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How Do We Know What We Think We Know:
Facts in the Legal System

Reading Beyond the Lines: Oral Understandings and Aboriginal Litigation

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I. Introduction

Aboriginal peoples in Canada have constitutionally protected Treaty and Aboriginal rights which are "recognized and affirmed" in Section 35 of the *Constitution Act, 1982*.[1] This simple constitutional statement is the foundation for a legacy of rich legal reasoning on the nature of Aboriginal and Treaty rights, and the evidentiary struggles that accompany the litigation of those rights.

Historical evidence is generally necessary to prove Treaty and Aboriginal rights. In large part, this is due to the historical framing of rights by the courts through legal tests that are rooted in prior occupation of lands, past cultural practices, and the interpretation of historical treaties. Aboriginal rights are held to the standard of being "integral to the distinctive culture of the Aboriginal group"[2] prior to contact (and in the case of the Métis, prior to effective control).[3] The litigation of Aboriginal title requires proof of exclusive use and occupancy that dates back prior to British Sovereignty.[4] Treaty rights are generally litigated in a context of competing historical understandings of the treaties, requiring extrinsic evidence as to the meaning of the original Treaty terms themselves.[5]

While historical evidence may be necessary to prove these rights, there is very little written historical evidence from an Aboriginal perspective. Professor Borrows argues that oral history can be controversial in nature in that it can "question the very core of the Canadian legal and constitutional structure."[6] This poses a challenge: how to balance the principles of evidence with the reception of oral history and Elder

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[1] *The Constitution Act, 1982*, being Schedule B to *the Canada Act 1982* (UK), 1982, c 11, s 35.
[2] *R v Van der Peet*, [1996] 2 SCR 507 at para 45 [*Van der Peet*]; *R v Sparrow*, [1990] 1 SCR 1075 at 1990 [*Sparrow*].
[3] *R v Powley*, [2003] 2 SCR 207 at paras. 37-38 [*Powley*].
[4] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*].
[5] *R v Sioui*, [1990] 1 SCR 1025 [*Sioui*]; *R v White and Bob*, (1964) 50 DLR (2d) 613 (BCCA); *R v Taylor and Williams*, [1981] 3 CNLR 114 (Ont CA); *R v Simon*, [1985] 2 SCR 387; *R v Horseman*, [1990] 1 SCR 901; *R v Badger*, [1996] 1 SCR 771; *R v Sundown*, [1999] 1 SCR 393; *R v Marshall*, [1999] 3 S.C.R. 456 [*Marshall*]; *R v Marshall*, [1999] 3 SCR 53; *R v Marshall and Bernard*, [2005] 2 SCR 220; *R v Morris*, [2006] 2 SCR 915.
[6] John Borrows, "Listening for a Change: The Courts and Oral Tradition" (2001) 39 Osgoode Hall LJ 1 at para 31.

evidence?[7] While recent efforts have paved the way for the admissibility of oral history and Elder evidence,[8] we still have much ground to cover in terms of the purposes for which this evidence is considered, and the weight that it is given in judicial decision making. Below I suggest that although the Supreme Court of Canada ("SCC") has provided clear direction to give oral history and historical evidence equal weight, courts continue to struggle with how to receive, treat, and decide based on this *sui generis* type of evidence. The heart of this paper is a description of a multi-year, multi-party effort aimed at developing Guidelines for Elder Testimony and Oral history. This process unfolded in the context of the Federal Court Aboriginal Law Bar Liaison Committee.

I end by suggesting that we have much more work to do. While we have not yet really wet our feet in the waters of oral history and Elder evidence, I anticipate that we are about to dive into the deep waters of indigenous legal traditions. Their presence in Canadian courts will surely enhance the common law, while giving many of us the opportunity to challenge our legal assumptions of what is in fact, *law*.

II. Aboriginal Law Needs Aboriginal Evidence

Aboriginal rights and Treaty rights are unique in their nature, or "*sui generis*". The SCC has written that they are rooted in the "reconciliation of the prior occupation of North America by distinctive Aboriginal societies with the assertion of Crown sovereignty over Canadian territory."[9] They attempt to achieve that reconciliation by "their bridging of Aboriginal and non-Aboriginal cultures."[10] Accordingly, "a court must take into account the perspective of the Aboriginal people claiming the right […] while at the same time taking into account the perspective of the common law" such that "[t]rue reconciliation will, equally,

[7] I will not, in this paper, comment on the appropriateness of calling Oral history and Elder evidence in Aboriginal litigation. Some consider that it becomes decontextualized and "fractured into slices by both direct and cross-examination": Val Napoleon, "*Delgamuukw*: A Legal Straightjacket for Oral Histories?" (2005) 20 CJLS 123.
[8] I refer to both 'oral history' and 'Elders evidence'. Oral history is generally considered to be a history that is shared through generations, whereas Elders evidence may be in the nature of oral history, it is also direct knowledge about the practices and customs, ways of being, and facts directly related to the subject of the litigation.
[9] *Delgamuukw, supra* note 4 at para. 81.
[10] *Van der Peet, supra* note 2 at para. 42.

place weight on each."[11]

A special approach is required. As mandated in *Delgamuukw*, the Aboriginal perspective and the common law perspective must be considered in equal measure. Equal weight must be given to equal perspectives. This is what is required if we are to achieve Aboriginal law's objective of reconciling "Aboriginal peoples and non-Aboriginal peoples and their respective claims, interest and ambitions."[12]

More concretely, the SCC recognized that the histories of Aboriginal nations are largely, if not entirely, ora,l and that the laws of evidence need to be modified in order for weight to be given to this perspective. We must: "adapt the laws of evidence so that the Aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of Aboriginal societies, which for many Aboriginal nations, are the only record of their past."[13]

The Aboriginal perspective is oral, not written; it is contextual and holistic rather than fact based; and it is also linked to culture.[14] For example, Anishinabe understandings are generally not written[15] but rather recorded through oral transmission.[16] Historically, understandings, stories, and laws were physically recorded in birch bark scrolls, wampum belts, pictographs and petroforms. Some of these forms of "writing on the land" continue today.

[11] *Ibid* at paras. 49-50. See also *Marshall, supra* note 5*; R v Bernard* 2005 SCC 33.
[12] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 1.
[13] *Delgamuukw, supra* note 4 at para. 84.
[14] Bruce Granville Miller, "Oral History on Trial: Recognizing Aboriginal Narratives in the Courts" (Vancouver: UBC Press, 2011) at 172 [*Miller*].
[15] Note that exceptions exist and are becoming more common.
[16] See Basil Johnston, *Ojibway heritage* (Toronto: McClelland & Stewart, 1976); Eddie Benton-Banai, *The Mishomis Book: The Voice of the Ojibway* (Minneapolis: University of Minnesota Press, 1988).

From an Aboriginal perspective, "cultural identity is a subjective matter and not easily discerned".[17] In *Delgamuukw*, the SCC cited what they considered to be a "useful and informative" passage from the Royal Commission on Aboriginal Peoples (1996):

> The Aboriginal tradition in the recording of history is neither linear nor steeped in the same notions of social progress and evolutions [as in the non-Aboriginal tradition]. Nor is it usually human-centred in the same way as the western scientific tradition, for it does not assume that human beings are anything more than one – and not necessarily the most important – element of the natural order of the universe. Moreover, the Aboriginal historical tradition is an oral one, involving legends, stories and accounts handed down through the generations in oral form. It is less focused on establishing objective truth and assumes that the teller of the story is so much a part of the event being described that it would be arrogant to presume to classify or categorize the even exactly.
>
> In the Aboriginal tradition the purpose of repeating oral accounts from the past is broader than the role of written history in western societies. It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority and prestige
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> [...]
>
> Oral accounts of the past include a good deal of subjective experience. They are not simply a detached recounting of factual events but, rather, are "facts enmeshed in the stories of a lifetime". They are also likely to be rooted in particular locations, making reference to particular families and communities. This contributes to a sense that there are many histories, each characterized in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people. [18]

The rules of evidence must be adapted to accommodate Aboriginal oral histories and the Aboriginal perspective.

> In determining whether an Aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive Aboriginal

[17] *Mitchell v MNR*, [2001] 1 SCR 911 at para. 32 [*Mitchell*]. In *R v Sappier*; *R v Gray* 2006 SCR 54 [*Sappier*], Bastarache J, writing on behalf of the Court, expressed that "[w]hat is meant by 'culture' is really an inquiry into the pre-contact way of life of particular aboriginal community, including their means of survival, their socialization methods, their legal systems [...]" at para. 45.

[18] Ontario, Canada Communication Group, Looking Forward, Looking Back, vol. 1 at 38 <http://caid.ca/RRCAP1.3.pdf>.

> culture, 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 originate in times where there were no written records of the practices, customs and traditions engaged in. *The courts must not undervalue the evidence presented by Aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case*.[19] [Emphasis in original.]

Courts and decision makers have expressed difficulty and discomfort with the treatment of oral history and Elder evidence and evidentiary legal standards; struggling at the interface with issues of necessity and reliability.

> 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 culture" but also as an expression of "the values and mores of [that] culture…"
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> [...]
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> Dickson J. (as he then was) recognized as much when he stated in *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 109, 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 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.[20]

Although oral history evidence is a valid exception to the general rule for exclusion of hearsay evidence, courts have been reticent to accept this evidence in the absence of other forms of corroborating evidence. For example, in *Montana Band v Canada*, a 2006 decision of the Federal Court, the trial judge stated:

> Certain aspects of this evidence are corroborative of other evidence adduced at the trial. However, neither the oral history evidence nor the evidence it tends to corroborate are particularly useful in relation to the resolution of the technical issues before the Court. As well, none of this evidence contradicted any of the relevant documentary or expert opinion evidence. For this reason, it is not necessary to engage in an analysis of the weight that ought to be given to

[19] *Van der Peet, supra* note 2 at para 68.
[20] *Delagmuukw, supra* note 4 at para. 86, emphasis added.

> this evidence. Having said this, given that the Cree perspective for the most part is absent in the historical record, the oral history evidence provided the Court with an additional context within which to consider the evidence.[21]

Where historical, scientific or expert evidence contradicts oral history, the former have often been the preferred evidence. In many cases, oral history has either been deemed to be unreliable and set aside or given little evidentiary weight.[22] While corroboration may be an appropriate measure in the adversarial process more generally, the Aboriginal perspective should not necessarily be subject to strict standards requiring corroborating documentary or expert opinion evidence. As stated by Chief Justice McLachlin in her opinion for the majority in *Mitchell*: "The flexible adaptation of traditional rules of evidence to the challenge of doing justice in Aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not 'cast in stone, nor are they enacted in a vacuum'."[23] This is particularly important given the challenges that have been identified, such as lack of written historical evidence from the Aboriginal perspective.

There are examples of cases in which evidence of oral history has been accepted and relied upon in judicial reasoning. In the *Sappier* case, Mr. Sewell was qualified as an expert "regarding oral traditions and customs which have been passed down through the generations and more particularly in the field of describing practices and customs relating to the use of and gathering of wood by Aboriginals in the geographical area encompassed by the terms of the charge."[24] In *Mitchell v Canada*, Grand Chief Mitchell's testimony "confirmed by archaeological and historical evidence, was especially useful because he was trained from an early age in the history of his community. The trial judge found his evidence to be credible and relied on it."[25]

While the evidence was accepted in both of these cases, the adaptation of the rules of evidence was to no

[21] *Montana Band v Canada*, [2006] FC 261 at para 313.
[22] See generally *Miller, supra* note 14.
[23] *Mitchell*, *supra* note 17 at para 30. [Internal citation omitted]
[24] *Sappier, supra* note 17 at para 29.
[25] *Mitchell, supra* note 17 at para 25.

extent evident. In *Sappier*, the evidence was tendered as "expert evidence" which requires experts to be qualified to provide opinions based on their particular area of knowledge or expertise.[26] In *Mitchell*, the evidence was credible and reliable, at least in part because it was "confirmed by archaeological and historical evidence…"[27] Where oral historians have been educated in history, anthropology, archaeology, or ethnography, their evidence may be subject to these questions: Is the evidence considered as biased, tainted or contaminated? Should the Elder or oral historian be held to the same standards as experts?[28] Can academic or professional experts be called to question the evidence or the qualifications of the Elder?

Although admissibility and weight must be determined on a case-by-case basis, issues have arisen systematically, including advance disclosure, cross-examination, the qualification of witnesses and the use of experts to challenge oral history and Elder evidence. In an adversarial context, these may be perfectly appropriate means of testing the evidence. Nonetheless, this approach can foster an atmosphere of distrust and frustration with the legal process, particularly for the Aboriginal parties involved. Bruce Miller suggests that

> [t]he Department of Justice effort at responding to the Canadian Supreme Court's evolving position on oral narratives has been less than helpful, and perhaps less than honourable on some occasions. The emphasis remains on the strategic defence of the Crown's perceived prerogative to control resources and land, and on the tactical use of academic devices intended to discredit and dislodge the use of oral narratives in civil litigation. These legal tactics have contributed to making litigation long, expensive, and contentious, developments that are not in the best interests of Canada or Aboriginal peoples.[29]

This distrust and frustration are further amplified in the context of aboriginal litigation, for cultural reasons and because of the particular nature of oral history and Elder evidence. For example, from an indigenous perspective, questioning an Elder is a sign of disrespect. Elders are generally the community knowledge keepers and leaders in terms of their community decision-making processes. Questioning them or treating them in a way that is perceived as disrespectful is damaging to the group and the culture.

[26] *Sappier, supra* note 17.
[27] *Mitchell, supra* note 17 at para 35.
[28] Bruce Miller suggests that oral historians may be considered experts: *Miller, supra* note 14 at 169-73.
[29] *Ibid* at 164.

Yet, questions may arise as to who may properly be considered as part of the “category” of “Elders”.

As part of the process of developing the Guidelines, Elders assisted in identifying the issues that have arisen when they have been called to testify. They also suggested some solutions that would accommodate both the requirements of the legal process and the Aboriginal perspective. “Elders have frequently said their experience in court has not been favourable. The formalities of the court and the adversarial aspect of litigation do not accord with Aboriginal approaches to sharing knowledge and stories.”[30] Interrupting and questioning the truth or reliability of Elder evidence has been devastating to Elders personally and to their reputation in the community. Elder Fran Guerin expressed that respect and acknowledgement of difference is at the center of the issue:

> How do you reconcile this with the adversarial system? How do you treat Elders with respect in the adversarial system? In part by allowing as much time as is needed for parties to deliver information – it is ceremony and a great degree of caution is taken to ensure no one is offended. It is the opposite of the court system. It’s the two cultures clashing. The principle of respect is integral.[31]

While some Elders are familiar with courtrooms, public speaking, or having their thoughts and views challenged, others will have very little familiarity with the adversarial process. Elder testimonies must be accommodated to foster truth seeking and to encourage the Aboriginal perspective. Sakej Henderson explains that the Elders have a constitutional voice:

> Elders provide a new, distinct, Constitutional voice that has not been heard, one that the courts describe as *sui generis* [...] when Elders come to court, they carry Constitutional supremacy and Aboriginal rights with them, the power to explain Aboriginal traditions, which no one else can do [...] they have a Constitutional voice that in a federal system is considered superior to other rules [...] the Federal Court rules must be consistent with Aboriginal rights.[32]

Oral history and Elder evidence is essential to understanding the Aboriginal perspective. An international

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[30] Federal Court - Aboriginal Law Bar Liaison Committee, “Aboriginal Litigation Practice Guidelines” (2009), at 15 < http://cas-ncr-nter03.cas-satj.gc.ca/fct-cf/pdf/PracticeGuidelines%20Phase%20I%20and%20II%2016-10-2012%20ENG%20final.pdf > [*Guidelines*].
[31] Elders Gathering, Tsartlip First Nation (November 13, 2011) [*Gathering*]. [on file with author]
[32] James Sakej Youngblood Henderson, “Symposium on Oral History” (Paper delivered in Ottawa, 7 April 2009), [unpublished, on file with author].

comparative review of the treatment of oral history evidence by courts, prepared under the direction of Professor James Hopkins, Associate Professor, Rogers College of Law, University of Arizona found that "[M]oving forward, it is clear from the comparative analysis that Canada's system must respectfully tender oral history evidence and recognize the dignity of Elders whose customary knowledge places them in a unique position within the community."[33]

In the *Tsilhqot'in* aboriginal title case, Vickers J. of the British Columbia Supreme Court addressed considerations for oral history.[34] In a procedural ruling in advance of the trial, Justice Vickers indicated that counsel should address the following issues on behalf of the claimant clients:

1) How their oral history, stories, legends, customs and traditions are preserved;
2) Who is entitled to relate such things and whether there is hierarchy in that regard;
3) The community practice with respect to safeguarding the integrity of its oral history, stories, legends and traditions; and
4) Who will be called at trial to relate such evidence, and the reasons they are being called to testify.[35]

Justice Vickers was clear that this "is not a formula or template to be applied in every case where hearsay evidence of oral history, genealogy, practices, events, customs and traditions are a critical part of the evidence at trial. It is a procedure that will, in my view, be helpful in this case, and might have eliminated some objections if it had been undertaken at an earlier stage."[36]

Nonetheless, it provides a reasonable basis from which to consider and adapt according to the

[33] James Hopkins & David Nahwegahbow, "Draft Protocol/ Practice Direction on the Oral Testimony of Aboriginal Elders" (Federal Court-Indigenous Bar-Aboriginal Law Bar-Liaison Committee, Yellowknife, 20 February 2008) [unpublished].
[34] *Williams v British Columbia et al,* [2004] 2 CNLR 380 [*Williams*]. The trial decision granting the declaration of aboriginal title was reversed in *Tsilhqot'in* v British Columbia 2006 BCCA 2. That decision, however, was in turn reversed in 2014 SCC 44.
[35] *Ibid* at para 24.
[36] *Ibid* at para 23.

particularities of each legal matter and each Aboriginal community.

III. Federal Court Guidelines: Elder Testimony and Oral History

In 2005, the *Federal Court – Aboriginal Law Bar Liaison Committee* was created, with representatives of the Federal Court, the Indigenous Bar Association, the Department of Justice (Canada), and the Canadian Bar Association (Aboriginal Law Section). The purpose of the Committee was to "provide a forum for dialogue, review litigation practice and rules, and make recommendations for improvement."[37] Issues relevant to Aboriginal litigation were discussed by the Liaison Committee including the suitability of the adversarial process, pre-trial disclosure of oral history evidence, adaptation of the judicial process to the cross-cultural context, and delay and cost, amongst many others. The ultimate objective was to build in enough flexibility to allow for "the just, most expeditious and least expensive determination of every proceeding on its merits."[38]

The first four years of dialogue resulted in an Aboriginal Litigation Practice Guideline (November, 2009), which focused primarily on case management and trial management. The Guidelines contain best practices for litigation, specific to the Aboriginal law context. While the committee members did not agree on all proposals that were put forward, we did ultimately compromise on wording and suggestions for best practices, drawn primarily from the experience and suggestions of legal counsel, to improve the practice of Aboriginal litigation. Guiding principles were set out, encouraging the flexible interpretation of the rules of procedure to give equal weight to the Aboriginal perspective and the academic historical perspective requiring the respectful treatment of Elders, and an approach that is fair and responsive to the practices of the Aboriginal group and the Elder who is testifying. "The overarching theme permeating

[37] *Guidelines, supra* note 30 at 2.
[38] *Ibid* at 3.

these guidelines is that the Aboriginal perspective provided by Elders can assist the Court by providing context for the matter before the Court."[39]

The committee continued to actively work on recommendations for the Practice Guidelines on Elder Testimony and oral history until the publication of a second edition in October, 2012. Throughout the process, academics, judges, Elders, lawyers and collaborators were called upon to provide guidance to the committee.[40] A two-day symposium was held in Ottawa, where Elders from across Canada and various indigenous nation groups shared their perspectives on oral history and Elder evidence in the courts. The Elders shared their views and past experiences, relating their concerns about speaking in foreign environments such as courtrooms, and in places that they have felt disrespected in the past. In the Fall of 2010, at the invitation of the Elders to come to "our house", members of the Court attended a two-day session in a traditional lodge at the Sagkeeng First Nation.

The Guidelines on Elder Evidence and Oral History

When Elders agree to testify, consideration should be given to the Guidelines. Issues about the evidence may be considered in a case management or trial management conference to "settle on a flexible appropriate procedure of hearing the Elder's testimony."[41] Where appropriate, the case management or trial management judge may make rulings to this effect.

The Guidelines appropriately note that the admissibility of an Elder's testimony depends on the circumstances of the case and that it will be for the trial judge to decide on a case-by-case basis. Since the Elder testimony is aimed at informing the court on the Aboriginal perspective, Elders evidence "will usually be admissible where an Elder is a person recognized by his or her community as having that

[39] *Ibid* at 12.
[40] Minutes of the meetings are available on the Federal Court website < http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Liaison_Committees>.
[41] *Guidelines, supra* note 30 at 12.

status."[42] This principle helps address some of the difficulties identified above, such as subjecting Elders to the requirements of legal tests to determine "expertise" and issues related to the qualification of Elders. There are internal mechanisms in the Aboriginal communities that allow for the identification of the Elder(s), and that can provide the Aboriginal perspective of the particular aboriginal group or indigenous nation group. Often Elders will not call themselves "Elders" by virtue of customary of cultural practice. Therefore, an introduction of the Elder to the court by a member of the community may be appropriate.

In advance of trial, information should be disclosed about the Elder and the basis of his or her knowledge. This need not be at the same time as document disclosure. Issues about the adequacy of disclosure can be raised in case management or trial management for directions or rulings on the disclosure and its timing. In addition to a summary of the proposed evidence, the disclosure should include information about the practices and protocols for requesting evidence from the Elder, such as offering tobacco, making gifts, and explaining the purpose for which the request is being made.

Where Elder evidence is being called, legal counsel should prepare the Elders, explaining what will be expected from them. They should have the opportunity to reflect on the form and substance of their contribution, including any protocols that may apply. In some cases, the court may play a role in this preparation. Judges can express "respect and appreciation to the Elder for coming to share their knowledge with the Court."[43] This is where the court can take a leadership role in explaining the legal process and addressing any concerns that the witness may have, either in advance our throughout the proceeding.

Where evidence is either supported by demonstration, or directly demonstrative, it can be considered as part of the Elder's evidence (*i.e.* songs, dances, culturally significant object or activities on the land) and in these cases, special arrangements may be made. The Guidelines also address the treatment of

[42] *Ibid* at 12.
[43] *Guidelines, supra* note 30 at 15.

confidential or sensitive material. Due to past experiences and abuses, many are concerned with the protection of the intellectual property of Aboriginal groups' information.

In some cases, it may be appropriate to commission evidence or out-of-court examination of Elders in advance of trial, for example in situations where Elders may no longer be available at the time of trial. This is particularly important given the long duration of litigation and delays, as well as the age and physical health of Elders. There is a list of considerations for evidence gathering in the Guidelines, including language and translation considerations, procedures for recording, appropriate cross-examination, and the location and length of sessions.

Special proceedings for the hearing of Elder evidence may be considered at any stage of the trial. However, it may be beneficial to to hear the Aboriginal perspective at an early stage in order to allow the parties to consider their positions, and the potential for resolving the dispute out of court (including through mediation or negotiation). These special hearings serve the purpose of preserving Elder evidence in case the trial is delayed or prolonged. The procedure for the special hearing should be determined in advance, and may take the form or be guided by some of the considerations in the *Williams* case, and adapted to the particular Aboriginal community involved.

Procedural matters, such as the location of the court hearing, the use of Aboriginal languages and interpretation, and Aboriginal protocols should be canvassed early in the case management or trial management process. Special accommodations to courtroom procedures for the hearing of evidence can have a significant impact on what evidence is brought forward about the Aboriginal perspective. Given the largely oral tradition of Aboriginal people, discussions, remembrances and the telling of stories is often not limited to one person speaking. Notably, the ability for Elders to testify in each other's presence or in the presence of the community, including as part of a panel, accord with many of the customary practices related to truth telling. In some cases, the Elders should be accompanied by someone while they testify, either a relative, or an Elder with whom they collaborate. Although there are protocols about not

interrupting while someone speaks, an Elder may defer to others who have knowledge of a particular fact or an event, which can corroborate or enhance what is said by a particular witness. Other persons may be asked by the Elder to share a bit of information that supports the primary story. In addition, some stories are best told at a particular time of day or night, which may be accommodated.[44]

A key recommendation in the Guidelines is that discussions about Elder evidence, including admissibility and weight of the Elder evidence should be held in advance of the Elder testimony, and not when the Elder is on the witness stand. Unless there are immediate issues such as objections because of privilege, "challenges to admissibility may be deferred on a without prejudice basis to completion of the Elder's testimony while questions of the weight may be left for later argument."[45]

The Guidelines provide that special procedures may be adopted for Elder testimony, including:

- Decorum and respect to be afforded an Elder in keeping with Aboriginal sensibilities for respecting Elders;
- Whether examining counsel will need to direct the Elders attention to testimony the party wishes to elicit;
- How objections may be raised without disrupting the flow of an Elder's testimony;
- Procedures for challenging the admissibility and weight of an Elder's testimony; and,
- Being mindful of the Elder's age and physical health and the need for health breaks in the Elder's testimony so as not to tax the Elder's limitations in prolonged questioning.[46]

One of the key contentious issues for counsel and the Elders was how to conduct cross-examination in the context of Elder evidence. The Elders were particularly concerned with real or perceived disrespect that

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[44] In the Tsilhqot'in trial, a special sitting was scheduled at night to accommodate a story that is only told after dark: *Williams, supra* note 34.
[45] *Guidelines, supra* note 30 at 14.
[46] *Ibid* at 16.

characterized cross-examination. The following considerations and principles have been built into the Guidelines, and serve as a benchmark for appropriate cross-examination in this context:

- All witnesses are entitled to respect. Questions put to Elders should be courteous in keeping with the respect afforded the Elder by his or her community.
- Counsel should take into account the cultural approach of the Elders in making best efforts to ensure that the Elder understands the questions asked.
- The Court should intervene where questions stray from the bounds of examination or cross-examination, or where the Elder may have difficulty understanding the questions.
- The special context of the testimony of Elders suggests that alternative ways of questioning on cross-examination should be explored in appropriate cases. This exploration should be done on consent of the parties or on direction of the Case Management Judge.[47]

There are processes that may assist in attenuating the difficulties surrounding the cross-examination of Elders. In particular, alternative and respectful modes of asking questions of Elders may include:

- Counsel for the other party may make a list of questions that will be put to the Elder by Counsel for the Aboriginal person/group;
- Questions may be altered from leading questions to more open questions on cross-examination;
- Counsel for both sides may make a joint list of questions. Where questions are not agreed to by both parties, they may be asked separately by each party.

While the general rules for re-direct should apply, the court might consider granting leave for the discussion of certain subjects between counsel and a witness where it is necessary, and when it might assist in advancing the trial process.

[47] *Ibid* at 16.

The Guidelines contain a whole section on direct examination and cross-examination that includes suggestions for procedures that "should be chosen to achieve the best environment to receive that testimony."[48] These may include:

- The use of Aboriginal languages:
  - Address the need for interpretation;
  - Choose the mode of interpretation (simultaneous or sequential interpretation);
  - Even where Elders choose to testify in English or in French, interpreters may be required to assist with the interpretation of certain words or concepts;
  - Counsel should be encouraged to prepare glossaries of Aboriginal terms, including places and ideas;
  - Consideration should be given to the choice of the interpreters, given regional dialects;
  - The appointment and cost of the interpreters may be shared between the parties;
  - The approach to interpretation, court procedure and legal language should be discussed with the interpreters in advance (in particular if they have not been trained as court room interpreters).
- Observance of cultural and spiritual protocols:
  - Parties and the court should be made aware of the protocols (*i.e.* offering of tobacco);
  - Consideration should be given to whether or not the protocols should be conducted on the record or in advance of the hearing (given that some ceremonies are not allowed to be recorded);
  - Some Elders may choose to take an oath in accordance with their Aboriginal practice (*i.e.* with an eagle feather).
- The choice of a suitable venue (including in the community or on the land):

[48] *Ibid* at 14.

  - Aboriginal community venues should be canvassed in light of the effect on the ability of Elders to testify, and other considerations such as public access, travel, accommodation, court equipment and records.
- The format or mode of the testimony:
  - There are formats in which oral histories are transmitted, including types of forums such as circle settings, on the land, or in ceremony.
- The viewing of certain sites:
  - Certain evidence should be given on site to accommodate cultural or spiritual protocols, and in some cases, for ease of demonstration.
- The admission of demonstrative evidence:
  - Demonstrative evidence such as songs, dances or ceremonies may be part of the Elder's evidence.

The Guidelines acknowledge that the Federal Court Rules for expert evidence are typically not suitable for Elder testimony and oral history. Their evidence and knowledge "comes directly from their own culture's traditions and teachings, and needs to be acknowledged accordingly."[49] The expert rules continue to apply to the topic of oral history by academic experts. In a hybrid situation where an Elder is sharing both from traditional learning and academic education, the expert witness rules should be "adapted as necessary to meet the requirements of receiving the Elders' testimony and oral history evidence."[50]

While this procedural openness and flexibility is a positive step forward, it remains a procedural accommodation that may not address the entirety or the complexity of differing worldviews, cultural practices and legal traditions. Elder Stephen Augustine suggests that "there should be a system in place where someone experienced in [indigenous] law decides on the issues. Like a tri-jural system. Is there a

[49] *Ibid* at 17.
[50] *Ibid.*

progression towards the tri-jural system – what is the vision? The flexibility of the court rules is more of a procedural accommodation to the Aboriginal perspective...” [51]

IV. Indigenous Legal Traditions: Law and Fact

Indigenous laws have a place carved into the fabric of Canadian law. In the *Mitchell v MNR* decision, McLachlin C.J. recognized that “English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment.”[52] Chief Justice Lutfy (as he then was) of the Federal Court, acknowledged during the course of the Liaison Committee’s work on the Guidelines, that Canada is tri-juridical in nature. John Borrows explains that Indigenous legal systems pre-date British or Canadian Law and continue to co-exist with (or exist alongside) Canadian law.[53] While Borrows states that Canada has three legal traditions, Common Law, Civil Law, and Indigenous Law, he acknowledges that this is not a universally held view:

> There is a debate about what constitutes ‘law’ and whether Indigenous peoples in Canada practiced law prior to European arrival. Some contemporary commentators have said that Indigenous peoples in North America were pre-legal. Those who take this view believe that societies only possess laws if they are declared by some recognized power that is capable of enforcing such a proclamation. They may argue that Indigenous tradition is only customary, and therefore not clothed with legality.[54]

Indigenous legal traditions have survived multiple attempts at suppression by the Canadian state. [55] “Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered.”[56] I have argued that Treaty interpretation and implementation should not be rooted only in Canadian

[51] *Gathering, supra* note 31.
[52] *Mitchell*, supra note 17 at para. 9.
[53] *Ibid* at 16.
[54] John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 12 [*Indigenous Constitution*].
[55] John Borrows, *Drawing Out Law* (Toronto: University of Toronto Press, 2010) at 68.
[56] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 SCR 511, at para. 25.

common law, but should recognize and consider the indigenous legal principles that were central to the negotiations and formation of the agreements.[57] Borrows suggests that "[w]e do not have to abandon *law* to overcome past injustices... we only have to relinquish those *interpretations of law* that are discriminatory."[58]

If Canadian courts are going to consider the laws of indigenous people, the process by which those laws are considered and given effect poses a unique challenge. Indigenous laws are generally not articulated in written textual form, or founded by the same structural and theoretical principles. The value systems or worldviews on which they are based have been, and continue to be, in conflict with Canadian normative values. In addition, each indigenous nation is unique, and the laws of each nation will be particular to that group (although admittedly, similarities will arise). Borrows expresses this caution: "When working with Indigenous legal traditions one must take care not to oversimplify their character. Indigenous legal traditions can be just as varied and diverse as Canada's other traditions, though they are often expressed in their own unique ways."[59]

Absent the creation of indigenous courts, Canadian courts may be called upon to consider indigenous legal traditions.[60] How will decision makers interpret and apply various indigenous legal traditions in a Canadian legal context? Val Napoleon and Hadley Friedland suggest that indigenous law can be accessed through indigenous stories and that the use of a case brief model can draw out indigenous legal principles and processes of legal reasoning.[61] Other scholars are working on foundational indigenous legal and

[57] Aimée Craft, *Breathing Life Into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* (Saskatoon: Purich Publishing, 2013).
[58] *Supra* note 54 at 20.
[59] *Ibid* at 30.
[60] For example, the *Canadian Human Rights Act* requires that the *Act* be "interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws...": *An Act to Amend the Canadian Human Rights Act*, SC 2008, c 30, s 12.
[61] Val Napoleon and Hadley Friedland, "An Inside Job: Developing Scholarship From An Internal Perspective of Indigenous Legal Traditions" (Paper delivered at the Exploratory Workshop Thinking about and Practicing Indigenous Legal Traditions, 2011) [unpublished, on file with the author].

political theory.[62] The University of Victoria Faculty of Law is contemplating a joint JD/JID (indigenous laws) program and has established a Canada Research Chair in Indigenous Laws and Legal Systems.

When indigenous legal traditions are introduced into Canadian courts, questions and disagreements may arise. I anticipate that creative approaches will need to be developed to address some of the following considerations:

- In which circumstances will it be appropriate to rely on indigenous legal traditions?
- How will legal authorities be considered in the absence of written precedents or authoritative texts?
- Will judges and lawyers be able to rely on precedents when many indigenous laws and legal principles are in an oral or demonstrative form?
- How will issues of conflicts of laws be resolved between indigenous laws and Canadian law, or amongst different indigenous legal traditions themselves?
- Will indigenous laws be led as evidence or will they be argued in oral and written legal submissions? Or a hybrid of both?
- Will the decision makers have the necessary cultural competence to determine the meaning or interpret what is not in a textual or oral form?

Jeremy Webber suggests that in considering attempting to describe the law of a particular context, we

> should not state the law as though it were singular. Instead, it should aim to capture a *legal culture*, portraying the range of contending arguments; the normative resources on which those arguments can build; the relationship between those arguments on the one hand, and practices, interests, patterns of historical experience and individuals' identifications on the other; the extant mechanisms for resolving social disagreement; and, from an assessment of all of these factors, the relative chances of success of various normative assertions.[63]

[62] See e.g. the work of Gordon Christie, Darlene Johnston, Heidi Stark, Sarah Morales, Johnny Mack, Andrée Boiselle, Kerry Sloan, and Aaron Mills.
[63] Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44 *Osgoode Hall LJ* 167 at 192.

Indigenous legal traditions were and are a part of Canada's legal culture. Justice Lamer stated succinctly, "[l]et us face it, we are all here to stay."[64] Indigenous legal traditions and laws are here to stay. It is now our task to make space.

V. Conclusion

As identified in the Guidelines, oral history and Elder evidence must be treated with cultural sensitivity, while meeting the requirements of fairness and truth finding. Respect must be at the centre of any approach. In order to be responsive to the ultimate goal of reconciliation, we must aim not only at balancing competing interests, but seek to engage indigenous nations and individuals in the legal system in a way that is considerate of culture, language and protocols. As a start and at a minimum, we should embrace the following principles:

- Diversity must be recognized in all dealings with indigenous people, nations and groups;
- Inquiries and accommodation which consider difference should be encouraged; and
- Knowledge and familiarity with the process is essential. Courts should take a leadership role in communicating with Elders about their role in the proceedings and ensuring that appropriate respect and consideration is given to each Elder in providing evidence to the court.

The principles and the suggestions in the Guidelines are not meant to be prescriptive; rather, they are meant to serve as a starting point for engaging respectfully with oral history and Elder evidence in Aboriginal litigation. The best measure of success will be how the suggestions in the Guidelines make their way into the courts, or even better yet, if by engaging with them, issues are resolved without having to resort to litigation.

[64] *Delgamuukw*, *supra* note 4 at para 186.

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