these are not *Adaawk* and *Kungax*)

A preponderance of Aboriginal Title and Rights cases arise in British Columbia where Aboriginal Title and Rights have largely not been addressed, unlike the majority of Canada where there are historic treaties. For example, *Delgamuukw*, *Gladstone*, *Van der Peet*, *Sparrow*, *Haida* and *Taku* all arose in British Columbia. It is interesting to note that, even within British Columbia, this list is not particularly representative. There are none of the Central Interior Nations (Nlaka'pamux, Stl'atl'imx, Okanagan, Secwepemc, Tsilhqot'in) represented on this list. The social and political organization of the Central Interior Nations

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<sup>375</sup> By way of personal observation on this point, I have been surprised on several occasions while traveling through some parts of Alberta to have store clerks automatically exempt taxes from my purchases because I am Indigenous.

<sup>376</sup> Language referencing a "nation to nation" relationship or recognition of the sovereignty of Indigenous treaty nations might, therefore, have embodied a belief that tax exemption flows from this relationship.

is different in many ways from the Ocean and Marine Peoples listed. Because the jurisprudence regarding Aboriginal Title and Rights (including oral tradition evidence) has largely evolved from the SCC's consideration of these B.C. cases, the social structures and organizations of Indigenous Nations from B.C. are often used as a measure against Nations from the prairies, central Canada or the Maritimes with very different political and social organizations.

In *Delgamuukw* the SCC assessed the three types of oral tradition evidence offered by the Gitksan-Wet'suwet'en and discussed the markers of credibility inherent in those traditions: "(i) the adaawk of the Gitksan, and the kungax of the Wet'suwet'en;<sup>377</sup> (ii) the personal recollections of members of the appellant nations,<sup>378</sup> and (iii) "the territorial affidavits filed by the heads of the individual houses within each nation."<sup>379</sup> The court cautioned that this was not an exhaustive list of the possible evidence categories.

Some trial courts have taken the fact that the oral tradition evidence presented to them is different from the forms recognized in *Delgamuukw*, particularly the adaawk and kungax, as an indicator that it is less likely to be accurate. In a number of circumstances, Indigenous Peoples have had their own oral traditions devalued because they were not passed on in a

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<sup>377</sup> *Delgamuukw*, *supra* note 45 at para. 93:

The adaawk and kungax of the Gitksan and Wet'suwet'en nations, respectively, are oral histories of a special kind. ... The content of these special oral histories includes its physical representation totem poles, crests and blankets. The importance of the adaawk and kungax is underlined by the fact that they are "repeated, performed and authenticated at important feasts". At those feasts, dissenters have the opportunity to object if they question any detail and, in this way, help ensure the authenticity of the adaawk and kungax.

For a general discussion of similar types of oral traditions amongst the Tsimshian see Susan Marsden, "Adawx, Spanaxnox, and the Geopolitics of the Tsimshian" (2002) 135 B.C. Studies 101.

<sup>378</sup> *Delgamuukw*, *supra* note 45 para 99: "That evidence consisted of the personal knowledge of the witnesses and declarations of witnesses' ancestors as to land use....[A]dduced by the appellants in order to establish the requisite degree of use and occupation to make out a claim to ownership".

<sup>379</sup> *Ibid.* at para. 102: "Those affidavits were declarations of the territorial holdings of each of the Gitksan and Wet'suwet'en houses and, at trial, were introduced for the purposes of establishing each House's ownership of its specific territory."

formally identifiable structure, such as the *adaawk* and *kungax* of the Gitksan-Wet'suwet'en Peoples.

This tendency can create very real problems for a number of Indigenous Peoples whose social structure and organization are unlike the Gitksan-Wet'suwet'en and who have different oral traditions and ways of holding and transmitting knowledge and culture. By way of illustration, in *Drew*, the Court, in largely dismissing the oral tradition offered by the Mi'kmaq, observed that the evidence in *Delgamuukw* "contained circumstantial guarantees of reliability in the form of cultural practices. ...These oral traditions [*adaawk* and *kungax*] were deemed to be reliable by virtue of their frequent public retellings."<sup>380</sup> Ultimately, the court concluded that there was no "similar indicia of circumstantial reliability in the present case" and "nothing presented which would indicate that there is anything special or particularly trustworthy about the evidence."<sup>381</sup> In *Benoit* the Federal Court of Appeal was mindful of the fact that the evidence presented in that case was different from that presented in *Delgamuukw*, and used the differences in the form or style of evidence presented to devalue it:

It is also important to point out that the nature of the oral history evidence in this case is quite different to that presented, for example, in *Delgamuukw*, supra. In that case, the oral history of the Gitksan and Wet'suwet'en, known as the *adaawk* [sic] and *kungax* respectively, was considered as "sacred 'official' litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House". Only specially-appointed people at certain important community events were entitled to repeat these stories and the authenticity of the stories was ensured, because anyone who objected to any details of the stories had the opportunity to raise his or her objections at the events. Thus, the oral history was formal and regimented. In the present case, however, it is of a substantially different nature in that it was passed on from individual to individual in an informal manner. The types of "checks and balances" which ensured authenticity in the *adaawk* and *kungax* were not present. Consequently, the oral history evidence adduced in this case could not be considered as reliable as that presented in *Delgamuukw*.<sup>382</sup>

<sup>380</sup> *Drew*, supra note 285 at para. 677. See also *Squamish* (supra note 285 at para. 36) where it was observed that the oral tradition evidence presented "did not take the form of a formal authenticated litany such as those referred to in *Delgamuukw*. The one exception, it was argued, was genealogical information passed on during a Musqueam naming ceremony."

<sup>381</sup> *Drew*, *ibid.* at para. 680.

<sup>382</sup> *Benoit*, supra note 289 at para. 109.

What is particularly troubling is that the evidence presented in these cases, in many respects, would fit within the category of personal recollection evidence identified in *Delgamuukw* but was still devalued because it was not *adaawk* and *kungax*. These cases indicate that some courts have fundamentally misunderstood the SCC's listing of the various types of oral tradition evidence in *Delgamuukw* where the SCC was specifically addressing the information that it had before it. It was not listing closed categories of evidence, or commenting on the individual indicators of validity that might occur within separate traditions. The effect of these judgments is the creation of a hierarchy of evidence and potentially of different Indigenous claimants. By way of illustration, there are often a set of oral traditions or laws regarding responsible harvesting and resource management that are taught on the land, in a process of showing, doing and telling. For example, hunting safety laws might ordinarily be passed in a number of ways, including oral traditions about respect and the sacredness of all wildlife, but primarily taught through an actual process of learning on the land over a period of years. These activities and types of teaching oral traditions would not be captured in the categories of evidence enunciated in *Delgamuukw*.

Case law has contributed to an examination of those features of oral traditions that ensure accuracy, including an incorporation of the features that arise from within the traditions themselves. In *Jacobs* Justice Macaulay referred to the Sto:lo oral tradition and noted these features within the tradition itself for ensuring accuracy:

When told by a member of the Sto:lo community, this type of oral history is called *Sqwelqwel* or "true news." Its cultural legitimacy is established by "oral footnoting", a process involving consideration of the respect accorded by the community to both the speaker and his or her lineage through which the story has been passed back to its source. The importance of *Sqwelqwel* in a community needing an accurate means of passing on its history and lineage cannot be overstated. Only those speakers providing appropriate footnotes were considered

reliable. Controls by the community were exercised in a subtle fashion; those who did not provide proper footnoting were not invited to speak at future public gatherings.<sup>383</sup>

Judge Point, in *Haines*, admitted the oral tradition evidence of Nisga'a elders and fishers on the basis that it was both reliable and necessary and that "all of the Nisga'a witnesses were in the best position to provide evidence of the Nisga'a fishing tradition and practices. They were each taught by other Nisga'a fishermen in the usual way of being schooled by their uncles or other knowledgeable fishermen."<sup>384</sup>

Justice Vickers in *Tsilhqot'in(1)* set out the process that he intends to follow in assessing the oral history and tradition evidence of the Tsilhqot'in and Xenigwet'in at trial (regarding a claim of Aboriginal Title).<sup>385</sup> This includes an examination (based on evidence presented by the Indigenous People) of what constitutes internal validity within the oral traditions themselves (the information the court requested that the Tsilhqot'in present included their "way of preserving and recalling oral history, legends, stories and traditions," which would provide a "a sufficient background against which the reliability of any individual witness's evidence can be tested").<sup>386</sup> The decision contained a fairly broad list of concerns that the Court asked that each Indigenous witness address, including these factors (aimed at identifying the internal validity of oral tradition evidence):

- 1) how their oral history, stories, legends, customs and traditions are preserved;
- 2) who is entitled to relate such things and whether there is a hierarchy in that regard;
- 3) the community practice with respect to safeguarding the integrity of its oral history, stories, legends and traditions;
- 4) who will be called at trial to relate such evidence, and the reasons they are being called to testify.<sup>387</sup>

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<sup>383</sup> *Jacobs*, *supra* note 325 para. 57.

<sup>384</sup> *Haines*, *supra* note 323 at para. 118.

<sup>385</sup> *Tsilhqot'in (1)* (*supra* note 325 at para. 24, and 19-25 generally).

<sup>386</sup> *Ibid.* at para. 26.

<sup>387</sup> *Ibid.* at para. 24.

Decisions such as *Haines*, *Tsilhqot'in (1)* and *Jacobs* represent examples of where trial courts have indicated that they are willing to consider Indigenous oral traditions from within the context of the cultures which gave rise to them, including by examining those internal markers of credibility which arise within the tradition themselves. This approach is certainly preferable to one which does not seek to actively engage with the particular oral tradition under consideration. In many respects, the treatment of oral tradition evidence may be very influenced by the ways in which this evidence is presented. For example, is counsel is not familiar with oral traditions or does not pursue examinations of witnesses which ask about the features which ensure reliability this discussion may not even get before the court. A note of caution should be heralded about the transformative possibilities that exist in introducing Indigenous oral traditions, together with evidence of internal features that ensure reliability. This process invites the court to appropriate for itself the ability to assess whether or not Indigenous oral traditions can be considered internally valid within the society that gave rise to that tradition.

In some cases, where courts delve into a witnesses credentials or ability to give evidence (or even to know) their Peoples' oral traditions this can serve as another route for devaluing that evidence. In practice, the results are often paradoxical: an Indigenous community chooses people to testify on its behalf, and a court may devalue this testimony because they find that the witness is unrepresentative or incapable of transmitting oral traditions, or that the evidence offered was not valid within the tradition within which it was presented.<sup>388</sup>

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<sup>388</sup> In *S.K.K. v. J.S.* ([1999] N.W.T.J. No. 94 at para. 34 (N.W.T.S.C.)) it was important to the court that the testimony on Inuit custom was given by the applicant and "not presented as expert evidence, there being no information as to the deponent's knowledge of custom adoption or aboriginal customary law."

Where there is an underlying bias or presumption against the reliability or credibility of oral traditions factors for ensuring internal validity may be used as one more basis upon which to dismiss Indigenous oral tradition evidence. There are numerous instances in which courts dismiss oral traditions based on their own assessment of the features that render oral traditions reliable within the traditions themselves. Despite the fact that it is the Indigenous community itself who identified the people to give evidence on their behalf (presumably, they choose people who were capable of representing their collective knowledges and traditions) courts may determine that these people are not representative. In *Quinney* the court noted that there is “no evidence that the elder represents a reasonably reliable source of his people's history. Indeed there is no evidence of his qualifications or authority even within the aboriginal community”).<sup>389</sup> In *Benoit* the F.C.A. observed that a witness was “in his early 50s, but was not an elder and had no mandate from his community to give evidence on its behalf”.<sup>390</sup>

A common example of the devaluation of witnesses' testimony based on the courts' own assessment of what makes oral traditions internally valid or reliable occurs in assessment of the age of Indigenous witnesses called to testify and the willingness to reject evidence because the witness is not an “elder”.<sup>391</sup> This line of reasoning negates the fact that many Indigenous Peoples may have knowledge of traditions, and that elders are not the only persons who hold and carry forward knowledge in living oral traditions. People are trained and groomed from a young age, taught in the traditions of their people, and thus there are People at various different ages or stages of life who carry information, and yet those who

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<sup>389</sup> *Quinney, supra*, note 326 at para. 26.

<sup>390</sup> *Benoit, supra*, note 289 at para. 70.

<sup>391</sup> In *Bear Island (supra* note 191) the Ontario Court of Appeal affirmed the trial judge's decision to systematically devalue the oral tradition evidence presented, partly on the basis that there were older band members who could have testified.

are not considered an elder are vulnerable to having their testimony devalued based on their age alone.

(vii) Special Rights and Special Evidence

A common fear that trial courts have shown in addressing Aboriginal Title and Rights claims is that these rights, if recognized, afford “special rights” or “preferential rights” to Indigenous Peoples.<sup>392</sup> This concern has been carried over into an assessment of Indigenous Peoples oral traditions, exacerbated by the majority’s caution in *Mitchell* against a “complete abandonment” of the rules of evidence, and direction that the relaxation of evidence law should not mean that they may be “artificially strained to carry more weight than it can reasonably support”.<sup>393</sup> The concern, since mirrored by trial courts, is that Indigenous oral tradition evidence not be unduly favoured or given a form of evidentiary special treatment. The majority noted that “claims must be proven on the basis of cogent evidence establishing their validity on the balance of probabilities. Sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim” and rejected what they characterized as “the application of a very relaxed standard of proof (or, perhaps more accurately, an unreasonably generous weighing of tenuous evidence).”<sup>394</sup>

In *Mitchell* the majority went on at some length to discuss the appropriate interpretation to be given to evidence offered in the oral tradition, noting that they would not

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<sup>392</sup> See Chapter 2 for a fuller discussion of this point. For a similar example arising from Australia, see Barbara Ann Hocking and Barbara Joyce Hocking who have observed that Australian courts are reluctant to recognize Aboriginal property interests because of the fear that this recognition is “race based” (“Australian Aboriginal Property Rights as Issues of Indigenous Sovereignty and Citizenship” (1999) 12 Ratio Juris. 196 at 197-198 [Hocking and Hocking]). This argument conveniently denies the continued impacts of colonization. Hocking and Hocking contend that, in Australia, “the human rights of Indigenous people has been politicized and transformed from a human rights issue to a race issue” (*ibid.* at 218) which effectively precludes self-determination considerations.

<sup>393</sup> *Mitchell*, *supra* note 48 at para. 39.

<sup>394</sup> *Ibid.* at para. 51. The majority concluded: “The Van der Peet approach, while mandating the equal and due treatment of evidence supporting aboriginal claims, does not bolster or enhance the cogency of this evidence...”

set out "precise rules" or "absolute principles" but rather that the weighing and interpretation of evidence is properly left to the trier of fact who hears the evidence in each instance. Having affirmed the necessity of giving due weight to oral tradition evidence, the majority reiterated "that a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law".<sup>395</sup> The majority then concluded with this statement:

There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. ...[T]he Van der Peet approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. .... Placing "due weight" on the aboriginal perspective, or ensuring its supporting evidence an "equal footing" with more familiar forms of evidence, means precisely what these phrases suggest: equal and due treatment. While the evidence presented by aboriginal claimants should not be undervalued "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case", neither should it be artificially strained to carry more weight than it can reasonably support.<sup>396</sup>

The suggestion that Indigenous Peoples may be invoking special evidentiary rights has lead subsequent trial courts to be particularly conscious and on guard against this possibility. Trial courts have eagerly seized upon the comments of Chief Justice McLachlin in *Mitchell* as a way of remedying this situation and avoiding any "special treatment" of Indigenous Peoples evidence. The suspicion that Indigenous oral tradition has been given "preferential treatment"<sup>397</sup> has been influenced by the assertion that differential consideration of Indigenous oral traditions has resulted in a form of legal favoritism. Von Gernet, for example, has argued that the SCC's treatment of the oral tradition in *Van der Peet* "risks an imbalance in which oral traditions will be consistently *overvalued* in the courts" including

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<sup>395</sup> *Ibid.* at paras. 37-38.

<sup>396</sup> *Ibid.* at para. 39.

<sup>397</sup> See e.g. *Benoit*, *supra* note 289 at para. 110.

possibly “an outright abandonment of the rigorous scrutiny that is essential to any fact-finding process.”<sup>398</sup> Von Gernet is critical of the SCC’s criticism of Justice McEachern’s dismissal of the evidence presented at the trial phase of *Delgamuukw*, claiming that despite the more unfortunately racist statements that McEachern made, his overall methodology was a rigorous and fair one, and is the approach that should be followed in assessing Indigenous Peoples’ evidence.

In *Wasauksing* Justice Blair characterized the SCC’s decision in *Mitchell* as a caution that admitting Indigenous oral traditions as evidence “does not contemplate jettisoning of all normal considerations in valuing evidence.”<sup>399</sup> Interpreting *Mitchell* the court in *Drew* found that “equal and due footing” meant that “when oral evidence is presented as proof of what actually happened in the past it must be treated with the same critical case as other historical sources”<sup>400</sup> and concluded that the guiding principle in *Mitchell* was that “the fact that the evidence forms part of an aboriginal oral tradition does not mean that the evidence is automatically trustworthy or cogent.”<sup>401</sup> Justice Barry then went on to accept as a “principle of good faith in decision-making” with the aim of “achieving justice in adjudication” the statement that “the double standard once privileging written over oral documents has been dismantled, it should not be replaced with another double standard exempting oral histories and traditions from the critical scrutiny that all primary and secondary sources deserve.”<sup>402</sup>

These considerations reflect broader concerns about the “special” nature afforded to Aboriginal Rights and Treaty Rights by virtue of their constitutional protection. The

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<sup>398</sup> Von Gernet, 2000, *supra* note 30 at 115. It is interesting to note that von Gernet testified as an expert at trial in *Mitchell*, and while the trial judge did not follow his reasoning, the majority of the SCC in *Mitchell* appears to have been influenced by it.

<sup>399</sup> *Wasauksing*, *supra* note 298 at para. 299.

<sup>400</sup> *Drew*, *supra* note 285 at para. 202.

<sup>401</sup> *Ibid.* at para. 666.

<sup>402</sup> *Ibid.*, at paras. 670-671. This statement is drawn directly from the Expert Report prepared in the case by von Gernet (Expert Report, pp. 16-17).

persistent concerns that Indigenous oral tradition evidence not be afforded “special status” is particularly troubling in light of a review of cases which shows that Indigenous oral tradition evidence continues to be denied even equal weight or consideration.

### C. Conclusion

Expert evidence offered outside of the oral tradition and in support of the Crown’s challenge of Indigenous Peoples claims has *footnotes*,<sup>403</sup> Indigenous oral traditions may have *supernatural bears*.<sup>404</sup> For some courts, there is no contest. Despite the direction given by the SCC that oral tradition evidence must be placed on an “equal footing” and given “due weight”<sup>405</sup> the original assessment of oral tradition evidence at the trial phase of *Delgamuukw*, (B.C.S.C.) - as faulty and light-weight historic evidence - continues to dominate trial courts (and their immediate appellate courts) considerations of Indigenous oral traditions.

Despite a nearly universal concern about avoiding the creation of “special” evidence rules in favour of Indigenous litigants, a review of cases to have considered oral tradition evidence shows that there is indeed a “special” class of evidence law evolving which systematically devalues and undermines Indigenous oral traditions. Indigenous oral traditions are routinely assessed and weighed according to a methodology of suspicion that questions their accuracy, trustworthiness and reliability.

The fact that Indigenous oral traditions are routinely given little weight in their consideration by trial courts highlights the way in which law operates to mask or render as neutral processes which protect and forward the interests of dominant society (here, through

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<sup>403</sup> See *supra* note 360.

<sup>404</sup> *Delgamuukw*, (B.C.S.C.), *supra* note 104 at 179.

<sup>405</sup> *Delgamuukw*, *supra* note 45 at para. 87.

enforcing the dispossession of Indigenous Peoples' territories and denial of Indigenous Peoples' rights). Loo has observed that:

[T]he power of the law cannot rest on naked force because obedience to the law depends on a continued belief in its legitimacy. People must believe that despite their condition they will be treated equally before the law, and that those who administer it as well as the laws they enforce are reasonably fair. Belief in the rule of law is achieved and maintained by the theoretical and ritualistic features of courtroom procedure that mask the interests upheld by the law.<sup>406</sup>

The operation of this process is clearly evidenced in the admission of Indigenous oral traditions as evidence (fostering a continued belief in the legitimacy of Canadian courts) coupled with a habitual refusal to afford any weight to that evidence. A methodology of suspicion names the problem as being located within individual oral traditions or witnesses (lack of reliability, lack of accuracy, lack of specificity, presence of bias) and therefore fosters the appearance of Canadian courts as fair or balanced, such that the systemic bias against Indigenous oral traditions (and, thus, against the Indigenous claims which rely upon those traditions) is obscured. At its most bare, this review suggests that evidence law (and classification as evidence) is not the appropriate venue for the consideration or use of Indigenous oral traditions.

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<sup>406</sup> Tina Loo, "Dan Cranmer's Potlatch: Law as Coercion, Symbol, and Rhetoric in British Columbia, 1884-1951," in Tina Loo and Lorna McLean, eds., *Historical Perspectives on Law and Society in Canada* (Mississauga: Copp Clark Longman Ltd., 1994) 219 at 223 [Loo].

## Chapter 5. Surely Controversial (or, Necessary Controversies): Conservation and Safety Laws

### A. Introduction

I started this inquiry at the safest of places – in my mother’s stomach. When she was in advanced stages of pregnancy, my mom was confined to bed rest and did not yearn for pickles or strawberry ice cream but rather for *smiyɔ* (deer meat). After several weeks of unsuccessful hunting forays, my dad determined it was necessary that my mom (and me in her stomach) accompany him to bring luck to the hunt. My mom’s medical condition necessitated elaborate preparation, including the borrowing of a vehicle with a backseat which was converted to a traveling bed and lined with blankets and pillows for my mom to rest on. (Thus, allowing her to follow doctor’s strict orders for bed rest, while still participating in the hunt). Our night hunt was successful. This is how it came to be that I went night hunting before I was born, and continued through my infancy and adolescence to go night hunting with my dad. This is also how it came to be, that years later when I was approached to represent Ivan (Wayne) Morris and Carl Olsen against charges for hunting dangerously (with children in a vehicle, at night), my own sense of justice was outraged that these hunters had been charged at all.

I now propose to continue this inquiry in the unsafest of places – in Canadian courts where common sense assumptions about safety arm themselves in challenge of Indigenous night hunting practices, and the laws and traditions which keep those hunts safe. Even within this most dangerous of places I have chosen what should be the safest place to start: within the protection offered to Indigenous hunting and safety jurisprudences by the Douglas

Treaty.<sup>407</sup> Through an examination of *R. v. Morris and Olsen*,<sup>408</sup> a case involving night hunting charges brought against two Tsartlip hunters, I hope to highlight several ways in which common sense assumptions about the necessity of Canadian safety and conservation laws continue to impede recognition of Indigenous Peoples laws.

### **B. Surely Uncontroversial: Canadian Safety and Conservation Laws**

In setting out the valid legislative objectives where government could infringe Aboriginal Rights in *Sparrow*, the SCC listed conservation of natural resources and harm prevention “to the general populace or to aboriginal peoples themselves” as measures said to be “surely uncontroversial” where overarching government regulation was both justified and required.<sup>409</sup> The SCC affirmed its earlier statement in *Kruger* that “without some conservation measures the ability of Indians or others to hunt for food would become a moot issue in consequence of the destruction of the resource.”<sup>410</sup> Similarly, Justice McLachlin in her dissenting opinion in *Van der Peet* confirmed the necessity of the Crown’s regulatory regime: “There can be no use, on the long term, unless the product of the lands and adjacent waters is maintained. ... Any right, Aboriginal or other, by its very nature carries with it the obligation to use it responsibly. It cannot be used, for example, in a way which harms people, Aboriginal or non-Aboriginal.”<sup>411</sup> Cory, J., writing for the majority in *Nikal*,

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<sup>407</sup> The North Saanich Treaty of 1852 (the “Douglas Treaty”) should present a safer place to start because it is a nation-to-nation treaty entered between the Tsartlip and representatives of the Crown (Britain, with obligations later assumed by Canada) that affirms the Tsartlip right to hunt as formerly. For further discussion of the Douglas Treaties see Hamar Foster and Alan Grove, “Trespassers on the Soil: United States v. Tom and A New Perspective on the Short History of Treaty Making in Nineteenth-Century British Columbia” (2003) 138/139 BC Studies 51.

<sup>408</sup> [1999] B.C.J. No. 3199 (B.C. Prov. Ct.) [*Morris*, (BC Prov. Ct.)], affirmed at [2002] 4 C.N.L.R. 222 (B.C.S.C.) [*Morris*, (B.C.S.C.)], and [2004] 2 C.N.L.R. 219 (B.C.C.A.) [*Morris*, (B.C.C.A.)].

<sup>409</sup> *Sparrow*, *supra* note 42 at 1113-1114.

<sup>410</sup> *Ibid.* at 1112.

<sup>411</sup> *Van der Peet*, *supra* note 43 at [check for para references] 272, also 279. Similarly in *R. v. Marshall* ([1999] 3 S.C.R. 533 at para. 29 [*Marshall (II)*]) the SCC noted that “Conservation has always been recognized to be a

reiterated the need for government regulation as a precondition to the existence of Aboriginal Rights: “The very right to fish would in time become meaningless if the government could not enact a licensing scheme which could form the essential foundation of a conservation program.”<sup>412</sup> The *Gladstone* case was critical in structuring the current definition of Aboriginal Rights within Canadian legal imagination as without internal limits and thereby justifying expansive state regulation and interference with Aboriginal and Treaty Rights for public purposes.<sup>413</sup>

Two mutually reinforcing assumptions are reflected in these decisions. First, that Indigenous Peoples are subsumed into Canada, such that they have no separate or independent interests that are in conflict with what Canadian governments determine to be in the general public interest. Second, that without state intervention, Indigenous Peoples would over-exploit the resources and possibly cause harm to themselves or others in the process. Absent from the combined weight of this reasoning (and this absence is critical) is any reference to Indigenous Peoples’ own laws. A circular form of reasoning results, from which it is almost impossible for Indigenous Peoples to escape: (1) Indigenous Peoples have safety and conservation laws and values; (2) Canada and the provinces pass safety and conservation laws; (3) Therefore, Canadian safety and conservation laws do not violate Indigenous Peoples rights. Critiquing the approach taken by the Court in developing its justification tests in *Delgamuukw* and *Gladstone* Macklem has observed that the fact that

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justification of paramount importance to limit the exercise of treaty and aboriginal rights in the decisions of this Court”

<sup>412</sup> *Nikal*, para. XCIV.

<sup>413</sup> *Supra* note 44. For a fuller discussion of the *Gladstone* decision and the way in which the SCC cast the Indigenous fishery as unlimited as a means of justifying state control see Chapter 2, and Harris, 2003 *supra* note 11; and, Borrows, 1997-98, *supra* note 8.

Indigenous Peoples are also Canadians is not sufficient to ground a justification for the infringement of constitutional rights.<sup>414</sup>

Kent McNeil, assessing the SCC's casting of Aboriginal Rights as "unlimited" and not subject to Indigenous Peoples own laws, draws an analogy to the SCC's reasoning in *Reference Re Manitoba Language Rights*.<sup>415</sup> Upon finding that the bulk of Manitoba's statutes to be unconstitutional, the SCC imposed a grace period for unilingual laws to preserve the "rule of law". McNeil argues that the SCC's reasoning was that it was better to have unconstitutional laws, rather than to have no laws, and suggests that in assuming that "the Aboriginal peoples do not have adequate laws of their own to govern the exercise of their rights" the SCC preserves overarching federal regulatory power out of fear that a legal vacuum would otherwise result.<sup>416</sup> The "standard denial of the inherent right of the Aboriginal peoples to govern themselves...appears to have been the Supreme Court's starting point for assessing the effect of section 35(1)" leading to a concern to protect federal legislative power, rather than alter the existing structure to create space for Indigenous Peoples' laws.<sup>417</sup>

Macklem has argued that, by restricting s.35(1) constitutional protection to culture, the SCC construes Indigenous Peoples as cultural minorities and diminished the collective rights of Indigenous Peoples, which ought to operate to protect Indigenous Peoples, as peoples, as individual rights to engage in certain cultural practices and would have included protection of both governance and territorial interests in the definition of rights.<sup>418</sup> Macklem asserts that the fact of Canadian sovereignty does not provide reason to limit constitutional

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<sup>414</sup> *Supra* note 81 at 189-190.

<sup>415</sup> [1985] 1 S.C.R. 721 [*Reference Re Manitoba Language*].

<sup>416</sup> McNeil, *supra* note 13 at 202-212.

<sup>417</sup> *Ibid.* at 197.

<sup>418</sup> *Ibid.* at 61, and 51-52.

protection of Aboriginal Rights, and that the reconciliation test developed by the courts “wrongly excludes certain interests associated with Indigenous difference and wrongly includes countervailing state interests”.<sup>419</sup> Leonard Rotman has observed that by defining Aboriginal Rights in a limited and compartmentalized fashion, absent recognition of Indigenous Peoples governance powers which form the context of Indigenous Peoples exercise of these rights the SCC creates a “jurisdictional vacuum” which justifies the denial of Indigenous Peoples governance abilities.<sup>420</sup>

Assertions that it is common sense or uncontroversial that government regulation is needed for conservation and safety purposes are rarely subject to judicial scrutiny or examination. Where governments are able to frame the issue before the court as involving public safety or conservation, with few exceptions, they appear to be able to achieve a form of constitutional override, as safety and conservation laws are found, by their very classification, to be sufficient to justify any government actions that infringe Aboriginal or Treaty Rights. Anchored by the weight of their positioning as common sense necessity, Canadian safety and conservation laws are lodged firmly in place and seemingly impervious to any challenges offered by Indigenous Peoples’ own laws or constitutionally recognized rights.

The assertion that conservation and safety laws are good “for aboriginal and non-aboriginal people alike” is deserving of closer scrutiny. Dale Turner has observed that “for many political liberals, imposing sameness is better than recognizing difference. Of course, throughout the discussion of rights, especially Indigenous rights, there is no need for the

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<sup>419</sup> *Supra* note 81 at 166.

<sup>420</sup> “Creating a Still-Life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada” (1997) 36 *Alta. L. Rev.* 1 [Rotman, 1997].

Indigenous voice.”<sup>421</sup> When Indigenous interests are assessed in legal determinations as assimilated (embodied or subsumed) into broader Canadian public interests it becomes possible to obliterate those areas in which Indigenous laws are distinct and call for different outcomes. Shared objectives (safety and conservation) do not automatically justify the assumption by one party of the means and ways of achieving those objectives, or account for the different definitions which may be inherent in discussions of conservation and safety values and concerns.<sup>422</sup>

### C. Common Sense

Common sense is a powerful ideological tool that can normalize and rationalize prejudices, rendering them arduously difficult to dislodge. When relied upon by courts, common sense assumption can reproduce and legally enshrine stereotypes and biases. The assertion that something is simply “common sense” enrobes the assertion it contains in neutrality, shielding it from scrutiny.<sup>423</sup> Eagleton has observed:

Successful ideologies are often thought to render their beliefs natural and self-evident – to identify them with the “common sense” of a society so that nobody could imagine how they might ever be different...[T]he ideology creat[es] as tight a fit as possible between itself and social reality, thereby closing the gap into which the leverage of critique could be inserted. ... On this view, a ruling ideology does not so much combat alternative ideas as thrust them beyond the very bounds of the unthinkable.<sup>424</sup>

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<sup>421</sup> Turner, 2004 *supra* note 9 at 236.

<sup>422</sup> Rebecca Tsosie (“Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights” (1999-2000) 47 U.C.L.A. L. Rev. 1615 at 1617) argues that public discourse on treaty rights (in Indian Treaties and the Treaty of Hidalgo with Mexican Americans) has been complicated by questions about whether or not Indigenous Peoples (both Indian and Mexican American) are also “Americans”.

<sup>423</sup> Sonia Lawrence (Book Review: *Prejudicial Appearances: The Logic of American Anti-discrimination Law*, (2004) 42 Osgoode Hall L.J. 180 (QL)) has argued that if “judges are convinced that what amounts to common sense is not discriminatory, then anti-discrimination law will never succeed in changing social practices. It will only condemn actions that are already the subject of some undefined societal consensus, actions that common sense would not support” concluding that common sense therefore is not an adequate basis for anti-discrimination law as “[t]ime after time we have seen political, judicial, or social reconsiderations conclude that what was common sense was also discriminatory.”

<sup>424</sup> Terry Eagleton, *Ideology: An Introduction* (New York: Verso, 1991) at 58, as quoted in Kline, 1992 (*supra* note 139 at note 76).

Ruth Sullivan suggests that the main advantage of a resort to common sense is the judicial efficiency which it affords: “[I]t does not require proof. Its truths can be taken for granted. It can be relied on by judges...without having to go through the trouble of sifting through evidence pro and con. ...[I]t saves time and expense. It also permits interpreters to rely on truths that may not be susceptible of proof in the ordinary way.”<sup>425</sup> Sullivan also identifies a “worrisome side” to common sense assertions, including that “what passes as common sense is not necessarily true or appropriate or good” and that “[w]hat is accepted as desirable and self-evident to some may be hateful or doubtful to others” noting that where common sense beliefs are taken for granted often “little opportunity is afforded for challenge.”<sup>426</sup>

Justice Bastarache made these comments about the use of common sense rationale in legal reasoning:

[T]here is now a clear tendency of the Court to reinforce the legitimacy of certain decisions by alluding to common sense or what you might describe as the “common understanding of reasonable people”. But one must be very cautious with regard to recurring to common sense. Usually, common sense is convincing because of its ambiguity rather than its evidential value. I am personally worried about the use of common sense where subjectivity is amplified by reference to public perception rather than clear analysis. Although we have, intuitively, an understanding of the world and its phenomena, it is usually necessary to bring forward real evidence to establish the context in which a decision is to be made. Prejudice, myths and changes in values suggest that it is necessary to question many popular conceptions.<sup>427</sup>

Justice L’Heureux-Dube, in *R. v. Seaboyer*, commenting on the application of “rape shield” laws and the question of whether or not a woman’s sexual history would be admissible as relevant information (the common sense assumptions referred to were about

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<sup>425</sup> Ruth Sullivan, *Statutory Interpretation* (Concord, Ont.: Irwin Law, 1996) at 39-40 [Sullivan].

<sup>426</sup> *Ibid.* Sullivan highlights that “[a]t one time, it was obvious to all that the world was flat, that burning was a good way to dispose of witches” as examples of where common sense was assumed in the past; In “Statutory Interpretation in the Supreme Court of Canada”(1998-1999) 30 Ottawa L. Rev. 175 Sullivan identifies similar difficulties with a “plain meaning” approach to statutory interpretation arguing that the plain meaning of any given provision may vary over the cultural contexts of those interpreting the statute.

<sup>427</sup> Michel Bastarache, “Supreme Advice to the Successful Litigator” (Paper presented to the Advocacy in the Supreme Court of Canada conference, November, 1998, Ontario County of Carleton Law Association) (QL).

the tendency of “unchaste” women to lie or be more likely to consent to sex), wrote that “there are certain areas of inquiry where experience, common sense and logic are informed by stereotype and myth” and lamented that, despite a societal recognition of the stereotypes that have been pervasive about women and their harmful repercussions, this knowledge “has had surprisingly little impact in this area of the law.”<sup>428</sup>

In *Thomson Newspapers Co. v. Canada (A.G.)*,<sup>429</sup> Justice Bastarache observed that there are situations where it is necessary to take common sense notice of the potential harms to particularly vulnerable groups and where courts should not “demand a scientific demonstration or the submission of definitive social science evidence”.<sup>430</sup> He then went on to caution that while reliance on common sense assumptions might be appropriate to *protect* vulnerable groups, common sense assumptions are not an acceptable basis on which to *deny* rights. Therefore, in *Thomson*, even though the majority agreed that there was a “pressing and substantial” issue (the potential of voters to be misled by the polls published in the newspaper) common sense assertions about the potential negative impact of polling information in the absence of absent specific evidence of actual harm was found to be an insufficient basis for allowing a restriction of freedom of expression.<sup>431</sup>

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<sup>428</sup> [1991] 2 S.C.R. 577 at 586-87, and 680 [*Seaboyer*]. Feminist theorists have actively challenged “common sense” assumptions that impact upon the way women are perceived within the legal system. See e.g. Regina Graycar, “The Gender of Judgments: An Introduction” in M. Thornton ed. *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995) 262 who argues that common sense assumptions are value laden and gendered; Justice L’Heureux-Dube’s comments in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para 95. “This case has not dispelled any of the fears I expressed in *Seaboyer*... about the use of myths and stereotypes in dealing with sexual assault complaints”; and, Bertha Wilson, “Will Women Judges Really Make a Difference?” (1990) 28 Osgood Hall L.J. 507.

<sup>429</sup> [1998] 1 S.C.R. 877 at paras. 116-117 [*Thomson*]. This case concerned an application to ban the publication of polling results too closely to an election so as to avoid prejudicing the election results.

<sup>430</sup> Citing the example of Justice Sopinka’s reliance on the common sense assertion that pornography can harm women in *R. v. Butler*, [1992] 1 S.C.R. 452. Similarly, in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 [*RJR-MacDonald*] Justice McLachlin held that there was a common sense link between tobacco use and cancer, and the impact of advertising in encouraging tobacco use. Common sense was found to be enough, despite the lack of conclusive scientific evidence, to ground these findings.

<sup>431</sup> *Thomson*, *supra* note 429 at para. 117.

In *Gosselin v. Quebec (A.G.)*<sup>432</sup> the SCC split on the issue of whether or not Quebec's social assistance laws, creating a "workfare" program which required those under 30 years of age to work in order to gain an increased benefit level, was discriminatory. The decision turned on assumptions of whether or not younger people were in a better position to find and maintain employment. Justice Bastarache, in dissent, found that it was fatal to Quebec's argument that they relied on an "unverifiable presumption" that "people under 30 had better chances of employment and lower needs".<sup>433</sup> Justice McLachlin, writing for the majority, found that "logic and common sense"<sup>434</sup> supported a scheme that makes distinctions based on age, noting that "[a]s a matter of common sense, if a law is designed to promote the claimant's long-term autonomy and self-sufficiency, a reasonable person in the claimant's position would be less likely to view it as an assault on her inherent human dignity."<sup>435</sup> McLachlin rejected Bastarache's reasoning because she found that the distinction was to the *benefit* of the claimant. She found that requiring empirical evidence "where these assumptions are reasonably grounded in everyday experience and common sense" was to require "too high" a standard, and that the legislature "is entitled to proceed on informed general assumptions without running afoul of s. 15, ... *provided these assumptions are not based on arbitrary and demeaning stereotypes.*"<sup>436</sup> Had, however, she found that the provisions were not beneficial to those under 30 years of age, she too would have required a higher standard of government to justify its actions.

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<sup>432</sup> [2004] 4 S.C.R. 429 [*Gosselin*]. For commentary on this case see Natasha Kim and Tina Piper, "Gosselin v. Quebec: Back to the Poorhouse..." (2003) 48 McGill L.J. 749 who argue that the common sense assumptions relied upon by the majority have the impact of reinforcing stereotypes against young people and that it is demonstrable that younger people *do not* have an easier time in finding and retaining employment than their older counterparts.

<sup>433</sup> *Ibid.* at para. 248.

<sup>434</sup> *Ibid.* at para. 44.

<sup>435</sup> *Ibid.* at para. 27.

<sup>436</sup> *Ibid.* at para. 56 [Emphasis added].

These decisions indicate that while “common sense” assertions may be useful, (e.g., to protect the interests of vulnerable groups in society by not requiring that they conclusively prove potential harms resulting from government actions) it is particularly important to avoid recourse to common sense assumptions in situations where there are prevailing stereotypes, myths and assumptions that may be reinforced and entrenched by reliance on those assumptions.

In applying notions of “productivity” to land, Schneiderman observes that common sense notions of productive and unproductive uses of land have been used in law “simultaneously to justify occupation of aboriginal land by European colonists claiming title and to demote aboriginal title to simple occupation”.<sup>437</sup> The notions of productivity that are assigned to Indigenous Peoples posit that Indigenous Peoples *lived* or *survived* on territories, but could not possibly be said to have *owned* or *occupied* them in any legally consequential way. A similar process is in operation regarding safety and conservation laws. Common sense assumptions (about the dangerousness of night hunting, for example) bolster the jurisdiction of Canadian governments, while simultaneously demoting and minimizing Indigenous laws.

#### **D. False Assumptions**

Embodied within common sense assertions of the need for conservation and safety laws to regulate the practice of Aboriginal and Treaty Rights are deeply buried assumptions which prevent consideration of the existence or operation of Indigenous laws. The Royal Commission on Aboriginal Peoples identified “false assumptions” which are “no longer

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<sup>437</sup> David Schneiderman (“Constitutional Interpretation in an Age of Anxiety: A Reconsideration of the Local Prohibition Case” (1996) 41 McGill L.J. 411 at 460 [Schneiderman]) observes that “ideology” can attain “universalizing and naturalizing effects” (ibid. at 456).

formally acknowledged” but not “lessen[ed] [in] their contemporary influence,”<sup>438</sup> including that Indigenous Peoples are “inherently inferior and incapable of governing themselves” and that “wardship was appropriate for Aboriginal peoples, so that actions deemed to be for their benefit could be taken without their consent or their involvement in design or implementation”.<sup>439</sup>

Justice McLachlin, for the unanimous SCC in *R. v. Williams*, identified the possibility of bias against Indigenous Peoples in the criminal justice system and noted that racial prejudice “rests on preconceptions and unchallenged assumptions that unconsciously shape the daily behaviour of individuals. Buried deep in the human psyche, these preconceptions cannot be easily and effectively identified and set aside, even if one wishes to do so.”<sup>440</sup>

Racism against aboriginals includes stereotypes that relate to credibility, worthiness and criminal propensity. As the Canadian Bar Association stated in *Locking up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release* (1988), at p. 5:

Put at its baldest, there is an equation of being drunk, Indian and in prison. Like many stereotypes, this one has a dark underside. It reflects a view of native people as uncivilized and without a coherent social or moral order. The stereotype prevents us from seeing native people as equals.

There is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system: ... Finally, ... tensions between aboriginals and non-aboriginals have increased in recent years as a result of developments in such areas as land claims and fishing rights. These tensions increase the potential of racist jurors siding with the Crown as the perceived representative of the majority's interests.<sup>441</sup>

The false assumptions and biases identified in the context of criminal law have long been implicated in grounding a dispossession of Indigenous Peoples from their territories.

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<sup>438</sup> RCAP, v. 1, *supra* note 170 at 249.

<sup>439</sup> *Ibid.* at 248.

<sup>440</sup> [1998] 1 S.C.R. 1128 at para. 12 [*Williams*]. See also *R. v. Gladue* ([1999] 1 S.C.R. 688 at para. 61) where the court noted that there is “widespread bias against aboriginal people within Canada”.

<sup>441</sup> *Ibid.* at para. 58 [References omitted]. The report referred to was authored by Michael Jackson, *Locking up Natives in Canada: a report of the Committee of the Canadian Bar Association on Imprisonment and Release* (Ottawa: Canadian Bar Association, 1988). See also: Michael Jackson, “In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities,” (1992) U.B.C. L.R. 147 at 149 (“Over-representation of this magnitude suggests that either Aboriginal peoples are committing more crimes or they are being subject to systemic discrimination. The recent studies and reports provide strong confirmatory evidence that both of these phenomena operate in combination”).

Ross has reviewed the involvement of Indigenous Peoples in the criminal justice system, and suggests that the “criminalization of Native rights” has marked colonization and that criminal law has served as a tool to assist governments in solidifying their management and control over Indigenous territories and People.<sup>442</sup> Ross also argues that:

The values that ordered Native worlds were naturally in conflict with Euro-American legal codes. Many traditional tribal codes instantly became criminal when the United States imposed their laws and culture on Native people. New laws were created that defined many usual, everyday behaviours of Natives as “offenses.” The continuous clashing of worlds over the power to control Native land and resources constantly brought Native people in conflict with the legal and judicial system...<sup>443</sup>

Anaya and Williams have argued that the denial of Indigenous Peoples’ land tenure and management systems (which would necessarily include conservation and the safety issues associated with resource use) “perpetuate[s] a long history of discrimination against indigenous peoples with regard to their own modalities of possession and use of lands and natural resources.”<sup>444</sup> Brickman has argued that myths and stereotypes of Indigenous Peoples guided original contact periods and lead to the “juridical erasure” of Indigenous Peoples and that the “lack of similarity” of Indigenous Peoples to the newcomers was used to ground dehumanizing policies which devalued Indigenous Peoples’ laws and ownership of land: “What was unintelligible simply did not seem to exist, and thus these peoples were seen as deficient and inferior compared to European standards.”<sup>445</sup> Despite their recognition

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<sup>442</sup> Luana Ross, *Inventing the Savage: a social construction of Native American criminality* (Austin, TX: University of Texas Press, 1998) at 12 [Ross]. See also Arthur Manuel, “Aboriginal Rights on the Ground: Making Section 35 Meaningful,” in Ardith Walkem and Halie Bruce, eds., *Box of Treasures or Empty Box: Twenty Years of Section 35* (Penticton: Theytus Books, 2003) who discusses the criminalization of Secwepemc people trying to prevent a ski hill from being expanded on their territory at Skwekwekwelt; and, Wilkins, *supra* note 97 at 11-14.

<sup>443</sup> *Ibid.* at 16.

<sup>444</sup> S. James Anaya and Robert A. Williams, “The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources Under the Inter-American Human Rights System” (2001) 14 Harv. Hum. Rts. J. 33 at 47.

<sup>445</sup> Celia Brickman (*Aboriginal Populations in the Mind: race and primitivity in psychoanalysis* (New York: Columbia University Press, 2003) 22-23 [Brickman]). See also: Daniel Francis, *The Imaginary Indian: The Image of the Indian in Canadian Culture* (Vancouver: Arsenal Pulp Press, 1995); and, Robert Berkhofer, *White Man’s Indian: Images of the American Indian from Columbus to the Present* (New York: Alfred A. Knopf, 1978) at 10-13.

of the possibility and operation of racial prejudice founded on false assumptions in the area of criminal law, the SCC continues to rely upon false assumptions in areas impacting Aboriginal Title, Rights and Treaty Rights, including safety and conservation laws related to land and resource use.

(i) Conservation Laws

Grounding the necessity of Canadian conservation laws (to preserve natural resources for Indigenous Peoples and Canadians alike) in arguments that otherwise Indigenous Peoples would over-exploit resources and behave in an environmentally destructive fashion blatantly ignores the fact that Indigenous Peoples are quite consistently before the courts arguing that governments have authorized uses of lands, water and resources that are unsustainable. This unexamined assumption also runs contrary to the burgeoning recognition in broader society that recognition of Indigenous Peoples' ecological knowledges, traditions and laws is necessary for true conservation or preservation to occur.<sup>446</sup>

The evidence offered at trial in *Morris* provides an interesting example of divergent views about conservation. At trial, provincial wildlife conservation measures were discussed, including bag limits and lotteries to control harvests in an attempt to conserve wildlife populations. Tsartlip witnesses testified of an alternate view of conservation that did not locate the problem in their own harvest, but rather in provincial management regimes that, for all practical purposes, separate the animals that they seek to protect from their

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This point is also illustrated in Justice Addy's reasoning in *Apsassin* (*supra* note 265 at 189): [The Dunne-za/Cree] had no organized system of government or real law makers. They also lacked to a great extent the ability to plan or manage, with any degree of success, activities or undertakings other than fishing, hunting and trapping. It seems that many of their decisions even regarding these activities, could be better described as spontaneous or instinctive rather than deliberately planned.

<sup>446</sup> See e.g.: Fikret Berkes, *Sacred Ecology: Traditional Ecological Knowledge and Resource Management* (Philadelphia: Taylor and Francis, 1999); Fikret Berkes, Johan Colding and Carl Folke, "Rediscovery of Traditional Ecological Knowledge as Adaptive Management" (2000) 10(5) *Ecological Applications* 1251; Turner, *supra* note 5; Borrows, 1997(a) *supra* note 8; and, Mandell, *supra* note 8.

habitat for purposes of management. The province had allowed, and continued to allow, logging, subdivision development and a myriad of other activities that destroyed wildlife habitat and then sought to conserve the wildlife by limiting the harvest levels. Elder Thomas Sampson framed the conservation issue (and the differences between the provincial and Tsartlip perspectives) in this fashion:

[T]hey [the conservation officers] raised it with me, that there was a conservation problem with the animal. I said, "Conservation isn't about hunting, conservation is about the preservation of the total right of the animal." And that's what I explained to them, that the habitat, the mountains, the lakes, the streams, everywhere the animal was at was being destroyed, and it wasn't on account of hunting, it was on account of the way the land and the habitat was being managed.<sup>447</sup>

From the observations offered by the Tsartlip, provincial wildlife laws do not protect wildlife, the habitat that sustains wildlife, or the Indigenous Peoples whose identities, cultures and lifeways continue to be intricately tied to lands and resources. From an Indigenous perspective Canadian conservation laws (or, the absence of conservation values in Canadian laws) are surely controversial. At a minimum, this cursory review shows the fallibility of an automatic recourse to Canadian conservation laws to justify the infringement of Aboriginal Title, Rights or Treaty Rights.

(ii) Safety

Many Canadian cases have considered the issue of night hunting, with steadily mounting consensus that it is an area in which governments are justified, and perhaps should even be lauded, for banning this practice. Despite earlier SCC recognitions of night hunting as a protected method of exercising a treaty hunting right,<sup>448</sup> Canadian courts are increasingly disavowing night hunting as a method of hunting that will attach constitutional protection

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<sup>447</sup> *Morris* (B.C. Prov. Ct), *supra* note 408, Transcript, v. 3 at 23.

<sup>448</sup> There are few SCC to have directly considered night hunting, although there are instances in which the SCC has said that it is protected as a method of exercising Treaty hunting rights. See e.g.: *R. v. Horseman*, [1990] 1 S.C.R. 901 [*Horseman*]; *R. v. Sutherland, Wilson and Wilson*, [1980] 2 S.C.R. 451; and, *R. v. Prince and Myron*, [1964] S.C.R. 81.

(largely as a result of evolving s. 35 jurisprudence and the SCC's statements about the need for Canadian laws to override Aboriginal Rights and jurisdictions in the interests of safety).<sup>449</sup> In *R. v. Stump* the court considered a provincial night hunting ban and found that the objective of the ban was to "prevent the exercise of hunting rights that would cause harm to the general public and to aboriginal peoples themselves" and concluded that

Restrictions on hunting at night with firearms or bows at the geographic latitude in question (where there is no dark period as there is in the high arctic) allows the Chilcotins to exercise their constitutional right to hunt in a reasonable manner. It does not extinguish the right but rather regulates it for the safety of all and is a reasonable limit to impose in a civilized society.<sup>450</sup>

In *Myran v. The Queen*, while recognizing the accused's Treaty Right to hunt the SCC cautioned, "[b]ut that is not to say that he has the right to hunt dangerously and without regard for the safety of other persons in the vicinity...[T]here is no irreconcilable conflict or inconsistency in principle between the right to hunt for food ... and... that such right be exercised in a manner so as not to endanger the lives of others."<sup>451</sup> In *R v. Badger* (interestingly, after reiterating its earlier finding in *Horseman* that hunting at night was a valid method of exercising Treaty hunting rights) the Court affirmed that "aboriginal or treaty rights must be exercised with due concern for public safety" and concluded that "reasonable regulations aimed at ensuring safety do not infringe aboriginal or treaty rights to hunt for food".<sup>452</sup> What the decision in *Badger* misses is the fact that the hunting within Indigenous societies does not encompass solely the right to procure and consume game, but reflects more broadly on the cultures, traditions and existence of the Peoples, including their

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<sup>449</sup> See e.g.: *R. v. Napoleon* (1985), 21 C.C.C. (3d) 515 (B.C.C.A.); and, *R. v. Seward*, [1998] 3 C.N.L.R. 237. In

<sup>450</sup> [1999] B.C.J. No. 2577 (QL) at para 33 [*Stump*].

<sup>451</sup> [1976] 2 S.C.R. 137 at 141-142 [*Myran*].

<sup>452</sup> [1996] 1 S.C.R. 771 at paras. 88-89.

relationship with their territories.<sup>453</sup> In *Nikal*, the Court accepted the comments of the

Ontario Court of Appeal in *R. v. Agawa* that:

Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others...<sup>454</sup>

Once a presumption of dangerousness is created and incorporated into common sense knowledge structures it is not vulnerable to any evidence to the contrary. Almost universally, calls for the imposition of hunting safety regulations on Indigenous hunters are tied to the assertion that it would be irrational and nonsensical to embark upon a case-by-case examination of safety in each individual instance. These decisions make a link that they claim to be rational and reasonable (provincial safety laws are needed to ensure the safety of Indigenous hunters, non-Indigenous hunters, and the public) not only in the complete absence of evidence, but in the face of empirical evidence to the contrary and avoid a necessary and critical examination of the Indigenous safety laws and traditions that operate and should be recognized.

A general finding that night hunting is unsafe leads to the assumption that anyone who engages in this activity must be engaged in a dangerous act, without regard for the lives or safety of others. The reasoning is as follows: (1) Night hunting is inherently unsafe and dangerous; (2) There are no Treaty or Aboriginal Rights which can be exercised dangerously; therefore, (3) There can be no Treaty or Aboriginal Right to hunt at night. Or, if there is a Treaty Right which embraces the method of night hunting, governments do not infringe that

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<sup>453</sup> By way of illustration, consider the story about my mom lighting fires (Chapter 1) which illustrates that hunting is far broader than the mere procurement of game, it is deeply embedded within Indigenous cultures.

<sup>454</sup> *Nikal*, *supra* note 77 at para. 91 citing the decision in *R. v. Agawa* (1988), 65 O.R. (2d) 505.

right by banning night hunting for the protection of the general public *and* Indigenous Peoples.

There are a few notable cases where courts have not simply accepted (absent further investigation) state laws purported to be for the purposes of public safety. Two of these cases are *Kadlak v. Nunavut (Minister of Sustainable Development)*<sup>455</sup> and *R. v. Noel*.<sup>456</sup> In *Noel* an elderly hunter was charged for shooting in a “no-shooting” zone established for safety purposes. The court, in deciding that the restriction was unconstitutional, noted that “ties to the land and the pursuit of hunting remain strong in the older members of the band. It is a part of who they are and a major part of the Dene culture and history. In this way the regulation becomes unreasonable, especially when there were less intrusive alternatives.”<sup>457</sup>

In *Kadlak* Justice Kilpatrick framed the issue as follows:

[Noah Kadlak] is an experienced Inuk hunter, and a beneficiary under the Nunavut Land Claims Agreement. He lives his life close to the land. In this unforgiving landscape, Noah carries on the proud hunting traditions of his people; traditions that have ensured the survival of the Inuit from time immemorial.

Mr. Kadlak wishes to hunt a polar bear using the traditional methods and technology of this ancestors. The taking of a bear with spear or harpoons is a risky business. There is little room for mistake. The strength, agility and cunning of the bear make it an extremely dangerous and formidable adversary. This form of hunt requires exceptional skill and courage. It is perhaps the ultimate test of the hunter.

Noah Kadlak has been denied the opportunity to participate in this traditional hunt. The Minister...has determined that this form of hunting presented an unwarranted risk to public safety and has refused to grant Mr. Kadlak an exemption from the provisions...<sup>458</sup>

The issue was ultimately sent back to the Minister for review, with the direction that “[b]efore any decision is made to prohibit a particular form of harvesting activity, traditional or otherwise, the ...Minister must first consider whether other reasonable conditions could effectively address the legitimate safety or public health concerns arising from the

<sup>455</sup> [2001] 1 C.N.L.R. 147 (Nu. Ct. J.) (QL) [*Kadlak*].

<sup>456</sup> [1995] N.W.T.J. No. 92 (QL) [*Noel*]. See also *R. v. Fox*, [1994] 3 C.N.L.R. 132 (Ont. C.A.) where an Indigenous hunter was acquitted of shooting from a boat in Northern Ontario. The court seemed to find it instructive that the activity, while otherwise prohibited to the general public for safety reasons, was allowed for those who are physically challenged and so unable to hunt on land.

<sup>457</sup> *Ibid.* at para. 29.

<sup>458</sup> *Kadlak*, *supra* note 455 at paras. 1-3.

activity”.<sup>459</sup> Here, even though safety was an issue, Kilpatrick, J., cautioned that the “outright prohibition of a traditional Inuit harvesting activity is a drastic step. It is a step of the last resort.”<sup>460</sup>

In both of these cases, the trial judges commented about the importance of hunting to the Indigenous Peoples and recognized the need to be sensitive to the impact of the safety regulations on these cultures. The consideration of the cultural impact on hunting societies of state hunting prohibitions is largely absent in the reasoning in other hunting cases concerning safety. This distinction is interesting, because the relatively few cases to have favourably considered Indigenous Peoples own safety laws and traditions have arisen in the North, where the court may have been more willing to view firearms as an everyday fact of life rather than as a dangerous item in need of regulation and control,<sup>461</sup> and additionally, to see Indigenous Peoples as distinct Peoples rather than as a minority subsumed into the larger Canadian population.

The assumption that Indigenous Peoples are lawless, operate more on instinct than on laws, and are therefore dangerous, continues to influence judicial decisions and ground the denial of constitutionally guaranteed rights. Assertions that hunting according to Indigenous laws is the equivalent of hunting in a legal vacuum are just as invidious and prejudicial as earlier assertions that Indigenous Peoples had no laws, and continue to justify a wardship relationship, here, the imposition of provincial safety laws for Indigenous Peoples’ “own good”. An assumption of lawlessness (or inadequacy of laws) continues to be actively at play in s. 35(1) jurisprudence, and that the prejudices embedded within these assumptions are

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<sup>459</sup> *Ibid.* at paras 31-32.

<sup>460</sup> *Ibid.*

<sup>461</sup> Although compare this generalization with the British Columbia *Hunting and Fishing Heritage Act*, SBC 2002, c. 79, which states in the preamble that “hunting and fishing are an important part of British Columbia’s heritage and form an important part of the fabric of present-day life in British Columbia”.

not as raw or explicit as in the past does not mean that they are any less real, or that their consequences are not experienced just as harshly. If we assume, for the sake of argument, that courts while generally well intentioned have a belief that Indigenous societies are lawless (or, have laws of marginal utility) and require some form of supervision, then this framework will not be displaced no matter what information that Indigenous Peoples bring forward about their own laws.

### **E. Morris and Olsen Case Study**

The *Morris* case involved night hunting charges under the *Wildlife Act* brought against two members of the Tsartlip Indian Band. At trial, the Tsartlip hunters were found guilty on charges involving hunting at night, hunting using an illuminating device and hunting from a vehicle (and acquitted on the charge of hunting without reasonable consideration for the lives, safety or property of other persons (s. 29).<sup>462</sup> The Tsartlip hunters are adherents of a Douglas Treaty which includes the following treaty promise regarding the hunting right:

...it is also understood that we are at liberty to hunt over the unoccupied lands; and to carry on our fisheries as formerly.<sup>463</sup>

Common sense assumptions about safety (and the dangerousness of a Tsartlip night hunting practice) have been strong enough to carry the courts (in their deliberations at different levels in *Morris*) through formidable barriers that argue against the legislative ability of the province to regulate to the point of absolute prohibition a treaty hunting right, including (1) that the right itself is limited geographically to unoccupied lands, providing

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<sup>462</sup> S.B.C. c. 57, ss. 27(1)(d)-(e), 28(1), and 29[*Wildlife Act*].

<sup>463</sup> Other cases to have considered the hunting provision contained within the Douglas Treaties include *R. v. White and Bob*, [1964] 52 W.W.R. 193 (B.C.C.A.) and *R. v. Bartleman*, [1984] 3 C.N.L.R. 114 (B.C.C.A.).

what should be a workable conciliation of the possible safety interests; and, (2) the coordinate federal and Tsartlip authorities embodied within the Douglas Treaty itself.<sup>464</sup>

At trial, Justice Higginbotham found that “night hunting has been an accepted practice of the Tsartlip people from pre-Treaty days to the present”<sup>465</sup> and accepted the oral tradition evidence offered by the Tsartlip hunters about the existence of their own hunting and safety laws:

I accept that the Treaty holders in this case, the Tsartlip Indian Band, have a tradition of teaching firearms safety to their children. I also accept that the two Defendants have knowledge of firearm safety. More importantly, I accept the evidence of the elders and other witnesses who testified before me that safety is an integral part of the hunting tradition of the Coast Salish people, of whom the Tsartlips form a part. This universal concern for hunting safety is well founded, and in conjunction with the expert evidence in this case, satisfies me that the prohibition against night hunting is not unreasonable on its face. *I do not accept that the Tsartlip view and practices of hunting safety are an adequate or reasonable response to the inherent dangers of night hunting.*<sup>466</sup>

Despite finding Tsartlip laws and traditions for governing safe hunting practices, Justice Higginbotham found “the evidence establishes that it is dangerous to permit the use of high-powered rifles in the dark, and to leave it to individual hunters to use their *common sense* to minimize those risks in the face of a *sudden opportunity* to kill game.”<sup>467</sup> Despite references to the Tsartlip’s own safety and hunting traditions (which Justice Higginbotham accepts) it is found to be “common sense” and not the Tsartlip hunting jurisprudences, which are in operation during the actual hunt. The further reference to “sudden opportunity” is

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<sup>464</sup> Many commentators have argued that historic treaties recognized Indigenous authorities and legal orders, and that Indigenous legal orders form part of the constitutional structure of Canada. See e.g.: Sakej Henderson, “Empowering Treaty Federalism” (1994), 58 Sask. L. R. 241; and, Kiera Ladner, “An Indigenous Vision of Canadian Federalism” in Francois Rocher and Miriam Smith, eds., *New Trends in Canadian Federalism* (Peterborough, Ont: Broadview Press Ltd., 2003).

<sup>465</sup> *Morris* (BC Prov. Ct), *supra* note 408 at para. 18.

<sup>466</sup> *Ibid.* at para. 12. Emphasis added. Note that the reference to the Tsartlip jurisprudences regarding hunting safety as not being “adequate” or “reasonable” to address the safety issue. This disposition has been upheld by both the B.C.S.C. and the B.C.C.A. The Crown challenged these findings but they were subsequently upheld on all levels of appeal. The S.C.C. subsequently refused to hear an appeal by the Crown on the admittance and weighing of the oral tradition evidence ([2004] S.C.C.A. No. 199) but did agree to hear the appeal on other grounds.

<sup>467</sup> *Ibid.* at para. 11 [Emphasis added].

troubling, as it seems to suggest that it is “instinct” (as opposed to Tsartlip laws) guiding this hunt. This finding is also in conflict with the evidence which showed that the Tsartlip hunters had passed several deer on their travels to the spot at which they were arrested, but chose not to hunt those deer because they determined that they were too close to a populated area.

Justice Higginbotham concluded that “night hunting is inherently dangerous” and so agreed with the Crown’s assertion that “an ex post facto examination of the location, background and proximity to buildings in each case is counter-productive...reasonable regulations aimed at protecting the safety of both the public and the hunter will not be found to offend aboriginal or treaty rights”.<sup>468</sup>

The provisions which Justice Higginbotham referred to were from the SCC judgment in *R. v. Mousseau*:

The difficulty presented in the practical application of such an ill-defined test is obvious. The right to hunt would vary with the locality and the particular stretch of road, with the time of day, volume of traffic, proximity of habitation and non-hunters, and many other factors. The right to hunt would rest upon the view one might take as to the danger of the hunting. The impracticality of such a test is patent.<sup>469</sup>

The issue in *Mousseau* involved whether or not a road allowance could be variably considered “occupied” and also “unoccupied” depending on the individual circumstances of any case. The decision of the SCC was that road allowances should always be considered “occupied” and thus an area where treaty hunting is never allowed. As the lands were found to be occupied, the hunt did not occur within the terms of the treaty. The proposition in this case is not that Indigenous Peoples should not be allowed to assess safety on a case-by-case basis, but rather that lands should not be variably considered occupied at one point, and then

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<sup>468</sup> *Ibid.* at para 27.

<sup>469</sup> (1980), 52 C.C.C. (2d) 140 at 148 (S.C.C.) [*Mousseau*].

unoccupied at another, for the purposes of determining if treaty hunting can occur on those areas.

On appeal, Justice Singh of the B.C.S.C. agreed that there was a Douglas Treaty right to hunt at night, however he found that “the real issue is whether such can be exercised *carte blanche*. I find that it cannot; rights do not exist in a vacuum.”<sup>470</sup> In finding that no infringement had occurred of the Tsartlip treaty hunting right Justice Singh noted that “the purpose of this legislation is the preventative safety of all of the citizens of the Province”.<sup>471</sup> Justice Singh concluded that “inherent or implicit in the right itself is the understanding that the right will be exercised reasonably”.<sup>472</sup>

The B.C.C.A. issued a split decision, with Justices Thackray and Huddart adopting to varying degrees the assumptions that provincial safety laws are in the best interests of Indigenous Peoples (wardship) and that regulation under Indigenous laws was an absence of regulation. Justice Thackray also relied on the assumption of the assimilation of Indigenous and non-Indigenous interests in finding that no conflict existed between the Tsartlip hunting right, and the province’s absolute prohibition against the exercise of a night hunt:

The reason that safety regulations do not conflict with treaty rights to hunt is straight forward. Safety regulations protect all members of the public, both Indians and non-Indians alike... It is hard to see how a law designed to protect Indians’ safety could be said to conflict with their right to hunt.<sup>473</sup>

Justice Huddart, for her part, accepted a similar proposition with her finding that “imposing a duty on every person to hunt with due regard for the safety of others, applie[s] to treaty Indians. I do not see that proposition as controversial, nor in light of the appellants’ submissions do I think that the Tsartlip people do. A duty to hunt safely is part of their

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<sup>470</sup> *Morris* (B.C.S.C.) *supra* note 408 at para. 48. Hunting according to Indigenous laws is commonly equated with hunting in the absence of laws (in a legal vacuum).

<sup>471</sup> *Ibid.*, at para. 60.

<sup>472</sup> *Ibid.* at para. 52.

<sup>473</sup> *Morris* (B.C.C.A.), *supra* note 408 at para. 137.

tradition and integral to their culture.”<sup>474</sup> Justice Lambert, in dissent, found that while safety was a part of the treaty, it was an aspect that the Tsartlip themselves should regulate: “Where the true meaning of the treaty is that safety is a matter for control by the Indian peoples under their own laws, customs, traditions, and practices and not by unilateral non-consultative enactment of the largely non-Indian people...”<sup>475</sup>

One of the difficulties that may arise in hunting safety cases is the inability of the dominant society to actually see the Indigenous laws inherent in oral traditions and practices. Sakej Henderson articulates a concept of “aboriginal jurisprudences” (which embody Indigenous laws and legal practices) and argues that they are incorporated into the constitutional order of Canada, and must be incorporated in all legal consideration of Aboriginal Title, Rights and Treaty Rights litigation through the mechanism of a *sui generis* interpretation.<sup>476</sup> Sakej offers these general descriptions of what Aboriginal jurisprudences are, and what they might include:

Aboriginal jurisprudences and law exists not as a thing or noun or rule but rather as the overlapping and interpenetrating processes or activities that represent teachings, customs, and agreements. Aboriginal peoples understand jurisprudences as a liquid force that lives through conduct, rather than as something that has to be written or produced by specialized thought and reasoning. It is more a matter of dynamic processes than a matter of logic, causality, or structural theory.<sup>477</sup>

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<sup>474</sup> *Ibid.* at para. 210.

<sup>475</sup> *Ibid.* at para. 62.

<sup>476</sup> Sakej Henderson, “Aboriginal Jurisprudences and Rights” (2005) (paper on file with the author) [Aboriginal Jurisprudences]. A slightly revised version of this paper has been published (Sakej, 2004 *supra* note 8).

<sup>477</sup> *Ibid.* at note 60: “Aboriginal teaching, traditions, customs, oral history, practices, and perspectives establish a *sui generis* knowledge, study and application of Aboriginal law and its orders. Aboriginal knowledge is concerned with the study of Aboriginal teaching and its principles are best translated in English as Aboriginal jurisprudences.” And, further: “Aboriginal jurisprudences are a unique and diverse species of law with its own genesis and categories. It exists in many different versions and manifestations, such as practices, traditions, and customs. It is indivisibly tied to Aboriginal spiritual worldviews and ceremonies. Legal meanings are derived from the intertwined, interpenetrating, and interactivity of ideas that are animated by the structure of Aboriginal languages, their stories, conduct and performance that underlie and unite those who live in an ecology to form a way of being human, good relations and living together” (*ibid.* at note 73).

Stories in the oral tradition twine along the threads of connection, highlighting the ways in which our actions can upset balance and providing guidance for the right courses of action to take to respect our responsibilities and relationships with all other life.<sup>478</sup>

References to the need for balance within Indigenous oral traditions, and directions for how to achieve and maintain that balance, are often references to laws.<sup>479</sup>

Sakej cautions that “when determining Aboriginal jurisprudences, traditional laws and perspectives, a comparative jurisprudential analysis and a transnational, *sui generis* analysis are critical since ‘one culture cannot be judged by the norms of another and each must be seen in its own terms.’”<sup>480</sup> A restricted view or vision of laws can foster findings that Indigenous societies are lawless, and the devaluation of Indigenous laws into something like myth or cultural prescription. Archibald discusses a project which she undertook with the Law Courts Education Society of British Columbia (results reported in *First Nations Journeys of Justice*)<sup>481</sup> which explores oral traditions and Indigenous Peoples’ concepts of justice and legal traditions. The project was motivated by the realization of the contrasting

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<sup>478</sup> See for example, the Okanagan conception of this in *Milk from the Land*: “The right of being a syilx is a **responsibility**, first to know and follow the natural laws to make sure of healthy generations to come, and second to follow the laws of a community for the same reason” (*supra* note 34 at 8)

<sup>479</sup> Archibald, *supra* note 18 at 14. See also, Nabokov *supra* note 25 at 74-75, who discusses this idea in the context of Indigenous oral traditions regarding natural cataclysms, which he argues explain “past violations of acceptable behaviour between species” including “human arrogance toward a personified force of nature and impropriety toward a fellow animal.”

<sup>480</sup> Aboriginal Jurisprudences (*supra* note 476), citing Chief Judge E.T. Durie of the Maori Land Court of New Zealand, “Biculturalism and the Politics of Law” (Address to the University of Waikato, April 1993). And further outlines the expressions that these jurisprudences may take, as follows:

Aboriginal jurisprudences’ mediums differ from British, French, and Canadian jurisprudence.

Aboriginal jurisprudences rely on performance and oral traditions rather than on political assemblies, written words, and documents. Aboriginal jurisprudences have always been consensual, interactive, and cumulative. They are intimately embedded in Aboriginal heritages, knowledges, and languages.

They are intertwined and interpenetrated with worldviews, spirituality, ceremonies, and stories, and the structure and style of Aboriginal art. They reveal a robust and diverse jurisprudences bases on a performance culture, a shared kinship stressing human dignity, and ecological integrity that demonstrates how Aboriginal peoples deliberately and communally resolved recurring problems.

<sup>481</sup> Law Courts Education Society of B.C., *Journeys of Justice: First Nations research project final report* (Vancouver: Law Courts Education Society of B.C., 2000).

*external* and *internal* expressions of law within Canadian and Indigenous societies.<sup>482</sup>

Within the Western/Canadian tradition, laws are externalized, written down, interpreted in courts with specialists (lawyers) trained to consider and represent different sides. Archibald contrasts this externalized notion of law with that within Indigenous societies where “traditional law is internal, known and embedded in cultural ways through stories and ceremonies such as feasting/potlatching where “rights” to territories or names may be given, exercised, and witnessed by the guests.”<sup>483</sup>

In many cases, the teaching of Indigenous laws is implicit in the teaching of practices and activities. For example, activities and teachings in relation to gathering, hunting, fishing or distribution of resources contain within them the laws about the proper mode of behaviour and respect for both the lands and water and other resources. Other laws may be explicitly spoken in big houses or other traditions that teach certain aspects of the laws in a different way.<sup>484</sup>

Indigenous jurisprudences are based on a land ethic. Oral traditions are strongly identified with the land and territories from which they arose and continue to reside in the hearts of the people, they reflect the nature of the land upon which they came into being and carry the messages to enable the people to live well upon the land. This territorial aspect of Indigenous laws reflects a specifically contextualized approach, which concerns itself with how people can live on the land and with other life forms upon the land. The laws of Indigenous Peoples arise on the land and evolve as the land and circumstances evolve,

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<sup>482</sup> Archibald, *supra* note 18 at 164.

<sup>483</sup> *Ibid.* at 151. See also, Milk from the Land: “The laws are always taught by telling the stories to each child and to any adults who need reminding” (*supra* note 34 at 4).

<sup>484</sup> In Blondin (*supra* note 34) it is clear that the stories contain the laws and guidance of ancestors and spiritual guidance, or the Creator, to live well and in harmony with each other and the environment, and also that these teachings were part of an active practice on the land: “Dene people learned these lessons and laws in body and mind. Even today elders don’t usually sit still, they are always moving...” (*ibid.*, at 73). See also Ryan, *supra* note 34 at 23-35.

keeping current to continually reflect and order the ways in which a hunt is conducted safely, including, for example, the ways in which hunting territories or the tools of the hunt may change.

The testimony by the Tsartlip hunters presented a very different perspective about the utility of provincial safety laws. Each hunter was, to varying degrees, concerned about the lack of safety resulting from provincial regulation, and believed that the province's regulations had the impact of endangering not only Canadians' lives, but their own as well.<sup>485</sup> A closer examination of safety laws and training for hunting within Canadian and Indigenous societies shows how the assumption of a dovetailing of interests (or, the assimilation of Indigenous interests into the broader Canadian public interest) is mistaken, and how common sense assertions of the need for provincial safety laws are not only unfounded, but contradicted by an examination of the relative abilities of the two legal orders under consideration (the Tsartlip jurisprudences regarding safety and the provincial hunting safety regulation) to actually ensure a safe hunt on the ground.

Understanding the different nature of Indigenous jurisprudences may help to shed light on this case. The trial judge found (as a matter of fact, which was subsequently upheld on appeal) the existence of Tsartlip safety laws. Despite this finding, the existence of Tsartlip safety laws played no part in the determination of the case (aside from in the dissenting judgment of Justice Lambert at the Court of Appeal).

There are many laws that relate to the relationship of the Peoples with their lands and resources that are taught on the land, and in the practice and observance. These traditions

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<sup>485</sup> Justice Thackray's reference to Joseph Bartleman's testimony about how unsafe the woods are and that people are drinking in the woods while hunting. Bartleman was referring to others (Canadians, not Tsartlip) but Thackray appears to have misunderstood this testimony and used it to buttress his assertion that regulation is needed to curb people drinking and hunting.

may take many years to learn, and yet remain largely invisible in a rendering of a particular part of an oral tradition at any point. For example, a hunter may say: "I learned to hunt from my Father and Uncle Joe, who taught me to hunt from when I was very young. And then, when I was older, I used to go out sometimes with Raymond. It wasn't until I was about fourteen and had been going out with them for seven or eight years that I was allowed to go alone." On the face of it, it may not be clear to non-Indigenous Peoples that the process being taught was one of laws, as well as spiritual and practical matters (thus, reflecting the Indigenous jurisprudences outlined earlier) and that the laws about safety, conservation, as well as the spiritual practice associated with the hunt were taught, all by showing and doing, in an active practice.

Almost universally, when Tsartlip hunters were asked to describe the Tsartlip traditions or laws about safety, their first reference was to the necessity of showing respect. Thus, in accordance with the concept of Indigenous jurisprudences that Sakej has outlined, the safety of the hunt is seen to be embodied within the sacred or respectful nature of the act itself. It would be in violation of the laws of respect to hunt unsafely. "Respect" as a basis for safety may not make sense to many who were not raised or trained within Indigenous traditions.

When asked about safe hunting practices, Wayne Morris referred to his earlier statements regarding teachings of respect noting that this was "what we're talking about, the teachings of our people and the safety, I always ensure that we practice safe procedures"<sup>486</sup>. His reference was to the analogy he had just made comparing the taking of an animal during a hunt and the taking of a cedar tree:

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<sup>486</sup> *Morris* (B.C. Prov. Ct), *supra* note 408 Transcript, Vol 2 at 13.

[A practice that] is looked at as real sacred, and if we chop a cedar tree down or cut a cedar tree down, we thank them for the use of the tree itself, and thank them for that use and then for what they're going to do for us. The deer or the elk, or whatever we're hunting for, we than[k] the Creator for the meat ....it's going to be a medicine for our people, our families, our ancestors gone before us.<sup>487</sup>

Wayne Morris further testified that "Our way of life, discipline, respect, all of that that. ... came from...the teachings that my parents and my grandparents, what they gave to me. What they gave to me was something that I look at as an unwritten treasure because none of our teachings are written, they're all – they're all from the heart."<sup>488</sup> Testimony in the *Morris* case revealed that grandmothers and mothers play an active role in teaching hunting safety by teaching laws about respect.<sup>489</sup> Courts may be unable to locate the laws, or be closed to the very idea that such laws exist.

To illustrate their safety perspective, the Crown called a conservation officer as an expert in hunting safety who testified that he had taught thousands of people firearms safety.<sup>490</sup> Tsartlip hunters testified that they had been taught by a handful of older, more experienced, hunters over the course of years, and that they are similarly teaching other younger hunters over the course of years. One of the Tsartlip hunters (Carl Olsen) who had taken the firearms safety course (in order to obtain a permit to purchase a new firearm) testified that the Canadian firearms safety course had taken eight weeks (two or three days per week, and approximately four hours for each class) in contrast, his training with his dad

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<sup>487</sup> *Ibid.* Transcript, Vol 2 at 12- 3

<sup>488</sup> *Ibid.* Transcript, Vol. 3 at 14.

<sup>489</sup> *Ibid.* Transcript, Vol. 2 at 12-14; Vol. 3, 11-16 and 54-56. Patricia Monture-Angus ("The Right of Inclusion: Aboriginal Rights and/or Aboriginal Women?" in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Press, 2004) at 39) has argued that "gender has not been a central or articulated component of Aboriginal and treaty rights debates taking place in the courts".

<sup>490</sup> *Ibid.* Transcript, Vol. 1 at 46.

occurred over “quite a number of years” and with another senior Tsartlip hunter “five or six years”.<sup>491</sup>

To Canadian society, the teaching of hunting safety through a firearms course may make imminent sense, reflecting the belief that it is possible to teach safety outside of the places where those practices will have to be practiced and observed. Firearms safety courses happen over a clear and discrete period of time, with readily measurable information being taught as well as a set standard for measuring the ability of the person to have understood that information. There are written tests. Indigenous hunters often express severe reservations about this method of teaching hunting safety, fearing that this will only lead to people with firearms in the woods that are manifestly unsafe, having not been taught properly, over a long period of time and under constant supervision. In particular, there has been no opportunity for the teachers to assess how well the new hunter is learning, and no opportunity to ensure that this knowledge is incorporated over time. They have no certainty that he or she knows and can implement and act upon the laws and traditions that have been taught in a multitude of different circumstances or times in his or her life.

A similar paradox occurs when discussing youth hunters. Tsartlip teaching is not a discrete and insular occurrence, but rather continues over a period of years, starting when children are at a very young age and continuing on through their lives. An underlying feature of the *Morris* case, and raising it to a particular level of danger in the eyes of successive courts was the fact that there were children (ages eight and twelve) in the car during the hunt. Wayne Morris (the boys' father) described his decision to take his children with him in this fashion, “I want them to understand the teachings that were given to me about respect for the

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<sup>491</sup> *Ibid.* Transcript, Vol. 3, 1-2.

deer, for the animals, for the plants, for the dirt. Everything that I understand, I want them to understand, so I've taken them at an early age to make sure of that.”<sup>492</sup>

For Canadian society, it may seem manifestly unsafe to have youth handling firearms or participating in the hunt. For Indigenous Peoples, on the other hand, only allowing someone to handle a firearm and hunt when they have reached adulthood is particularly problematic. The person who has not been trained from an early age has not been raised with the necessary respect and knowledge to carry out the responsibility that using a firearm or hunting carries with it.

The designation of activities as “dangerous” (and therefore in need of state sanction and control) can have serious and significant repercussions for Indigenous Peoples. For example, the designation of “night hunting” as dangerous can result in the complete denial of Indigenous Peoples’ right to hunt at night and thus disrupt an activity which is fundamental to many Indigenous cultures and so deny the ability of Indigenous Peoples to sustain their cultures and identities. A review of case law involving Indigenous Peoples charged with hunting safety violations reveals a number of assumptions which reflect a core belief that Indigenous Peoples have no laws to address safety concerns, or that Indigenous laws are not sufficient to protect either the public or Indigenous Peoples themselves, but in either case, that Canadian laws are necessary to ensure public safety.

In *Morris*, evidence to support the claims that the Indigenous hunting practices were unsafe was not only “sparse and equivocal” it was non-existent.<sup>493</sup> The evidence of the Tsartlip hunters was that they had personally never injured anyone (either Tsartlip, other Indigenous Peoples, or anyone else) while hunting, nor were they aware of any Tsartlip

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<sup>492</sup> *Ibid.* Transcript, Vol. 3 at 15.

<sup>493</sup> *Mitchell*, *supra* at para. 48.

hunter who had ever injured anyone.<sup>494</sup> This point was not controversial, and the Crown did not dispute this evidence. Indeed, evidence of the success of the Tsartlip laws and traditions for ensuring a safe hunt was not found to be important in the face of the overarching decision that provincial safety laws are necessary.

The complete disregard for the empirical evidence (showing that the Tsartlip had been able to guarantee safety in their hunt, as opposed to the Province whose regulations are unable to ensure safety and instead result in a number of hunting accidents or deaths)<sup>495</sup> requires that the evidence of safe Tsartlip hunting practices be dismissed as happenstance (or, perhaps, luck) and fails to make the causal connection between the Tsartlip hunting safety laws and traditions and the fact that this hunt has occurred safely. The fact that Tsartlip laws have ensured a safe hunt, and have protected and guarded the safety of both the Tsartlip and the public is not treated as an opportunity for the court to seriously question and examine the necessity of provincial regulation. These failures run expressly contrary to the SCC's direction, in cases such as *Thomson* and *Gosselin*, that it is particularly important to be conscious of the reliance on common sense assumptions (which may well mask prejudices) when making decisions which restrict or deny constitutionally protected rights.

In Indigenous hunting rights cases, Indigenous hunters and Nations are not even afforded the opportunity to demonstrate a "lack of dangerousness" - the law operates in such a way that once it is found that night hunting is unsafe (a near automatic designation), this provides justification for the imposition of provincial safety laws.<sup>496</sup> It is arguable that

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<sup>494</sup> *Morris*, (B.C. Prov. Ct), *supra* note 408 Transcript, Vol. 3 at 36. Similarly, conservation officer Brunham testified that 90% of the people they apprehend in deer decoy operations are aboriginal, and that he was unaware of any hunting accidents having happened in that area (*ibid.*, Transcript Vol. 1 at 20).

<sup>495</sup> *Ibid.* Transcript, Vol. 2 at 16, 29, Vol. 3 at 57-58; Vol. 4 at 1.

<sup>496</sup> An interesting contrast to the legal results which flow from a finding of "dangerousness" is provided by cases involving applications to designate repeat offenders as "dangerous" under Part XX.1 of the *Canadian Criminal Code*, R.S.C., 1985, c. C-46. In *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2

Indigenous right to hunt would be afforded greater protection if they were included in the *Charter* than they are afforded as s. 35 Aboriginal and Treaty Rights. Or, if the activity was defined outright as “criminal” rather than as a dangerous resource use. At least, as a dangerous criminal activity, Indigenous Peoples would be able to show that their actions, in fact, were not dangerous. Instead, as a s. 35 hunting right, it does not matter whether or not the activity was in fact dangerous (the very fact that Indigenous Peoples are hunting at night is what is in issue) and so there is no opportunity afforded for Indigenous Peoples to show lack of dangerousness.

Refusing to even admit of any possibility of controversy precludes an examination of ways in which this assumption might perpetuate stereotypes of Indigenous Peoples and reinforce the devaluation of Indigenous laws and hunting cultures.

## **F. Conclusion**

Canadian law is not set in stone; rather it is fluid and evolving. One benefit of this fluidity is that it affords the opportunity to revisit assumptions that might seem incapable of challenge and renders settled stereotypes and biases open to examination and change. This fluidity has both characterized and made possible the SCC’s jurisprudence on Indigenous Peoples.<sup>497</sup> Justice Hall in *Calder* observed that

The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species. This concept of the original inhabitants of America led Chief Justice Marshall in his

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S.C.R. 625 Justice McLachlin, writing for the majority, found that the provisions would have violated a person’s *Charter* rights if they *presumed* dangerousness, instead of calling for the Crown to establish dangerousness in each case. Jodi Libbey has argued that dangerousness (in either criminal matters or involuntary civil commitment under provincial mental health legislation) is not an appropriate criterion for limiting individual liberties (“Dangerousness – An Unsafe Criterion?” (1998) 1:7 Health L. Rev. 14 [Libbey]).<sup>497</sup> For a discussion of this point, see Gover and Macaulay *supra* note 268 at 5.

otherwise enlightened judgment in *Johnson v. McIntosh* [(1823), 8 Wheaton 543, 21 U.S. 240], which is the outstanding judicial pronouncement on the subject of Indian rights to say, "But the tribes of Indians inhabiting this country were fierce savages whose occupation was war ...". We now know that that assessment was ill-founded. ...

In a similar vein, Justice Dickson, writing for the unanimous court in *Simon*, dismissed the finding at trial that the Mi'kmaq were not sufficiently civilized to have entered a treaty with the British Crown, saying "It should be noted that the language used ... reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada."<sup>498</sup> These words eloquently illustrate the need to re-examine settled assumptions about Indigenous Peoples as they appear in Canadian case law.

A subtle form of racism subsists and is nourished by common sense assertions about the necessity of conservation and safety laws. These unexamined assumptions remain a significant impediment to the recognition of Indigenous laws. With a base assumption (undoubtedly, unconscious as opposed to malicious) that Indigenous Peoples are lawless (or have inadequate laws), assertions or references to Indigenous laws may be treated as suspect, or be entirely invisible or undervalued within judicial considerations. Meaningful or true recognition of Indigenous laws requires making room for controversy and for unpacking common sense assumptions that dismiss the legitimacy of Indigenous laws.

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<sup>498</sup> *Simon*, *supra* note 269 at para. 21. Here the Court is responding to the assertion of Justice Patterson in *R. v. Syliboy*, [1929] 1 D.L.R. 307 (Co. Ct.) at 313-314 where he refused to find a treaty, in part, on the basis of his assumption that Indigenous Peoples could not be considered nations capable of entering a treaty, as follows:

Indeed the very fact that certain Indians sought from the Governor the privilege or right to hunt in Nova Scotia as usual shows that they did not claim to be an independent nation owning or possessing their lands. If they were, why go to another nation asking this privilege or right and giving promise of good behaviour that they might obtain it? In my judgment the Treaty of 1752 is not a treaty at all and is not to be treated as such; it is at best a mere agreement made by the Governor and council with a handful of Indians giving them in return for good behaviour food, presents, and the right to hunt and fish as usual.

## Chapter 6. Bringing Water to the Land: Re-cognize-ing Indigenous Laws<sup>499</sup>

### A. Introduction (The land is dry)

My Uncle Bill would often talk with me about the beaver and Twaal Valley. Twaal Valley is the heartland of the Cook's Ferry Nlaka'pamux people, and the valley floor is marked by the intricate circles where we would build our *s?isktkn* (winter homes). Standing in the middle of the largest field is *Nq<sup>w</sup>iycut(t)n* a towering lodge pole pine tree that is ancient and marks the area where Nlaka'pamux people would gather each Fall. We would trade, laugh, hold *xill'ix* (a form of community court hearings), settle disputes and make plans. *Nq<sup>w</sup>iycut(t)n* literally translates as a "place to dance"; it is the place which still holds the heart of the Cook's Ferry Nlaka'pamux. It is the place where our people were forced to leave on a cold winter when small pox killed nineteen of every twenty people when we were living communally in our winter homes (my grandfather remembered being a small boy moving from there at that time). It is the place where we returned to re-build our families. It is also the place where no Nlaka'pamux people live now.

The water source for Twaal sits in a very high mountaintop, with steep fall-offs in either direction. One direction is to the South, to Twaal. The water's southern flow was directed by a series of beaver dams built in a marshy knoll near the top of the mountain. The beaver dams gathered the water and eventually sent it downward to Twaal sustaining the Nlaka'pamux. To the other side of the mountain is a valley settled by newcomers who

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<sup>499</sup> The introductory section of this chapter was included in "The Land is Dry: Indigenous Peoples, Water and Environmental Justice" in Karen Baker (ed.) *Eau Canada! Governing Water Wisely* (forthcoming: Vancouver: UBC Press, 2006).

established homesteads there before noticing that it was dry. When newcomers thought to investigate possible water sources for the valley (which was periodically wet, but not year-round), they eventually came to the mountaintop and its network of beaver dams. At first, they tried destroying the dams, but the beavers would quickly rebuild them and ensure the continual supply of water for Twaal. The newcomers then went in and systematically killed the entire beaver population on the mountaintop and re-routed the water to the dry valley they had settled. The volume of water flowing down to Twaal was no longer enough to sustain the Nlaka'pamux people, and family-by-family, we were forced to move away. My Uncle Bill always said that we should find a way to bring the beaver back, to bring water to the land once again.

In American Indian law there is a concept of “wet rights” which refers to the process whereby water entitlements or rights guaranteed to the Indigenous Nations through reservations established under treaty are realized, converted from “paper rights” to an actual water allocation, to “wet rights”.<sup>500</sup> In Canada, despite that Indigenous laws have been recognized on paper – in s. 35 of the *Constitution Act, 1982* and in legal judgments – the legal landscape remains dry and arid, barren of any real or practical space for Indigenous laws.

In *Delgamuukw*, Lamer, C.J.C., asserted that Indigenous oral traditions (and the laws embodied with them) must be “framed in terms cognizable to the Canadian legal and constitutional structure” before any space will be made for them within Canadian law.<sup>501</sup> The assumption that Indigenous laws and legal orders are alien or foreign (un-recognizable) to

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<sup>500</sup> For more information, see Jon Hare, *Indian Water Rights: An Analysis of Current and Pending Indian Water Rights Settlements* (Washington, DC, Confederated Tribes of the Chehalis Reservation and Office of Trust Responsibilities, Bureau of Indian Affairs, 1997).

<sup>501</sup> *Delgamuukw*, *supra* note 45 at para. 49.

Canadian legal or political systems is a legal fiction. Nation-to-nation treaties and recognition of customary law provide two examples of the past and continuing presence of Indigenous laws in the Canadian political and legal landscape.

Early examples of the recognition of the sovereignty and legal orders of Indigenous Peoples are reflected in the historic treaties entered between Indigenous Peoples and the newcomers, particularly pre-confederation treaties, such as the Covenant Chain of Treaties in the Maritimes and the Douglas Treaties on Vancouver Island.<sup>502</sup> Without an independent Indigenous legal order, Indigenous parties to treaties would have been incapable of making or keeping the promises they made to ensure the peace and safety (or other military and trade alliances) granted to the newcomers via treaty. In *Sioui* the SCC observed that the proper characterization of the treaty relationship is one which reflects the fact that “both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations”<sup>503</sup> and that “Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.”<sup>504</sup>

The recognition of the separate nationhood (including legal orders) of Indigenous Peoples waned and transformed, and as “the non-Aboriginal population became numerically dominant, ... non-Aboriginal governments abandoned the cardinal principles of non-

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<sup>502</sup> See e.g. *RCAP*, v.1 *supra* note 170 at 102:

[T]he existence of relatively strong, organized and politically active and astute Aboriginal nations caused the Europeans to recognize in practice, and later in law, the capacity of Aboriginal nations not only to govern their own affairs and to possess their own lands, but also to conclude treaties with them of a type similar to those the European nations were accustomed to making with each other

<sup>503</sup> *Sioui*, *supra* note 309 para. 68.

<sup>504</sup> *Ibid.* at para. 69. See also *Marshall*, *supra* note 309 at para. 17.

interference and respectful coexistence in favour of policies of confinement and assimilation – in short, ... the relationship became a colonial one.”<sup>505</sup>

Further evidence of the fact that Indigenous laws are far from strangers to the Canadian legal system is found in the historic and continuing recognition of Indigenous customary laws. One of the earliest recognitions of “customary law” occurred in *Connolly v. Woolrich* where the court was asked to decide whether or not a marriage between an Indigenous woman and a Canadian man under Cree law was valid.<sup>506</sup> The Superior Court of Quebec found that a marriage had occurred under Cree law, affirming the finding of the trial court judge that: “... the Indian political and territorial right, laws and usages remained in full force both at Athabaska and in the Hudson Bay region previous to the Charter of 1670 [establishing the Hudson's Bay Company], and even after that date”.<sup>507</sup>

In *Casimel v. Insurance Corp of British Columbia*, Justice Lambert, writing for the unanimous court, affirmed that customary laws continue to operate and had not been extinguished by the operation of provincial laws.<sup>508</sup> The issue before the Court was whether Indigenous parents (who had adopted their son according to the laws of their own nation, but not under provincial law) were eligible to receive death benefits following his death in a car accident. The issue in *Casimel* was characterized as being internal to the Indigenous group:

When the rights in issue are rights in relation to the social organization of the Aboriginal people in question, such as rights arising from marriage, rights of inheritance, and I would add, rights arising from adoption ...:

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<sup>505</sup> RCAP, v. 2 *supra*, note 170 at (Part 1) 18. The inadequacy of population numbers as a determinative factor in deciding whether sacred treaty agreements will be honoured should be obvious. In the upcoming years the question will undoubtedly rise to the fore as Indigenous population numbers in all areas continue to grow faster than Canadian population numbers. By 2016, for example, it is estimated that the percentage of Indigenous Peoples in Saskatchewan will be 13.9% in total, and 20.5% of those under 25 years of age (RCAP, v. 1, *supra* note 170 at 23), and it seems likely that the Indigenous population will exceed newcomer numbers in the Prairie Provinces of Manitoba and Saskatchewan over the next century.

<sup>506</sup> (1867), 1 C.N.L.C. 70 (Que. S.C.) (QL) [*Connolly*].

<sup>507</sup> *Ibid.* at para. 97.

<sup>508</sup> [1994] 2 C.N.L.R. 22 [*Casimel*]. Justice Lambert sets out the series of cases which has recognized customary law in Canada, including from the earliest days.

No declaration by this court is required to permit internal self-regulation in accordance with aboriginal traditions, if the people affected are in agreement. But if any conflict between the exercise of such aboriginal traditions and any law of the Province or Canada should arise the question can be litigated.<sup>509</sup>

In *Campbell v. British Columbia (Attorney General)* the British Columbia Supreme Court was asked to consider a challenge brought by members of the Nisga'a Nation to the creation of the Nisga'a Lisiiims government under a modern land claim agreement between the Nisga'a, British Columbia and Canada.<sup>510</sup> In rejecting the claim of the individual Nisga'a, Justice Williamson invoked an analysis of Indigenous customary law and its historic recognition within the Canadian legal system and constitutional framework:

Canada is not a nation governed by the military nor by a state police force. Laws are, by and large, accorded respect because the overwhelming majority of the citizenry accepts the legitimacy of the exercise of power by the executive, legislative and judicial branches. This precious reality distinguishes Canada from many nations. Cases such as *Casimel* manifest a recognition by the courts that most aboriginal persons accept the legitimacy of an evolving customary or traditional law, just as most Canadians accept the legitimacy of common and statutory law.

...[I]n interpreting the effect of a constitutional provision, to construe the word "law" emanating from a legislative assembly as distinguishable from a "law" emanating from the customs of an aboriginal community is to fall into the error of viewing such issues from the perspective of English or common law legal concepts while ignoring the perspective of aboriginal peoples. It is this pitfall which was addressed by the Supreme Court of Canada in *R. v. Van der Peet* at p. 550:

In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right. In *Sparrow*, supra, Dickson C.J. and La Forest J. held, at page 1112, that it is "crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."

This would seem essential when one is considering societies whose binding rules are promulgated by oral means rather than in written form.<sup>511</sup>

There are ample Canadian examples of where courts have recognized that Indigenous customary law is the appropriate legal order for governing certain circumstances.<sup>512</sup>

<sup>509</sup> *Ibid.* at 26. Justice Lambert cited the B.C.C.A. judgment in *Delgamuukw v. B.C.* which can be found at [1993] 5 W.W.R. 97.

<sup>510</sup> [2000] B.C.J. No. 1525 (QL) (B.C.S.C.) [*Campbell*].

<sup>511</sup> *Ibid.* at paras. 105-108.

Recognition of Indigenous laws (as “customary law”) has found its fullest expression in what might be considered, from a Canadian perspective, the safest of places: Where the matters under discussion are primarily internal and do not directly conflict with Canadian laws (such as adoption, marriage, and divorce).<sup>512</sup> Restricting recognition of Indigenous laws to internal matters effectively precludes Indigenous Peoples from a necessary involvement in protecting and managing their territories, and so leaves Indigenous Peoples without the ability to be actively engaged in protecting a crucial and defining feature of their existence as Peoples.

My purpose in raising these examples of past and continued recognition of Indigenous laws is to challenge now settled assumptions of the non-existence (or inadequacy) of Indigenous laws and legal orders. Indigenous laws and legal orders are not unknown to the Canadian legal system.<sup>514</sup> Engagement with distinct Indigenous legal orders marked initial contact periods and is reflected in historic treaties. In a limited fashion, recognition continues, though restricted to matters considered internal to Indigenous communities,

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<sup>512</sup> A full discussion of the limited recognition of Indigenous laws as “customary law” is beyond the scope of this thesis. For a fuller discussion of customary laws, see: Norman Zlotkin, “Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases” [1984] 4 C.N.L.R. 1; Richard Pesklevits, *Customary Law, The Crown and Common Law: Ancient Legal Islands in the Post-Colonial Stream* (UBC Master’s Thesis. Vancouver, 2002) [Unpublished] at 19) who offers this definition “a practice as of right having the legal attributes of immemorial existence, reasonableness, certainty and continuity”; Mark D. Walters, “ ‘According to the old customs of our nation’: Aboriginal Self-Government on the Credit River Mississauga Reserve, 1826-1847” (1998-1999) 30 Ottawa L. Rev. 1, “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982” (1999) 44 McGill L.J. 711; John Borrows, 1997(b), *supra* note 8; Jackson, *supra* note 257; and, Slattery, *supra* note 257.

<sup>513</sup> See e.g.: The Royal Commission on the Donald Marshall, Jr., Prosecution (“Digest of Findings and Recommendations”) [1990] N.S.J. No. 18 which included the recommendation that a Native Justice Institute be established by the Nova Scotia and Federal governments which would “undertake research on Native customary law to determine the extent to which it should be incorporated into the criminal and civil law as it applies to Native people” (Recommendation 21(b)). Remarking upon the trend to only view Indigenous laws as internal John Borrows observed (Borrows, 2005 *supra* note 8 at 161): “[I]ndigenous law is not simply something that continues to apply in Aboriginal communities. It is more than just private or Aboriginal community law. Indigenous law is also a part of Canada’s constitutional structure. Indigenous legal traditions shape and are embedded within our national structure.”

An interesting divergence from this restriction can be found in Justice Lambert’s dissenting opinion in *Morris* (BCCA) (*supra* note 408 at paras. 44-45) where he found that the Tsartlip had a treaty right to hunt, according to their own laws, customs, traditions and practices, including those for ensuring a safe hunt.

<sup>514</sup> The work of Joanne Fiske (*supra* note 11) is particularly helpful for a fuller understanding of this issue.

through customary law recognition. Indigenous legal orders stand more in the nature of an old acquaintance that Canada has refused to see for years, than they do a perfect stranger. What is required is a *re-cognize-ing*.

The *Delgamuukw* requirement that Indigenous laws must be cognizable to the Canadian legal system before any space will be made for those laws within the Canadian legal system or constitutional framework carries within it the dangerous possibility of impeding any recognition of Indigenous laws or legal orders. It fails to account for the fact that “cognition” requires a willingness to see and to understand. As the discussion in Chapters 3 and 4 has shown, a fundamental part of the re-constitution of Indigenous Peoples aspirations has occurred through the transformation of Indigenous laws into “oral history” and “evidence”: Useful for the proof of particular practices, but not considered as having any standing as laws themselves. Current Canadian jurisprudence continues to reflect this transition, including the oral tradition while transforming it – sanitizing it of its legal implications in the process.

Requiring that Indigenous laws be “cognizable” to the Canadian legal system before it will make any space for their protection is replete with normative assumptions about what laws and legal orders are, and the ways in which they can and should be framed in order to be valid. Therefore, to understand the absence of Indigenous laws within Canadian courts and legal decisions, it is necessary to understand the ways in which stories are work, and how understanding Indigenous oral traditions requires knowledge of the divide in the ways of understanding, knowing and structuring the world. Oral traditions are deep, complex and multi-layered, and not easily accessible at their middle or deeper levels of meaning at first telling. The inability of Canadian courts to comprehend these facets of the legal content of

oral traditions, or insistence on devaluing them, continues to impede Indigenous laws from flowing back onto the land.

A review of established jurisprudence shows that Indigenous oral tradition evidence becomes lost in the interplay between the separate determinations of admissibility and weight. The SCC's decisions to admit oral tradition evidence, while simultaneously questioning its reliability or accuracy have created a deliberative vacuum. According to the reasoning, oral traditions cannot be relied on to accurately portray historic events with any specificity and instead are relied upon for more general purposes. This then leaves open the door to experts or competing documentary narratives to provide evidence with the degree of historic specificity that will bring comfort to the courts. The willingness of courts to read legal, or even factual, content into Indigenous oral traditions is constrained by considerations of the interests or rights potentially impacted by this recognition. Where the interests that may be impacted are broader - such as lands, waters and resources - the consideration of the Indigenous oral traditions and the laws contained within them is constrained and limited.

### **B. Impeding Re-cognition of Laws: Inter-Societal Laws and Aboriginal Perspectives**

The failure of Canadian courts and governments to recognize Indigenous laws has lead to management regimes which allocate interests in lands, waters and resources absent any consideration of Indigenous laws, and to the criminalization (on hunting, fishing, gathering charges, for example) of Indigenous Peoples who are acting according to their own laws. The lack of recognition over land and resource matters is particularly troubling as it impacts upon Indigenous Peoples' continued survival, as Peoples.

The failure to recognize Indigenous laws and legal orders in a meaningful fashion over lands, waters and resources fundamentally limits what Indigenous Peoples can hope to achieve within a Canadian constitutional framework. Constitutional recognition is hollow if it does not provide and protect jurisdictional space for Indigenous laws over the territories that are constitutive of Indigenous Nationhood and existence as Peoples.

To illustrate how Canadian law continues to operate to prevent Indigenous laws from flowing back onto the land, I return to the discussion started in Chapter 2 about the ways in which constitutional inclusion (as s. 35 Aboriginal Title, Rights and Treaty Rights) has been transformative. The admission and devaluation of Indigenous oral traditions in Canadian courts was accelerated (or, perhaps, exacerbated) by the inclusion of s. 35 in the *Constitution Act, 1982* and the debates surrounding whether or not, and to what degree, Aboriginal and Treaty rights exist. The process of proof itself is grounded in an “empty box” theory of Aboriginal Rights. Rights are not presumed to exist, but must be proven. At earlier points in history (notably, prior to the inclusion of s. 35 in the *Constitution Act, 1982*) it was simply assumed that Indigenous Peoples rights existed, and the question was whether they had been extinguished or superseded by assertions of Crown sovereignty and regulatory power.<sup>515</sup>

Following constitutional inclusion, the SCC has created a doctrine of proof that constrains and limits what Indigenous Peoples could hope to achieve within the legal process and constitutional litigation. One of the central tenets of the doctrine of proof is the assertion that Indigenous Peoples must prove their claims in order to attach constitutional protection. Oral traditions containing Indigenous laws are then converted into evidence and admitted (or weighed) only to the extent that their content, as assessed by courts, are necessary or reliable.

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<sup>515</sup> See e.g. *Calder* (*supra* note 51) which was heard in a matter of a few days, unlike modern Aboriginal Title cases which proceed for a matter of years.

A further feature of the doctrine of proof is that it allows for cases to be dismissed on a lack of evidence and so provides a route for courts to avoid having to decide on more contentious legal issues. The case of *R. v. Pamajewon* provides an interesting example.<sup>516</sup> There, the defendants sought to rely upon s. 35(1) when charged under the *Criminal Code* for keeping a common gaming house, but were unable to establish an Aboriginal Right (under the newly formulated *Van der Peet* test, a somewhat unfair situation, as *Pamajewon* and *Van der Peet* were heard at the same time). The court characterized the right claimed as being one of “self-government” which, had it been established on the facts of the case, offered constitutional protection from provisions of the *Criminal Code*. *Pamajewon*, in conjunction with the *Mitchell* decision, raises an interesting inference regarding the SCC’s recourse to the doctrine of proof: where the legal issues are particularly contentious (such as high stakes gambling, or cross-border issues) and where the Indigenous Peoples may have a strong legal claim, the SCC has often refused to find a right and dismissed the claim at the proof stage and thereby avoided making more difficult decisions.

In its jurisprudence regarding s. 35 the SCC has set a framework that recognizes Indigenous Peoples laws and legal orders, and, at the same, impedes full or meaningful invigoration of Indigenous laws. In many respects, the manner in which the SCC framed and resolved the question before it in *Sparrow* (whether “Parliament’s power to regulate fishing [is] now limited by s. 35(1)”<sup>517</sup>) gave rise to this situation. The formulation offered in that case, of Aboriginal Rights as being unlimited and in need of state regulation has continued to be a source of sustenance that courts turn to when they seek to devalue Indigenous laws. The discussion in Chapter 5 outlined the ways in which Indigenous laws continue to be devalued

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<sup>516</sup> [1996] 2 S.C.R. 821 [*Pamajewon*].

<sup>517</sup> *Sparrow*, *supra* note 42 at 1083.

based on the common sense assumption that state regulation is necessary to protect resources, the general public and Indigenous Peoples. In those areas where governments are able to frame their exercise of jurisdiction as being for conservation or safety reasons, Canadian courts have generally refused to question this exercise of jurisdiction or the assumptions about Indigenous Peoples (as lawless, or in need of government wardship) embedded within them.

This positioning of Indigenous oral traditions - (1) as an exception to hearsay exclusions made necessary by the lack of other evidence, and (2) as a source for revealing the *subjective Aboriginal perspective* on the rights claimed – suggests questionable status. Classifying evidence offered in the oral traditions (including their legal content) as revealing a “perspective” suggests that they are opinions, not factual, but honest (capable of being shown to be mistaken) beliefs.

When Indigenous laws are subsumed as part of an “aboriginal perspective” they are afforded considerably less protection than had they been defined as laws alone. By directing that courts, in assessing Indigenous claims, take into account the “aboriginal perspective” and then going on to highlight this perspective as being revealed through Indigenous oral traditions, the court set the framework for the devaluation of Indigenous laws. Indigenous laws do not have a weight of their own; they merely provide a perspective that governments must take into account when they exercise their laws. Consultation and accommodation have been substituted *in lieu* of recognition of Indigenous laws about lands, waters and resources. And even the promise afforded by “consultation” has suffered a reduction (from the possibility of “consent” in *Delgamuukw* to something significantly less in *Haida* and *Taku*). Consultation fails to give recognition to Indigenous Peoples laws, as it vests decision making

firmly with governments and then posits a right of Indigenous Peoples to have their perspective considered and possibly incorporated in government decisions. Of key importance is the fact that the consultation framework is fundamentally responsive. Indigenous Peoples respond to government plans, they do not jointly construct, or solely construct their own. Consultation law does not, therefore, operate as a separate empowering source for Indigenous laws.

The McLachlin court appears to be still struggling to come to terms with the legal content of oral traditions, or perhaps to have given up the search altogether, with their recent turn in *Bernard* where they searched for the “aboriginal perspective” to reveal practices and traditional ways of life and then sought to fit this within the “European perspective” which included the “common law”.<sup>518</sup> With these statements, the Court seemed to retreat from its earlier statements in *Delgamuukw* and *Van der Peet* which spoke of “inter-societal” law and posited that the content of Aboriginal Title and Rights must be defined with reference to both. Here, the conversion appears to be nearly complete: Indigenous laws are evidence, which will not be accepted or considered unless it conforms to Canadian common law. Indigenous laws are not laws which the *Bernard* court recognizes, instead they are useful for revealing “facts” which may fit within the European common law.

The reference to the “aboriginal perspective” in judicial determinations demands closer scrutiny, particularly in the context of assessing oral traditions. Perspectives shift and mutate. Perspectives are a way of viewing things, mere opinions that are readily refutable by expert evidence or a selective interpretation of written documents. Perspectives are less than truthful, reflecting only one person’s or one group’s view of reality. Perspectives may offer diversity, variety, some colour to the discussion, but they are not laws. A legal anomaly

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<sup>518</sup> *Bernard*, *supra* note 51 at para. 48.

results: Although Indigenous laws are recognized to exist they are not invigorated. When courts selectively interpret oral traditions as merely evidence of the “aboriginal perspective” this renders the legal aspects of Indigenous oral traditions legal artifacts rather than laws with modern place and application.

The introduction of Indigenous oral traditions as evidence in Canadian courts furthers the process which Fiske described as the delgalization of Indigenous laws through their definition as “myth, legend, and folklore”<sup>519</sup> to which we might add, that the transformation of Indigenous oral traditions when they are introduced in courts as evidence is from Indigenous laws to “myth, legend, folklore *and the Aboriginal perspective.*” And, in all of these formulations, robbed of any legal content. As Borrows has so eloquently observed, “Aboriginal law should not just be received as evidence that Aboriginal peoples did something in the past on a piece of land: it is actually law.”<sup>520</sup>

Oral traditions find their fullest meaning in the context of the societies that gave rise to them, and a decontextualized reading (in courts, when they are adduced as evidence, for example) distorts their reception and bleeds meaning. The loss encompasses the many forms and layers of meanings inherent within oral traditions that are rendered invisible or shadowy when communicated across a courtroom witness stand, and barely discernable on the flattened transcript pages which may be all that remains when Indigenous cases, relying upon the oral tradition, progress through appeals courts. The most profound loss is the loss of legal content, of the Indigenous jurisprudences contained in oral traditions.

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<sup>519</sup> Fiske, *supra* note 11 at 284. Nabokov mirrors this suggestion, saying that the oral traditions that settlers would dismiss as “mere entertainment were central to tribal identity and continuity” (*supra* note 25 at 50).

<sup>520</sup> Borrows, 2005 *supra* note 8 at 173. LaBel cited this discussion in his dissenting decision in *Bernard* (*supra* note 51 at para. 128).

To return to the discussion with which we opened:

*Sʔecenk<sup>w</sup>u is deceptive and can lull you into thinking it is safe. Waters whose calm surface hides currents and back eddies not evident on the surface. A particular danger of sʔecenk<sup>w</sup>u waters are vertical whirlpools which can trap logs and sticks (or unfortunate people) cycling them through a dangerous circularity. Logs and other flotsam remain caught until the water loses interest or changes course. The danger is that people fight to break free when brought momentarily to the surface and struggling for breath. These attempts are never successful as the unseen currents and powerful pull of the water are too strong at the surface. The only way to break free is at river's bottom, by grabbing hold of rocks and clinging to the submerged land, fighting to a place where the circular motion does not hold so strong.*

The introduction of Indigenous oral traditions in court, as evidence, converts Indigenous laws into a source of evidence for a foreign court to judge. Even in the deceptively calm surface, in the willingness to admit oral traditions (in name, at least) on an equal footing, there are hidden undercurrents and back eddies. When we, as Indigenous Peoples, introduce our oral traditions in court in an attempt to break free, to protect some legal space for our own unique identities to flourish and survive, we are only struggling to break free at the surface, caught in the powerful pull of a legal culture systemically structured to constrain and limit Indigenous Peoples' aspirations. These are not the waters that will return Indigenous laws to the land.

*We will have to search for submerged ground, to continue to drive through gates, light fires, and bide our time.*

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