

The Value of Aboriginal Records as Legal Evidence in Canada: An Examination of Sources

by MARY ANN PYLYPCHUK*

Introduction

A good deal of the recent documentary heritage of the aboriginal peoples in Canada has been created in the context of law offices and law courts. The emergence of a type of testimony known as 'Indian evidence' has inspired this look at the existing and potential use of aboriginal documents, oral traditions and artifacts as evidence in Canadian legal proceedings. This study seeks to identify some of the relevant published sources and to examine their discussion of the topic. Being the product of an exploratory perusal, the present article does not pretend to be comprehensive or conclusive.

Of the two types of applicable primary sources — judicial case reports on aboriginal rights, and the Evidence Acts — only case reports have been considered in detail; the scope of the present article has precluded anything more than a perfunctory treatment of legislation. Secondary sources on legal evidence and aboriginal litigation were also surveyed, and a selection of archival literature was consulted to illustrate pertinent archival and diplomatic principles. An attempt was made to concentrate on materials published during the 1970s and 1980s.

This study addresses court cases dealing with the assertion of aboriginal rights. A central argument in many such proceedings has been whether or not a particular aboriginal community existed continuously as a viable socio-legal system from pre-contact times to the present. In these cases, aboriginal evidence has been used to convince judges to rule for or against specific issues. However, the same information - interpreted within its aboriginal context — might form part of a society's only trusted proof of the continuity of its traditional laws, the society's sacred historical memory, and the main means of transmitting its cultural heritage from generation to generation.

During the past two decades, court cases involving aboriginal rights have often been seen as the last resort for aboriginal groups claiming rights and freedoms which they believe have always been theirs. Among these cases, there has been some variety in the types of traditional aboriginal evidence found acceptable by the courts. The creators of artifacts and the purveyors of oral tradition were, and may still be, members of cultures which remain at least to some extent pre-literate.² Oral traditions — the vital instruments of ancient customs — have not fit neatly into Euro-Canadian criteria for the

admissibility of evidence. Strict interpretations of evidence law have thus directed Canadian courts to reject certain types of aboriginal evidence, although recent interpretations have begun to stretch the rules of admissibility by allowing the performance of traditional oral ceremonies in the court room.

Description of Aboriginal Evidence

A study of aboriginal evidence in the context of the Canadian judicial system must begin with an acknowledgement of the fundamental differences between the two types of 'juridical systems', and 'world views' involved. Luciana Duranti has defined a juridical system as "a social group founded on an organizational principle which gives its institution(s) the capacity of making compulsory rules. . . , a collectivity organized on the basis of a . . . legal system. . . . Each juridical system differs from all others and itself varies over time."³ According to Michael Jackson, "A people's world view is composed of two interrelated parts: first, the notion of how the world is structured, of how its parts have been fashioned into a cohesive whole; and second, a set of rules by which that structure is set into motion and of how that motion can be controlled or directed."⁴ Eric Colvin has discussed the error inherent in assuming traditional aboriginal systems to be 'non-legal' or 'pre-legal': the titular chief functioned primarily as a mediator. . . . If a legal system is defined. . . as a union of primary rules of substantive obligation and secondary rules of procedure, the conditions for its existence can be met within a system of mediation. . . . The authority of rules can be accepted without their necessarily determining the outcome of a dispute.⁵

Any attempt to judge one juridical system according to the legal system and world view of another is threatened by cultural and ethical obstacles. When presenting traditional aboriginal evidence in Canadian courts, the system responsible for creating the evidence is at odds with the system charged with evaluating it. Jackson has explained some of the discord between these two world views:

The Western world view sees the essential and primary interactions as being those between human beings. To the Gitksan and Wet'suwet'en (Indian people of B.C.), human beings are part of an interacting continuum which includes animals and spirits. Animals and fish are viewed as members of societies who have intelligence and power, and can influence the course of events in terms of their interrelationship with human beings. In Western society causality is viewed as direct and linear. . . time moves forward. To the Gitksan and Wet'suwet'en, time is cyclical. The events of the 'past' directly [affect] the present and the future. . . . Rendered conceptually from within a Western framework, such a view. . . would not be regarded as 'scientific' and such attribution of events to the powers of animals or spirits would be characterized as mythical. . . . Of particular importance to [lawyers] are such fundamental distinctions between the secular and the sacred, the spiritual and the material, the natural and the supernatural. . . . If we apply our distinctions to what Indian people say, we will make nonsense out of their evidence.⁶

Aboriginal legal evidence is, therefore, more than simply court evidence relating to aboriginal peoples. It is testimonies and exhibits which, having emanated from aboriginal societies, substantiate the enduring validity of the laws, philosophies, norms

and customs of those societies. From a viewpoint narrowly based in European legal tradition, some types of aboriginal oral and artifactual evidence might be categorized as unconventional forms of testimony and exhibits. As such, the admissibility of aboriginal evidence in Canadian courts may rest upon its being differentiated from hearsay evidence, and its submission may need to be justified on the basis of being the best evidence available. A judicial decision rendered in 1987, during the course of the British Columbia Supreme Court case *Delgamuukw v. Her Majesty the Queen in Right of the Province of British Columbia* and *The Attorney General of Canada (Delgamuukw v. B.C.)*, clearly admitted aboriginal oral tradition as evidence:

The Plaintiffs [were] obliged to establish their case by testimony of declarations by deceased persons of many details of their history, laws, traditions and culture, and its antiquity. . . . The Court ruled that the relevant oral history of a people can be given in evidence under an exception to the Hearsay Rule for it could not otherwise be proven, that is, it satisfies the test of necessity.⁷

Michael Jackson has provided the Canadian judicature with a definitive description of aboriginal evidence in his opening comments concerning *Delgamuukw v. B.C.*, which may be summarized as follows: 'Indian evidence' is presented from within a framework of Indian culture and flows from an Indian world view.⁸ As testimony, it consists of descriptions by Indian witnesses, given "within their own social structure and oral tradition, of the history and nature of their societies. . . . [It is their] articulation of a way of looking at the world which pre-dates the Canadian Constitution by many thousands of years."⁹ Jackson goes on to note,

the evidence which the Plaintiffs will present, while dealing with many of the same events which are relied upon by the Province. . . , will explain these events in terms of the authentic Indian voice, and the Indian understanding of these events within their cultural framework. So explained, the evidence. . . will take on a totally different character.¹⁰

Aboriginal evidence may include such forms as oral remembrances, artifacts, songs and ceremonies. According to Jackson,

the formal telling of the oral histories in the feast, together with the display of crests and the performance of the songs, witnessed and confirmed by the chiefs of other Houses, constitute not only the official history of the House, but also the evidence of its title to its territory and the legitimacy of its authority over it. . . . They represent also its spirit power.¹¹

Using common terms of archival analysis, one may study the archival 'nature' or 'quality'¹² and the 'characteristics'¹³ of aboriginal documents admitted as evidence by the courts. The archival nature or quality of an item depends on the context of its existence and changes when that context is altered. 'Characteristic' is a term that may be applied to documents regardless of their context.

Archival nature derives from the context of creation. A document has an archival nature if it is an organic component of an archival fonds, because of the circumstances of its creation.¹⁴ It must have been spontaneously created or received, and preserved, by the creator of the fonds as an integral part of the function or activities of that creator. Archival quality derives from association with an archival fonds. An item with previous

existence as a non-archival entity may assume archival quality by becoming connected with archival documents. For example, a newspaper clipping attached to a letter becomes intellectually, as well as physically, linked with that letter. Or, an artifact bearing a genealogical crest or spiritual symbols, if submitted as an exhibit in a land-claims case, takes on archival quality by becoming integrally associated with the archival records of that court.

The characteristics of a written document are usually its physical properties, such as size, age or condition. It is useful to this discussion to identify a sub-category which might be called 'type', referring to general groupings into which record creators and users place documents for various reasons. Such categories might correspond to media (e.g., machine-readable records, paper records), information configurations (e.g., maps, drawings), intellectual forms of information (e.g., letters, journals), or physical forms of expression (e.g., leaves, rolls, volumes¹⁵).

Traditionally, the term 'document' meant simply a source of evidence. A written document is "evidence which is produced on a medium. . . by means of a writing instrument. . . or of an apparatus for fixing data, images and/or voices";¹⁶ it has physical and intellectual form, as well as content.¹⁷ An oral tradition, having an ongoing intellectual form and content, may thus be considered an oral document.¹⁸ It may play a vital role in intentionally preserving for a society part of the official memory of that society's laws and customs, and the rights and privileges of its members.

To analyse an oral document as an archival document and a record, the principles of archival and diplomatic science must be applied within a predominantly oral juridical system. When an oral document has been spontaneously and organically created or received, and used, by a creator in the course of a practical activity,¹⁹ and when the will to generate the oral document, the document's intellectual formation, and its consequences are all foreseen by an oral society's rules,²⁰ then the oral document may be considered to fulfill the function of a record within that juridical system. While aboriginal oral traditions may be interpreted to have a legal nature, they usually bear more similarity to intentionally created documents such as law codes, gospels or historical and literary narratives, than to spontaneously created archival records.

Archival and diplomatic science are founded in a literate tradition in which records have been objectified in form. Oral traditions are not fixed as discrete physical objects, but rather are dependent upon the memories of successive minds. They are not accessible without some intellectual mediation by the deliverer, and their composition may vary — if only inconsequentially — by gesture from person to person and over time. When communicated orally and by gesture in a court room, they are transcribed by the court on to paper or a machine-readable medium. In this written form, they are no longer oral or aboriginal documents, but rather part of the archives of the court. If an aboriginal individual, family or corporate body were to record its oral traditions — in any form, on any medium, spontaneously and organically, in the course of its practical activities or functions — the resultant written documents would be aboriginal archival records, as they would form part of the fonds of that aboriginal record creator.

M. T. Clanchy, in considering oral and written record-keeping in light of the adoption of written archives in medieval Europe has noted that,

Non-literate societies. . . [employ] remembrancers [*sic*] to transmit formulaic phrases or [construct] memorable objects whose consistently used symbols demand verbal explanations which are passed on from one

generation to the next. . . . Once an oral tradition ceases to be continuously transmitted it is lost to posterity, whereas a document or inscription can be ignored for centuries and yet transmit its meaning again when rediscovered. . . . Oral tradition. . . can be adapted to changed conditions without anyone being aware that a departure from precedent has been made. Unwritten custom 'quietly passes over obsolete laws, which sink into oblivion, and die peacefully, but the law itself remains young, always in the belief that it is old'. . . . The external marks of writing. . . inhibit memory and understanding because they fix thought into a set mould.²¹

Clanchy has further traced the use in medieval times of mnemonic objects, such as swords and seals, not only to aid the memory, but also eventually to affirm transactions. This reliance on material evidence of oral agreements developed to the point where, "from the thirteenth century onwards a plaintiff at English common law had to offer written evidence of an agreement if it were to be upheld by the court."²² Although aboriginal societies no longer rely exclusively on oral record-keeping, "[t]he medieval belief in the 'tenacious' and unchanging significance of letters"²³ may be juxtaposed with the aboriginal belief in the tenacious and unchanging significance of oral traditions.

Aboriginal evidence may also be analysed in terms of being pre-literate (e.g., oral traditions, maps), literate (e.g., certificates, treaties), or post-literate (e.g., machine-readable records, sound recordings). Hugh Taylor has succinctly elucidated the continuum from pre-literate to post-literate communication:

In this age of automation, we are beginning to move into a 'post-literate' mode which. . . reintroduces the immediacy of rapid interactive networking and feedback analogous to oral exchange. Our understanding is more holistic and planetary. . . . Preliterate communities depended, and still depend, on memory and the spoken word accompanied by gesture and action to communicate with each other. 'Primal languages are very special in that words are thought of as being sacred'. . . . The emphasis on the user in these ancient patterns of speech was also evident in map making by native peoples in North America. . . . They were ephemeral and dependent on memory. . . . [W]hen a map was committed to media. . . detail was elaborated only where necessary. . . . Europeans frequently found these maps. . . confusing.' Retrieval from the automated record is likewise at its most effective when only that which is required is displayed.²⁴

In another article, he has noted that "[i]n an oral society where the daily chatter and decision-making is without written record, the human memory preserves only that which is absolutely necessary for cultural survival."²⁵ Quoting Derek de Kirockhove, Taylor goes on to describe a pre-literate phenomenon:

'The [Greek] chorus is the collectivity: the actor, the single person. The collectivity contains history as lived, not history as thought, history as myth, not history as logic or patterns of knowledge.' In a 'post-literate' age, where we paradoxically become 'literate' in all media, we may very well move again in this direction.²⁶

Thus oral traditions, which have been preserved and spoken by aboriginal mediators because of their necessity to cultural survival, are today also being electronically

recorded and transmitted as agents of cultural survival in the era of post-literate communication.

As discussed above, oral documents, under specific circumstances, may be considered to have functioned as records within the context of a pre-literate juridical system; as well, pre-literate documents may also exist in written form, and artifacts may become archival if they gain archival nature. It must be noted, however, that there is sometimes a blurred line between artifacts and documents in aboriginal societies, as when some objects preserve and display practical information such as genealogical and/or territorial data. In distinguishing among documentary, oral and artifactual items, it may be concluded that a written document created by an aboriginal person or agency may have archival nature within the fonds of an aboriginal or non-aboriginal record creator; that an oral document may have archival nature in the context of a pre-literate juridical system; and that an artifact takes on archival quality by becoming organically linked to archival records in a fonds.

Pertinent Legal Principles of Evidence

Canadian courts depend on precedents as well as the interpretation of statutes in considering the details of admissibility. The Evidence Acts, both federal and provincial, have been found to contain primarily generic directives and pertain to the evaluation of only some types of evidence.²⁷ Since they were not so directly relevant to the problems of admissibility of aboriginal evidence as was the literature on customary law, the statutes are here considered collectively and only briefly. Principles of admissibility are explained and discussed at length in a wealth of available basic law texts.

Evidence law is procedural or adjectival law, concerning the acceptable means of establishing a fact in support of a legal claim or defence. In Canadian courts, evidence law derives from two sources: statute law and common law. Statute law is composed of the legislative acts of all levels of government. Common law, composed of precedents as well as traditional rules, is commonly referred to as judge-made law.²⁸

“To be admissible, evidence must be material, relevant and not excluded by any rule of the law of evidence.”²⁹ In general, it must have been created prior to the formalization of the dispute that brought it into court. Some of the rules that potentially relate to the admissibility of aboriginal records are those regarding real evidence, oral evidence, expert opinion, hearsay, best evidence, and judicial notice. The brief outline of these principles that follows, with the present author’s added aboriginal examples, is an amalgamation of information from statutes and from the work of several authors in the area of evidence law.³⁰

Real evidence refers to exhibits of physical objects offered for the court’s inspection. These must be authenticated, or related by corollary evidence, to the issues of the case before they are admissible. This may be done by witness or expert testimony. Aboriginal real evidence might be in the form of crests or poles that record historical or genealogical information, or other types of artifacts that formed part of traditional activities. A still or moving image of the object, or a testimony describing it, is equally as admissible as the actual object.

Aboriginal real evidence might also take the form of written documents, most of which are required by the courts to be authenticated. All maps and charts, for example,

unless published by the Canadian government, require authentication. An 'ancient' document, twenty to thirty years old, does not require authentication unless challenged. Most Indian treaties are much older, and are therefore freely admissible. Although a sound recording is admissible under the criteria for real evidence, it is further subject to the rules of hearsay because it also resembles oral testimony. Therefore, a post-literate aboriginal document, such as a sound recording of an elder relaying an oral tradition, must be authenticated by testimony, as well as be deemed admissible by the judge under an exception to the hearsay rule. In addition, a textual transcript of a sound recording may be authenticated and ruled admissible, to aid in understanding the tape.

Oral evidence refers to the testimony of witnesses given under oath. This testimony must reflect personal knowledge, and the witness must be deemed competent. Direct evidence is the testimony of an eyewitness to the specific fact under consideration; all other types of evidence are circumstantial. In a land-claims case, aboriginal testimony about a land-use custom may be direct if it refers to current practice, whereas testimony about ancestors might be considered circumstantial evidence: "The judge determines whether or not an item of circumstantial evidence is relevant. . . . [E]vidence is relevant if a reasonable deduction or inference can be drawn to the material fact from the fact proven by the evidence."³¹

The admission of inference or professional-opinion testimony by expert witnesses is the major exception to the rule against hearsay evidence. Experts in aboriginal law cases have typically been anthropologists, historians and biologists, who have offered data about the traditional land-use activities of aboriginal groups. An expert, such as an archivist, might be called upon to testify in support of a document's authenticity.

The greatest objection to admitting aboriginal oral traditions as evidence is the hearsay rule. Hearsay evidence has been traditionally regarded as untrustworthy by Canadian courts, because it is information relayed by a third party: the originator of the statement cannot be cross-examined under oath and directly assessed. Quite in contrast to traditional aboriginal values, "the [common] law assumes that all natural human testimony is unreliable and has accordingly built in such safeguards as the oath, cross-examination and the crime of perjury."³²

Exceptions to the hearsay rule may be invoked in determining the admissibility of aboriginal records. For example, since aboriginal oral traditions concern ancestral history, the specific exceptions to the hearsay rule concerning genealogy apply directly:

At common law, a statement by a deceased member of the family about a matter of family genealogy is admissible to prove the truth of the fact stated. . . . The declarant must be dead. . . . The declaration must have been made. . . before any controversy had arisen upon the genealogical question in issue in the proceeding. . . . The declarant must have been disinterested, having no apparent reason or motive to lie. . . [and] must be related by blood or marriage."³³

Business records, as established in most evidence legislation, constitute another exception to the hearsay rule. Their potential for admissibility is increased when they are created in the usual course of business; when there is contemporaneity between facts and their recording; and when such documents reflect personal knowledge, are the product of a business duty, are originals, or record facts and not opinions. Aboriginal business

records might be found in the offices of local band and tribal governments, aboriginal political organizations and voluntary associations, and aboriginal lawyers and private businesses.

In the case of oral traditions relayed by aboriginal mediators, the original makers of the statements would be deceased. Furthermore, there may be no other form, documentary or otherwise, of the information. These criteria create circumstances favourable to the invocation of the test of necessity and the best evidence rule. If a questionable source of evidence is admitted as being the best available evidence, it has passed the test of necessity. This rule is commonly employed today to require originals instead of copies of documents. However, it has also been instrumental in evaluating the admissibility of oral tradition in aboriginal land claims cases, a novel application which has created legal precedents.³⁴

Judicial notice is applied by a judge to facts that do not, in his or her opinion, require proof. In cases involving aboriginal rights, judicial notice is routinely applied to well-known historical information. Also, the courts may rely upon the authority of the *Indian Act* and the *Constitution Act*. These are examples of documents of which a court may take judicial notice and thereby not require physical presentation of the documents as exhibit evidence. Knowledge about the facts in an Indian treaty, on the other hand, cannot be assumed; these documents are thus required in physical form, as real evidence.

Legal Cases

A sampling of case judgments has been perused to discover the nature and characteristics of aboriginal evidence admitted in Canadian courts in support of aboriginal claims. An understanding of these judgments, of the reasons underlying the presentation of evidence, and of the types of cases the evidence was intended to support, is aided by a brief explanation of aboriginal rights and claims.³⁵

There are three main categories of aboriginal claims: those based on unrelinquished aboriginal title and rights; those seeking fulfilment of treaty promises; and those arising from trusteeship practices of the federal government. The first category is referred to as 'comprehensive claims'; all other types fall under a second category, defined as 'specific claims'.

Comprehensive claims involve land rights founded on a people's ancient and enduring relationship with the land, and such associated rights as self-government which flow from original land title. In this category, the settlement of a claim would result in a far-reaching agreement or treaty between the claimants and the government.

Treaty rights, in the second category, can only be claimed by peoples bound by such documents. However, treaties have not been negotiated in all areas of Canada. In particular, most of British Columbia, the Yukon and the Northwest Territories, and much of Quebec, have not yet been acquired from the resident First Nations. Furthermore, the process of acquisition has not been completed in the Maritimes, Newfoundland and parts of Ontario. Therefore, treaty rights do not encompass all of the aboriginal peoples in Canada. Treaty claims seek redress for the government's failure to honour its commitments regarding reserve lands and treaty benefits, in return for which Indians have surrendered their aboriginal land rights.

Also in the second category are specific claims challenging the federal government's propriety, as trustee of Indian lands, in administering Indian affairs. Examples of

contentious issues in this area are management of reserve lands and band finances. The legal relationship between Indians and the federal government is defined by the *Indian Act*.

The cases discussed below deal with aboriginal rights and claims in these areas, as well as with broader issues of constitutional rights and freedoms. Although these judicial decisions trace many fascinating developments in the area of aboriginal rights, this study has attempted to focus on the litigants' usage of various types of aboriginal evidence, and the increasing acceptability of aboriginal oral traditions within the Canadian legal system.

Calder et al. v. Attorney General of British Columbia, 1973³⁶

Unresolved claims based on aboriginal title of non-reserve areas of British Columbia, where the Province has assumed jurisdiction, have been pending for over a century. Shortly after 1871, the Nisga'a people of the Nass Valley refused to permit government commissioners to establish reserves. The Nisga'a claimed that "all of the Nass Valley was theirs by virtue of their aboriginal rights."³⁷ Their claim continued unresolved until 1969, when the Nisga'a chiefs initiated proceedings to seek legal confirmation that their title to the Nass Valley had never been extinguished.

Two notable witnesses, University of British Columbia anthropologist Wilson Duff and then Provincial Archivist Willard Ireland, provided expert testimony in support of the plaintiffs. The defence lawyer "seemed frustrated in cross-examination, for the major documentary source for Duff's evidence was the unpublished field notes of [ethnologist] Marius Barbeau located at the National Museum in Ottawa."³⁸ The Nisga'a lost this case, but it was appealed to the British Columbia Court of Appeal and, in 1971, to the Supreme Court of Canada.

The judgment of the provincial Court of Appeal in 1970 warned that "the validity of claims of aboriginal title differ throughout Canada, and . . . each depends on the historical background."³⁹ Descriptions of the ancestral societies of the plaintiffs were provided, primarily by experts and textual historical materials. The court accepted anthropological attestations that the plaintiffs were descendants of the aboriginal people who occupied the claimed area during pre-contact times, and that the economic activities of the pre- and post-contact inhabitants were based on the land and water in question. Maps were submitted to delineate the boundaries of the claim.

The 1970 judgment further stated,

the appellants must establish that by a prerogative or legislative Act . . . the Crown ensured to the Nishga Nation aboriginal rights in the lands in question, which might be asserted and enforced in the Courts of this Province. Unless that can be determined affirmatively, no declaratory judgment can be delivered that such rights have not been extinguished, because to say that they have not been extinguished implies that they exist.⁴⁰

This court's insistence that aboriginal rights be established by legislation or treaty, in other words by a legal document, indicated that it would have found little or no value in evidence such as oral traditions.

The court considered documents from the colonial period to be important, as they revealed early governmental practices and policies: "Exhibit 11A contains a collection of

dispatches between the Secretary of State for the Colonies and Governor Douglas and letters relating to the establishment of some of the Indian Reserves.⁴¹ The great length at which these were quoted in the decision reveals the degree of trustworthiness placed in them by the judges.

The plaintiffs, in arguing before the Supreme Court of Canada, successfully demonstrated that aboriginal title derived from original occupancy, not treaties or legislation, and that this concept was based in English customary law. In the 1973 judgment, six out of seven Supreme Court justices agreed that the plaintiffs had had, as of the moment of contact with European cultures, aboriginal rights in their territories, based on long occupation. Three of the judges, however, found that those rights had been extinguished by subsequent governmental action; the seventh judge rejected the claim for procedural reasons.

Their arguments nevertheless relied heavily on precedents from Canada, the British Commonwealth and the United States.

Kanatewat et al. v. James Bay Development Corporation and Attorney General of Canada, 1973⁴²

In 1972, the Cree and Inuit inhabitants of the Quebec side of James Bay sought an injunction against the James Bay Development Corporation to halt the construction of a huge dam project and the concomitant flooding of their aboriginal lands. The main issue in this case was whether the aboriginal peoples had a legitimate claim to the land. During the course of the 78-day hearing, the Court considered the testimony of 167 witnesses, as well as 312 exhibits and more than 10,000 pages of transcribed evidence.

Exhibits included maps and plans to illustrate the many villages and waterways involved, and the intended location of the dams; the opinions of engineers and biologists were solicited to explain the processes and effects of building such dams. In order to establish original and continuous occupancy of the land by the aboriginal plaintiffs and their ancestors, the testimony and records of anthropologists and clergymen, as well as archival records from missions and fur-trading posts, were used as evidence. The Court also examined relevant treaties, legislation and case law to trace governmental jurisdiction and determine the validity of the concept of Indian title in Canada.

Aboriginal witnesses were called to testify about their own families and land-use activities. Although this court action took place only three years after *Calder v. B.C.*, the Cree plaintiffs supported their claim with aboriginal evidence, in addition to documents of non-aboriginal record-keepers and opinions of non-aboriginal experts. Since the *Calder* decision had recognized that aboriginal land rights existed legally prior to any legislation, evidence in support of traditional land use increased in importance. In his biography of Billy Diamond, one of the Cree chiefs who brought the action, Roy MacGregor has quoted the chief as explaining that 'These scientists played a very valuable role. Our people knew where the data was — the animals, what they did — but we needed the scientists to write it down so it would become scientific evidence.'⁴³

MacGregor has also analysed Diamond's own testimony. The chief's attempts to portray current Cree land-use activities, and to prove their aboriginal land rights, included an eloquent speech, still and moving images, anecdotes and historical accounts. Although the historical information was subsequently declared hearsay and inadmissible, it was nevertheless heard by the court. However, MacGregor continued,

the burden of proof would fall more on the experts than the Cree. The experts, after all, offered quantifiable evidence — statistics, empirical observation, precedent, documentation — all material that could be measured, digested and decided upon in an objective manner. . . . There seemed to be an expert for every possible circumstance. . . . The evidence was vital, accurate, quantifiable and, to a Canadian court, familiar. But it was the Cree testimony that unleashed the raw emotion surrounding this political issue, trappers and hunters speaking in their own language of their own lives and lands. There was no way to measure it properly, often no way to verify what was said, but. . . it was the Cree testimony that set the tone of the hearing.⁴⁴

This hearing illustrated the court's cautious acceptance of aboriginal evidence to substantiate the activities and values of the witnesses' own families. But the hearsay rule still prevented the admission of aboriginal oral tradition as a source of historical facts.

Re Paulette's Application to File a Caveat, 1973⁴⁵

In 1973, the Indian chiefs of the Northwest Territories filed with their Registrar of Land Titles a caveat, or notice of a claim to aboriginal title. This action spurred a series of hearings and negotiations which still had not produced an agreement by March 1990. Some of the witnesses who testified at these hearings were able to give firsthand accounts of the signing of Treaty Number 11 in 1921.

One of the initial issues to be decided was whether Treaties Number 8 and Number 11 were land-surrender treaties or peace treaties. If those who filed the caveat could establish that the land had never been ceded, then the Court would consider the caveat and the questions of aboriginal title and compensation. The treaties and the caveat were the primary documents upon which the entire issue depended. The caveat mentioned "Aboriginal Rights" in the tract of land as justification for forbidding "the registration of any transfer affecting such land or the granting of a certificate of title thereto except subject to the claim set forth."⁴⁶ If the caveat were accepted, so too would be the notion of aboriginal rights to land.

The judge's account of evidence collection bears quoting at length, as it reveals his sensitivity to the importance of aboriginal evidence:

The Caveators called expert evidence. . . to give the Court the observations and opinions of anthropologists. . . and to introduce through another witness. . . certain documents and opinions from various archives. In addition, oral evidence from many of the chiefs who had actually signed the caveat as well as testimony from Indians and others still living who remembered the treaty-making negotiations, was also brought forward. This entailed taking the Court to each of the Indian settlements. . . to record the evidence of some of these old people. In three instances because of the age and illness of the witnesses the Court actually attended at the home of the witness and took the evidence there. . . . I found this part of the case most interesting and intriguing. . . . [F]or a short moment the pages of history were being turned back and we were privileged to relive the treaty-negotiating days in the actual setting. The interest shown by today's inhabitants in each settlement helped to re-create some of the atmos-

phere. . . . There is no doubt in my mind that their testimony was the truth and represented their best memory of what to them at the time must have been an important event. It is fortunate indeed that their stories are now preserved.⁴⁷

The judge cited a 1971 precedent to justify allowing the testimony of witnesses concerning their customs and histories, stretching “as far back as their memories down through each generation could go.”⁴⁸ The judge further noted, “In my treatment of the sometimes repetitious statements of the many Indian witnesses as to what their ancestors did, I have considered them as coming within the exception to the hearsay rule relating to declarations of deceased persons about matters of public and general rights: *Milirrpum v. Nabalco Pty. Ltd.* (1971), 17 F.L.R. 141.”⁴⁹ The judgment concluded that the indigenous peoples, represented by those who filed the caveat, did have aboriginal rights and the right to pursue legal confirmation of their ownership of the lands. The testimonies of people who witnessed the signing of the early treaties, and their memories of what was spoken and understood, outweighed the printed words on the signed documents. The treaties, therefore, may be considered as probative rather than dispositive documents, in that the enforceable agreements and transactions were recognized as having been complete in their oral form.⁵⁰

Regina v. Jack et al., 1975⁵¹

This trial took place in the Provincial Court of British Columbia on 1 May 1975, and concerned a group of Cowichan Indians who were charged with fishing illegally on their land. Their defence, based on Article Thirteen of the Terms of Union between British Columbia and Canada in 1871, stated that “the Government of Canada would maintain a policy as ‘liberal’ in relation to Indians as that maintained by the government of British Columbia before union.”⁵²

Evidence included historical data provided by experts, which was presented as oral testimony, and exhibits of legislative and non-legislative documents. The judge acknowledged that the traditional Cowichan economic base included fishing on the waters where the group was arrested. These waters were in the areas of the Cowichan River system recognized by the neighbouring people as Cowichan territory.⁵³ The Cowichan were traditionally “protected in fishing in those places. . . [where they fished] in the traditional manner.”⁵⁴

There was no original evidence presented in this case. The only evidence supporting aboriginal customs and rights was supplied by expert witnesses. The remainder of the evidence was documentary in form, existing as or referring to the Terms of Union, plus various charters, grants, bills and acts. The judgment was based primarily on an interpretation of the Terms of Union. The question of the persistence of aboriginal fishing rights was not discussed because the Court did not recognize these rights as having been established by the documentation.

Regina v. Jack and Charlie, 1982⁵⁵

The failure of the First Ministers’ Constitutional Conferences to arrive at a definition of aboriginal rights and freedoms satisfactory to all participants meant that the task would be transferred to other forums, one of which was the courts. This eventuality necessitated reliance by judges upon legal precedents. *Regina v. Jack and Charlie* dealt

with the recognition of freedom of religion and aboriginal rights. This case was decided very close to the time when the Canadian Charter of Rights and Freedoms was entrenched, and it did not take into consideration this new Charter.

Anderson Jack and George Charlie of the Tsartlip Indian band were arrested for shooting a deer out of season, and convicted under the *Wildlife Act*. They shot the animal at the request of Elizabeth Jack who, having been visited by the spirit of her great-grandfather, wished to comply with his request that she burn raw meat for him. The deer meat was used "as part of and for use in a religious ceremony practised by the Coast Salish people. . . . [Evidence established that they] were believed to have lived in British Columbia for about 20,000 years. . . . [and that] serving the spirits of the dead by burning food. . . is a very ancient traditional practice among all Coast Salish people."⁵⁶

The decision was appealed on the basis of two defences: that the prohibition of shooting the deer for the ceremony interfered with the defendants' freedom of religion; and that the *Wildlife Act* limited the capacity of the Coast Salish to be Indians. It was submitted, therefore, that the *Wildlife Act* was not applicable to the accused in this case. The defence arguments were rejected, however, on legal grounds.

Ann Hayward has discussed the requirement of the Constitution that courts consider the effect of legislation on the rights and freedoms protected in the Charter:

In the case of the aboriginal peoples, this process may also require judges to define the rights protected. . . . In *Jack and Charlie* we see the kind of decision that resulted from thinking about the validity of legislation in terms of legislative supremacy. . . . [T]he decision is an expression of the narrow view of native rights to be found in early treaties and the Indian Act. Neither of these positions could be justified today. Judges must be willing to look beyond old case law to modern indicators of Canadian values in the areas of fundamental freedoms and aboriginal rights.⁵⁷

Prior to the entrenchment of the Charter in 1982, the courts recognized aboriginal rights according to treaties and federal legislation; the treaties dealt mainly with title to reserve lands:

These rights to land are protected in the new constitution under 'treaty rights' in section 35 and by the operation of section 25 of the Charter. . . . For a defence to be based on section 35 in a case like *Jack and Charlie*, it must be shown that the rights of native people extend beyond mere title to land. If this is to be established, such social, economic or cultural rights must be found in other sources [including] the history and testimony of the native peoples themselves.⁵⁸

This is an example of a human rights case which the court was able to decide purely on the basis of legislation. Hayward has asserted that this type of judgment is no longer possible, because the Charter has expanded the basis for legally defining the right to be aboriginal. Aboriginal rights are no longer confined to the right to occupy land and to collect treaty benefits. They have instead been extended to include rights associated with cultural identity and expression, social self-determination and self-government. In light of this broader interpretation, the courts could be expected to become more receptive to traditional aboriginal evidence. On this subject, Harry Slade noted in 1987 that the British Columbia decision of *Regina v. Sparrow* confirmed the existence of aboriginal

fishing rights, by holding that “the aboriginal right to fish is a constitutionally protected right and cannot be extinguished,” except by constitutional amendment.⁵⁹

***Attorney General for Ontario v. Bear Island Foundation et al., 1984*⁶⁰**

This decision ruled on an aboriginal land-claims case in northern Ontario. The judge assigned “Oral History and Ancient Documents” to a separate chapter, and stated succinctly that “Indian oral history is admissible in aboriginal land-claim cases where their history was never recorded in writing. However, this does not detract from the basic principle that the court should always be given the best evidence.”⁶¹ While the judge was clearly prepared to admit hearsay evidence, he also warned that special consideration must be given to the faultiness of human memory. However, he gave so much weight to aboriginal oral traditions, provided they were related by people who had received the information in the traditional manner, that he would have considered it best evidence: “The defendants should not rely entirely on non-Indian historical, anthropological or other evidence when Indian evidence is available.”⁶²

***Delgamuukw v. Her Majesty the Queen in Right of the Province of British Columbia and Attorney General of Canada, 1987*⁶³**

This massive land claim by the Gitksan and Wet’suwet’en hereditary chiefs was still in the courts at the time of writing. Several rulings on evidence have been issued throughout the trial. The decision concerning admissibility of oral traditions was handed down early in the case, and is summarized as follows:

Hearsay was defined for the purposes of the case as including collections of information or belief, passed on orally from generation to generation, which were also tendered as proof of the truth of the facts stated. Included in such evidence was evidence of origin, evidence of territory, historical evidence based upon declarations by deceased persons, evidence of more recent events to which there may be witnesses still living, and evidence of spiritual beliefs and values. Overhanging all aspects of the hearsay rule in the case were the *adaawx* of the various Houses, an *adaawx* being the important information of a House, which is orally passed on from generation to generation, including spiritual or mythological history and actual facts. What hearsay was part of an *adaawx* and what was just a story would be difficult to determine. . . . Held — Oral history is admissible as an exception to hearsay rule. The relevant oral history of a people can be given in evidence under an exception to the hearsay rule for it could not otherwise be proven.⁶⁴

The common law, as a result, accepted the need for recognizing the legality of admitting aboriginal oral tradition as evidence, under an exception to the hearsay rule.⁶⁵

The above cases illustrate a trend towards expanding legal criteria to admit more non-literate types of evidence. However, the judgments have also revealed that most types of documentary evidence in aboriginal law cases are still firmly set in the literate traditions of Canadian courts. References to pre-literate documents such as aboriginal maps, and post-literate documents such as still, sound and moving images, have been relatively infrequent.

Notwithstanding a widespread reliance on literate documentary forms, some differences may exist between document use by aboriginal and non-aboriginal public agencies. For example, a common record kept by reserve Indians as evidence of their individual land rights is a certificate which proves a band member's formally recognized right to use a portion of a reserve. There are four forms of these documents within the prescriptions of the *Indian Act*: the temporary 'Certificate of Occupation' and 'Notice of Entitlement', and the long-term 'Location Ticket' and 'Certificate of Possession'. These forms must be approved by the Department of Indian Affairs.⁶⁶ However,

Many bands. . . choose not to use. . . any of the *Indian Act* provisions for internal Indian land holding on reserves. They follow what may be called 'custom' or 'traditional' land allotment patterns, in contrast with those found in the *Indian Act*. They allot land to individual band members, but do so at the discretion of the band council. They avoid any Ministerial validation of the allotment. . . . In practice, on some reserves, the custom system is considered by the band council as being as sacrosanct as a fee simple system.⁶⁷

In British Columbia, for example, a band council, without the approval of the Department of Indian Affairs, may declare an Indian to have 'communal entitlement' to particular reserve lands.⁶⁸

Luciana Duranti has explained that, in the science of diplomatics,

if the purpose of the written form [of a document] was to put into existence an act, the effects of which were determined by the writing itself [that is, if the written form was the essence and substance of the act], the document was called dispositive. . . . If the purpose of the written form was rather to produce evidence of an act which came into existence and was complete before being manifested in writing, the document was called probative.⁶⁹

It follows that a written confirmation of custom land allotment — and of communal entitlement where bands choose to conduct such transactions orally — would be a probative document, whereas certificates approved by Indian Affairs would be dispositive. It might be generalized that documents of possession produced under the authority of the Department of Indian Affairs would tend to be dispositive, requiring the approval of the minister or his representative to become complete and enforceable, whereas textual documents of possession authorized by aboriginal governments using traditional systems would tend to be probative, existing only to confirm the completed, enforceable, oral agreements.⁷⁰

The archives of Canadian public institutions and agencies, as well as those of the governments of the First Nations, are records of public interest. According to T. R. Schellenberg, "public records. . . have two types of value: evidential value and information value. . . . By evidential value. . . I refer. . . quite arbitrarily to a value that depends on the importance of the matter evidenced, i.e. the organization and functioning of the agency that produced the records." The definition of records in the American *Records Disposal Act* is based on evidential value: "Essentially these [records] would be materials containing evidence on the organization and functioning of the agency that created them. . . [and] all activities of an agency that are necessary to accomplish the purposes for which it was established." Evidential value, as an archival

principle, refers to the capacity of records to reflect accurately the organization and functioning of their creating individual or agency, public or private. Informational value, on the other hand, is "the value that inheres in public records because of the information they contain that may be useful in research of various kinds."⁷¹

Aboriginal documents to be used in legal proceedings are assembled as part of the evidence-collecting activities of litigants, and become the raw materials of dispute-resolving activities. Depending on their context of creation and use, originals or copies of written documentary evidence could have evidential value in documenting the organization and functioning of litigants and law courts. Aboriginal evidence further documents the relationship between the aboriginal and Canadian legal systems, and their efforts to recognize and communicate with each other. The content of aboriginal evidence may have informational value for various types of researchers.

Aboriginal versus European Criteria for Evidence Creation and Use

Having considered case and procedural law on evidence, this study will now look at some of the European customs from which Canadian jurisprudence has derived, and at some corollary principles that govern the creation and presentation of records used as legal evidence in Canadian courts. Similarly, it will observe social values characteristic of Canadian tribal groups, and corresponding legal principles that have traditionally governed the creation and presentation of aboriginal evidence. A comparison of the two sets of criteria for evidence creation and use shows fundamental differences between these societies, and may suggest reasons for their difficulties in understanding and respecting each other's records and record-creating procedures.

Traditional Western European societies, as well as those of traditional Canadian aboriginal peoples, possessed peculiar means for dealing with social disputes. Both types of societies were viable; their survival depended on their ability to adapt to changing internal and external circumstances. The development of dispute-resolution procedures in these societies, as in any living society, must necessarily have been a dynamic process, encompassing continuity and change, growth and decay. In the English legal tradition, as well as in many tribal societies, formal dispute-resolution forums evolved; these may be referred to as 'courts'. The evidence considered by a society's dispute-resolution forum becomes an elementary component of that court's operations. Furthermore, the types of evidence which a society allows its courts to accept reflect the sources which that society values as most capable of storing and proving the truth.

There are wide cultural gulfs between what Canadian law courts and aboriginal laws most trust. In Canadian courts, there is a heavy reliance upon sworn firsthand accounts, facts established by scientific methodology, probabilities demonstrated by statistical surveys, interpretations of the wording of textual business records, and the opinions of expert professionals. Canadian legal culture prefers that transactions be substantiated by signed and dated documents. It mistrusts hearsay. It is no surprise to Canadian courts when its witnesses, who promise God to tell the truth, lie. Most Canadians live in a predominantly literate and visually-oriented culture and their courts reflect this focus by their dependence on written proof and eyewitness testimony.

Societies founded on Western European traditions may be described as comparatively impatient and competitive. Canada's decision-making institutions emphasize democratic voting, but seldom take time to reach a consensus. Canadian

politics and courts name winners and losers: "In the distinctively Western mode of legal reasoning, the primary criteria for decision making are fixed and abstract rules. The participation of the parties therefore focuses on argument with respect to the interpretation and application of these rules."⁷² Moreover, "the [Canadian] Charter [of Rights and Freedoms] expresses the values of a liberal democracy on the European model. It favours individualism and assumes a highly organized and impersonal industrial society. To apply those values to native societies is to destroy them."⁷³

The contrast between aboriginal and non-aboriginal methods of reaching political decisions has been further elaborated by Paul Emond, who notes that, to native societies,

problem analysis is contextual and experiential rather than rational. . . .Decisions or actions are bounded by the particulars of time and place. Results depend very heavily on the context in which the issues arise. . . .Decision-making is characterized by continuous (sometimes endless) dialogue and debate. . . .Dissent, however small it may be, is respected. . . .Action must await consensus. . . .Those who do not agree with a decision are not bound by it no matter how 'fair' the decision-making process may have been. . . .The status quo tends to prevail in the face of disagreement. . . .In non-native decision making. . .majority vote is all that is needed to change the status quo. . . .The process. . .encourages competition. To succeed, all one side needs to do is win over or persuade a majority. Permanent success can be won with perpetual domination.⁷⁴

Canadian negotiators and mediators could learn much from the patience of aboriginal leaders. However, the incorporation of traditional aboriginal methods of deliberation into the Canadian courts would only serve to slow down further an already overloaded system. The aboriginal style of evidence presentation, for example, accounts in part for the fact that *Delgamuukw v. B.C.* spanned sixty-four days of commission evidence, followed by 374 trial days.

In cases where treaty rights are in question, it is useful to compare the importance placed by the Indians on the treaty ceremony with the importance placed by the federal government and the courts on the resultant document:

In the Indian view, the Treaties must not be regarded as 'deals' consisting of disparate and unrelated rights and benefits. The Treaties 'when placed in their proper historical context and interpreted in relation to the severe problems facing plains tribes, emerge as comprehensive plans for the economic and social survival of the Bands.'⁷⁵

The Federation of Saskatchewan Indians cited statements given by government agents during treaty negotiations, and asserted that the agents' spoken words were accepted by the Indian signatories as part of the agreements, as required by their oral tradition. The oral terms, they claimed, must be considered along with the written terms of the treaties. The Federation described the spoken words of one such government negotiator, as follows:

In his various addresses to Chiefs and Headmen at treaty meetings, Commissioner Morris had a single message for the Indians: The Queen was not approaching the Indians to barter for their lands, but to help them, to

alleviate their distress and assist them in obtaining security for the future. 'We are not here as traders, I do not come to buy or sell horses or goods, I come to you, children of the Queen, to try to help you. The Queen knows that you are poor; The Queen knows that it is hard to find food for yourselves and children; she knows that the winters are cold, and you[r] children are often hungry; she has always cared for her red children as much as for her white. Out of her generous heart and liberal hand she wants to do something for you. . . .' These verbal assurances and statements of Crown intent, and the many others like them, given by Morris in his address to Chiefs and Headmen, cannot be separated from Treaty documents because they were accepted as truth by the assembled Indians.⁷⁶

In another example, the Nisga'a potlatch ceremony, according to the Chief of the Gitladamix people of British Columbia, was more than a social and cultural ceremony of gift-giving. It was the central political institution: "The potlatch is living dynamic proof of our ownership of the land. . . . [I]t serves. . . to carry on our title to the land from generation to generation. . . . [I]t represents our way of registering land title within our traditional system."⁷⁷

In aboriginal societies, therefore, emphasis was and is placed on community, spirituality, ceremony, memory and consensus. In aboriginal law, oral information is trustworthy if its context of transmission is trustworthy. If knowledge has been passed on and received in a sacred ceremony, that information has become sacred. Aboriginal societies honour transactions for having been carried out in the presence of certain people, or at certain times. Furthermore, traditional aboriginal societies were holistic; they did not separate spirituality from other aspects of life. Noel Lyon, Douglas Sanders and Eric Colvin further compare aboriginal and European religion, politics and courts:

What Europeans call freedom of religion is concerned with protecting people from interference with their religious beliefs and practices. But for native peoples the activities we describe as religious form an integral part of community life. For them it is the right to follow their traditional way of life that is involved, and with it the survival of their culture. To regard it as some kind of after-hours activity makes nonsense of their way of life.⁷⁸

When the colonists came to North America it was not a vast wilderness. North America had, at that point, as clear and established a set of political boundaries as existed in Europe. The aboriginal title of a particular tribe was in defined limits which they understood and which was recognized by the surrounding tribes as being the territory of that particular tribe.⁷⁹

Where courts with the power to render judgments are found in tribal societies, their functions sometimes include elements akin to mediation. . . . The court tends to be conciliating; it strives to effect a compromise acceptable to, and accepted by all the parties. . . . In contrast, the judicial process in contemporary Canada incorporates a relatively pure form of adjudication. Negotiation and compromise are relegated to informal pre-trial settlement. Litigation is a 'zero-sum' game, in which each side seeks to destroy the arguments of the other and 'winner takes all'.⁸⁰

Colvin's work concerned the effectiveness of Canadian courts in resolving Indian claims. The basic function of law courts, having evolved from Western European

traditions, is adjudication. Aboriginal tribal law, on the other hand, derives from a juridical heritage founded in mediation and consensus. Colvin has proposed the creation of specialized, independent, judicially binding claims commissions to mediate negotiations and settle Indian claims: "The result of combining mediation and adjudication would be an amalgam of the legal traditions of Indians and Europeans."⁸¹ Colvin goes on to conclude that "the courts. . .are inappropriate mechanisms for the resolution of many Indian claims. . . . The crucial evidence is sometimes of an historical kind which the fact-finding processes of the courts were not designed to handle and which tend to require heavy expenditures of time and money."⁸² Finally, he notes that

The courts have always existed for the settlement of Indian claims but Indian people have for the majority stayed clear of the courts. The reasons are one, it is expensive; two, the courts decide only legal issues, meaning moral and political issues are disregarded; and three, the rulings of the court are non-negotiable.⁸³

Paul Emond's discussion of negotiation versus arbitration in the settlement of aboriginal claims covers issues similar to Colvin's. Emond has also raised questions about the sensitivities and cultural expectations of both sides:

I have been struck by the dramatic differences between government and native negotiating positions. . . . Government negotiation is motivated by an attempt to make certain a legally uncertain situation. . . . Government strives for a final agreement and the extinguishment of aboriginal rights; native people seek a new 'social contract' with non-native people and the recognition and affirmation of their aboriginal title and rights. It seems to me that the native people are right to seek a social contract rather than a final agreement. . . . There is no finality to dynamic relationships. They are continually changing and evolving to meet the needs of the parties. Attempts to cast solutions in stone are non-solutions for they will soon become dated and hence irrelevant.⁸⁴

Emond has also discussed the differences in motivation between the government and aboriginal peoples. He sees the government's motivation as material and capitalistic. Its goal has been to acquire land, once and for all, and to develop it as soon as possible. On the other hand, the motivation of aboriginal peoples has been cultural and spiritual, as well as economic. It concerns the continuation of every aspect of their existence, as they seek to negotiate an ongoing, timeless relationship on behalf of their ancestors and future generations.⁸⁵

The relationship of early Europeans and aboriginal peoples to the land is at the foundation of the differences between their respective concepts of land title and resource exploitation, and helps to explain the great discrepancies between their religious practices. In Michael Jackson's words,

To the white European the land was a resource waiting to be settled and cultivated. There was also a very clear concept that linked land with private property and property with political responsibility. This political conception of land was further coupled with religious and economic assumptions. To the white Europeans the proper conditions for civilized existence could only be satisfied through the practice of the Christian

religion and cultivation of the land through agriculture. . . . The native people also had an intimate relationship with the land; but theirs was of a different order. To them the land was their mother to be respected, not a commodity to be exploited. In the spiritual as well as economic assumptions of most Indian tribes the land served the role of source and sustainer of life. It could no more be owned as private property than the air.⁸⁶

Ann Hayward's description further explains why, in land-claim negotiations, aboriginal oral evidence has often taken the form of accounts of traditional spiritual connections with the land. What most Canadians consider as religion differs substantially from traditional aboriginal religion:

The church and clergy of native religions is the land, and religious practice is inextricably woven with its use. . . . The [native] dependency on the land for spiritual identity can be seen in the testimony of the Berger Inquiry. The native people described the land as their flesh and blood, their mother and teacher. . . . It is hard for non-native Canadians to see this spiritual connection to the land as a religion.⁸⁷

Emond has also elaborated on this fundamental disagreement between European and aboriginal views of the land, a disagreement to which the economic differences between the two societies is attributable. He has noted that, to native people, "the environment is the context within which life unfolds, it helps define one's connectedness to the past, present and future. Not only does the environment demand respect, it generates a sense of duty and obligation." To native people, the land is "the community's storehouse, their refrigerator and bank. . . . There is no room for individual ownership. The resources are for the people to be allocated according to need."⁸⁸ To the non-native, land is

simply another resource, waiting to be utilized, developed and exploited. . . . Place does not define the person; but rather the person names and thus identifies the place. . . . Where native perceptions flow from a sense of harmony and cooperation with nature, non-native responses are motivated by first the need to survive and then the desire to dominate, manipulate and control.⁸⁹

This ongoing disagreement has complicated attempts by the two societies to understand each other's priorities during land-claims negotiation and litigation. Emond has concluded, "In comprehensive claim negotiations, it [the failure to comprehend or agree] leads to. . . the government talking about limited amount of fee simple ownership, while the other steadfastly maintains that they will not 'negotiate' God's land or, if they do negotiate, the result must leave intact native use over extensive land tracts."⁹⁰ These differences between concepts of land title are so deeply ingrained in each culture's traditions that they are integral components of each society's customary laws. In the English tradition, such legal customs are recorded and presented in the form of common law; in aboriginal law, such customs are recorded and presented in the form of oral traditions.

There has been a recent trend in legal and political literature to analyse aboriginal rights as stated in the Canadian Charter of Rights and Freedoms, and the role of First Nations in constitutional negotiations.⁹¹ Legal evidence, in the sense of court-approved

evidence, has not been requisite to such negotiations. However, some of the arguments presented by the First Nations in attempts to define and guarantee their rights and freedoms have been founded on aboriginal evidence. And what was not accomplished during the constitutional conferences may finally be pursued in court.

During the First Ministers' Conferences, the First Nations expressed the commitment to attain acknowledgement of their traditional institutions and to pursue recognition of the right to self-government, based on political traditions. Justification for claiming an inherent right to political self-determination stems from the fact that aboriginal peoples were organized as autonomous societies at the time of European contact. Their traditional social, economic and political institutions were held together by each society's common language, culture and relationship with the land. If legal claims for the perpetuation of traditional aboriginal rights to sovereignty and self-determination rest on the fact that these rights have never been relinquished, then proof of their continuous existence, in the form of oral traditions and other types of aboriginal documents, becomes a fundamental source of evidence.

Noel Lyon has pointed out that, although Section 25 of the Canadian Charter protects

'any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada' . . . the content of [these] rights and freedoms. . . is a matter for historical and legal evidence. . . . [Apart from primary legal evidence such as statutes and treaties,] ultimately we will find gaps where [aboriginal] custom and tradition have been left to function undisturbed by positive law. Our capacity to fill these gaps is greatly enhanced by what we have learned about cultural values.⁹²

Lyon has further advised that "aboriginal rights and freedoms. . . defined in accordance with current standards of international law and Canadian public policy should include land rights, rights of self-government, language rights and the right to observe tribal customary law in matters involving distinct cultural values."⁹³

Conclusion

This study has examined the nature of aboriginal evidence and attempted to discover how well it has met the criteria of Canadian evidence regulations. It has tried to pay special attention to problems encountered by aboriginal litigants in submitting pre-literate and post-literate evidence. Furthermore, it has identified cases where aboriginal evidence has not been accepted within traditional legal interpretations until the courts have stretched the rules of admissibility to create precedents in evidence law.

Many important issues have been left unaddressed and problems unresolved. The topic area has proven to be substantial, and covered by a wealth of published materials in several areas of research. A more comprehensive literature search is indicated. The most obvious omission has been the issue of languages. Most aboriginal oral traditions must be translated in order to become court evidence, and much meaning is lost in the process. Translators, however, are crucial in court rooms where traditional aboriginal testimony is presented. Language is a particularly complex issue with regard to native peoples, as there are hundreds of aboriginal languages in Canada,⁹⁴ and most of them have not been written down.

This article concludes with a short excerpt from J. Morrow's 1973 judgment in *Re Paulette's Application*. Judge Morrow clearly recognized the significance to the aboriginal documentary heritage of the collection and transcription of aboriginal oral traditions gathered in his court; he directed, in his report, that "all tapes taken of the evidence by the court reporters be turned over to the Public Archives of Canada because of their possible historic value and interest."⁹⁵

Addendum

In March 1991, a year after this article was written, Chief Justice Allan McEachern issued his *Reasons for Judgment* in the case of *Delgamuukw v. B.C.* This judgment contained significant pronouncements regarding the admissibility and weight of oral traditions and other aboriginal evidence. A substantial part of the 400-page publication was devoted to discussions of history and historical evidence.

A variety of sources and types of evidence were considered throughout the case. Testimony concerning the aboriginal societies and territory in question came from lay inhabitants as well as from experts in several disciplines. Although the judge admitted and heard the oral traditions presented by the plaintiffs, in the end he placed very limited value on them as historical sources. McEachern stated,

The witnesses say each Gitksan and Wet'suwet'en House has an 'adaawk' or 'kungax' which in a very general sense might be said to represent an unwritten collection of important history, legend, laws, rituals and traditions of a House including a description of its territories. . . . Admissibility and weight of evidence are two completely different concepts. While I have not been troubled by the former, the doubts I have about the latter preclude me from treating the adaawk and kungax as direct evidence of facts in issue in this case except in a few cases where they could constitute confirmatory proof of early presence in the territory. . . . I do not find them helpful as evidence of use of specific territories at particular times in the past.⁹⁶

The plaintiffs claimed that their social systems had evolved from those of their ancestors, who occupied the same territory from time immemorial. As far as possible, McEachern attempted to base his final decision on concrete proof about specific details of their historical and pre-historical social organization. He favoured evidence such as scientifically tested data and archival records, and mistrusted evidence that relied for its legitimacy on aboriginal traditions. "Generally speaking," he wrote, "I accept just about everything. . . [the historians] put before me because they were largely collectors of archival, historical documents. . . . Their marvellous collections largely spoke for themselves."⁹⁷

For collectors of aboriginal oral histories, he intended "no disrespect to. . . [their] fascinating work. . . , but much remains to be done in order to prove or disprove the authenticity of their conclusions."⁹⁸ With regard to the veracity and validity of aboriginal oral traditions, he commented, "Many of the [Gitksan and Wet'suwet'en people] believe God gave this land to them at the beginning of time. While I have every reason to believe their remote ancestors were always in specific parts of the territory, in perfect harmony with natural forces, actually doing what the plaintiffs remember their immediate ancestors were doing in the early years of this century

. . . . When I come to consider events long past, I am driven to conclude, on all the evidence, that much of the plaintiffs' historical evidence is not literally true. . . . Serious questions arise about many of the matters about which the witnesses have testified and I must assess the totality of evidence in accordance with legal, not cultural principles.

I am satisfied that the lay witnesses honestly believed everything they said was true and accurate. It was obvious to me, however, that very often they were recounting matters of faith which have become fact to them. If I do not accept their evidence it will seldom be because I think they are untruthful, but rather because I have a different view of what is fact and what is belief.¹⁰⁰

I am sure that the plaintiffs understand that although the aboriginal laws which they recognize could be relevant on some issues, I must decide this case only according to what they call 'the white man's law.'¹⁰¹

During his opening statement in this trial, Michael Jackson warned the court of the potential irrationality of using Western rules — with their focus on human beings, linear time and science, and their separation of secular and sacred, spiritual and material, natural and supernatural — to judge the evidence of a holistic society whose world view is founded on cyclical time, pervasive spirituality, and interrelationships among all living beings. Jackson's fear, that "[i]f we apply our distinctions to what Indian people say, we will make nonsense out of their evidence,"¹⁰² was indeed premonitory.

Notes

- * The original version of this paper was prepared in March 1990 for a course, ARST 615 (Directed Study), in the Master of Archival Studies Programme, University of British Columbia. I wish to extend my sincere gratitude to Professors Luciana Duranti and DeLloyd Guth for their advice, criticisms and encouragement. I also wish to thank Hugh Taylor for his inspiration. This paper's errors and omissions are my responsibility alone.
- 1 A discussion of the term 'Indian evidence' appears in a subsequent section of this paper. This term was used by Michael Jackson, lawyer for the plaintiffs, in his opening statement to the *Delgamuukw v. B.C.* land-claims trial. See Michael Jackson, "Delgamuukw v. The Province of British Columbia and the Attorney General of Canada," in Michael Jackson (ed.), *Native Peoples and the Law* (n.p., January 1989), pp. 9, 13, 21, 35.
- 2 Hugh Taylor, "My Very Act and Deed": Some Reflections on the Role of Textual Records in the Conduct of Affairs," *The American Archivist* 51, 4 (Fall 1988): pp. 457-458; M.T. Clanchy, "Tenacious Letters: Archives and Memory in the Middle Ages," *Archivaria* 11 (Winter 1980/81), p. 115.
- 3 Luciana Duranti, "Diplomatics: New Uses for an Old Science (Part II)," *Archivaria* 29 (Winter 1989-90), p. 5. See also Hans Booms, "Society and the Formation of a Documentary Heritage: Issues in the Appraisal of Archival Sources" (Hermina Joldersma and Richard Klumpenhower, eds. and trans.), *Archivaria* 24 (Summer 1987), p. 74.
- 4 Jackson, "Delgamuukw v. The Province of British Columbia and the Attorney General of Canada," p. 9.
- 5 Eric Colvin, *Legal Process and the Resolution of Indian Claims*, Studies in Aboriginal Rights, No. 3 (Regina, 1981), pp. 6-7.
- 6 Jackson, "Delgamuukw v. The Province of British Columbia and the Attorney General of Canada," pp. 10-11.
- 7 Greg McIntyre, "Delgamuukw v. Her Majesty the Queen in Right of the Province of British Columbia and the Attorney-General of Canada," *Aboriginal Law Bulletin*, no. 29 (December 1987), p. 15.
- 8 Jackson, "Delgamuukw v. The Province of British Columbia and the Attorney General of Canada," p. 9.
- 9 *Ibid.*, p. 21.
- 10 *Ibid.*, p. 35.
- 11 *Ibid.*, p. 13.

- 12 See, for example, Michel Duchéin, "Theoretical Principles and Practical Problems of Respect des fonds in Archival Science," *Archivaria* 16 (Summer 1983), p. 67.
- 13 See, for example, Maynard J. Brichford, *Archives and Manuscripts: Appraisal and Accessioning*, Basic Manual Series (Chicago, 1977), pp. 2-4.
- 14 According to the Canadian Working Group on Archival Descriptive Standards, an archival fonds is "the whole of the documents of any nature that every administrative body, every physical or corporate entity, automatically and organically accumulates by reason of its function or of its activity.' This definition may be taken to encompass documents in any form or on any medium created by agencies or persons acting in a public or private capacity." *Towards Descriptive Standards: Report and Recommendations of the Canadian Working Group on Archival Descriptive Standards* (Ottawa, 1985), p. 7. A more recent definition of fonds, published by the Bureau of Canadian Archivists, is "the whole of the records, regardless of form or medium, automatically and organically created and/or accumulated and used by a particular individual, family, or corporate body in the course of that creator's activities or functions." Bureau of Canadian Archivists, Planning Committee on Descriptive Standards, *Rules for Archival Description* (Ottawa, 1990), p. D-3.
- 15 The "Report of the Textual Records Working Group to the Bureau of Canadian Archivists Planning Committee on Descriptive Standards" (Draft, January 1991) defines these terms: "Leaf. A sheet of paper or parchment each side of which is referred to as a page." (p. 3-20.) "Roll. 1. A document or assembly of documents consisting of one or more membranes of parchment or sheets of paper in which the membranes and/or sheets are sewn together end to end and rolled. 2. A document wound in cylindrical form for convenience of storage. . . ." (App.B-2.) "Volume. Documents bound together within a cover." (p. 3-21.) An example of use of a 'leaf' form by pre-literate aboriginal societies would be maps drawn on animal skins or sheets of bark. D. Wayne Moodie, quoted in Taylor, "'My Very Act and Deed': Some Reflections on the Role of Textual Records in the Conduct of Affairs," p. 458. See also D. Wayne Moodie, "Indian Maps," in R. Cole Harris (ed.), *Historical Atlas of Canada*, Volume 1 (Toronto, 1987), plate 59. An illustration of a 'roll' form used in a pre-literate aboriginal society would be Midewiwin scrolls, the memory charts used by Ojibwa Grand Medicine Societies to record the many details of participants' positions and actions. Nancy-Lou Patterson, *Canadian Native Art: Arts and Crafts of Canadian Indians and Eskimos* (Don Mills, 1973), pp. 31-35.
- 16 Luciana Duranti, "New Uses for an Old Science," *Archivaria* 28 (Summer 1989), p. 15. In legal tradition, 'document' has been defined as "any writing or printing capable of being made evidence, no matter on what material it may be inscribed." In John Sopinka and Sidney N. Lederman, *The Law of Evidence in Civil Cases* (Toronto, 1974), p. 419.
- 17 Duranti, "New Uses for an Old Science," p. 15. Duranti further explained that the "purpose and intellectual result of the action of writing. . . [is] the expression of ideas in a form which is both objectified [documentary] and syntactic [governed by rules of arrangement]." p. 15.
- 18 In this paper, the term 'oral tradition' is used in reference to the acts of remembering and transmitting orally, and to the object of remembrance/transmittal. Both the informational content and intellectual form of an oral tradition are perceived aurally, sustained mnemonically, recited orally, and passed on to subsequent 'remembrancers.' Oral traditions in aboriginal cultures preserve and transmit, from generation to generation, such information as laws, territorial titles, hereditary privileges, socio-cultural/spiritual customs and values, family and tribal histories, and stories of creation and momentous natural and supernatural events. An oral tradition must be differentiated from an 'oral history' which is commonly "the name applied to the end products of interviews." Wilma MacDonald, "The Partnership of Oral History and Archives," *Canadian Oral History Association Journal* 8 (1985), p. 15. It must also be differentiated from personal, first-hand recollections.
- 19 See Duranti, "New Uses for an Old Science," p. 15; and Bureau of Canadian Archivists, Planning Committee on Descriptive Standards, *Rules for Archival Description*, p. D-3.
- 20 Duranti, "Diplomatics: New Uses for an Old Science (Part II), pp. 9-10.
- 21 Clanchy, p. 115.
- 22 *Ibid.*, p. 116.
- 23 *Ibid.*, p. 124.
- 24 Taylor, "'My Very Act and Deed': Some Reflections on the Role of Textual Records in the Conduct of Affairs," pp. 457-458 (in which appear quotes by Joseph Brown and D. Wayne Moodie, respectively).
- 25 Hugh Taylor, "Transformation in the Archives: Technological Adjustment or Paradigm Shift?," *Archivaria* 25 (Winter 1987-88), p. 17.
- 26 *Ibid.*, p. 19.
- 27 The following selection of evidence legislation was considered: Alberta Evidence Act, Revised Statutes of

- Alberta 1980, chapter A-2; Canada Evidence Act, Revised Statutes of Canada 1985, chapter E-10; Code of Civil Procedure, Revised Statutes of Quebec 1977, chapter C-25; Evidence Act, Revised Statutes of British Columbia 1979, chapter 116; Evidence Act, Revised Statutes of Nova Scotia 1967, chapter 94; and Evidence Act, Revised Statutes of Ontario 1980, chapter 145.
- 28 Judge-made law is also a source of law in the civil law jurisdiction of Quebec.
- 29 Anthony F. Sheppard, *Evidence* (Toronto, 1988), p. 121.
- 30 These authors and sources are: J. Douglas Ewart, Michael Lomer and Jeff Casey, *Documentary Evidence in Canada* (n.p.: Carswell, 1984); M. L. T. MacCrimmon, "Types of Evidence" (Lecture to Archival Studies 602 class, University of British Columbia, March, 1989); Alan M. Mewett, "What Is Not Hearsay," in Department of Continuing Education, The Law Society of Upper Canada, *Basic Problems in Evidence* (Toronto, 1973), pp. A-1-A-27; Sheppard; and Sopinka and Lederman.
- 31 Sheppard, p. 28.
- 32 Sopinka and Lederman, pp.40-41.
- 33 Sheppard, pp. 444-445.
- 34 See, for example, *Attorney General for Ontario v. Bear Island Foundation et al.*, 11 December 1984, Canadian Native Law Reporter, 1 (1985), pp. 16-20.
- 35 For a more complete explanation, see Eric Colvin, *Legal Process and the Resolution of Indian Claims*, Studies in Aboriginal Rights No. 3 (Regina, 1981); and two Department of Indian Affairs and Northern Development publications, *In All Fairness. A Native Claims Policy: Comprehensive Claims* (Ottawa, 1981) and *Outstanding Business. A Native Claims Policy: Specific Claims* (Ottawa, 1982).
- 36 *Calder et al v. Attorney General of British Columbia*, Western Weekly Reports, 4 (1973), pp. 1-91.
- 37 Michael Jackson ed., *Native Peoples and the Law: Supplementary Materials to Native Rights in Canada*, 2nd ed. (n.p., September, 1978), p. 16.
- 38 Douglas Sanders, "The Nishga Case," in Michael Jackson, ed., *Native Peoples and the Law: Supplementary Materials to Native Rights in Canada*, p. 85.
- 39 *Calder et al. v. Attorney General of British Columbia*, 7 May 1970, Dominion Law Reports (3d) 13 (1970), p. 65.
- 40 *Ibid.*, p. 67.
- 41 *Ibid.*, p. 81.
- 42 *Kanatewat et al. v. The James Bay Development Corp. and The Attorney General of Canada*, 15 November 1973, in Michael Jackson, ed., *Native Peoples and the Law: Supplementary Materials to Native Rights in Canada*, pp. 281-419. See also *Kanatewat et al. v. The James Bay Development Corp. and The Attorney General of Canada*, 21 December 1973, Dominion Law Reports (3d) 41 (1974), pp. 1-6.
- 43 Roy MacGregor, *Chief: The Fearless Vision of Billy Diamond* (Markham: 1989), p. 75.
- 44 *Ibid.*, pp. 90-91.
- 45 *Re Paulette's Application. etc.* [N.W.T.], 6 September 1973, Western Weekly Reports 6 (1973), pp. 115-149.
- 46 *Ibid.*, p. 116.
- 47 *Ibid.*, pp. 118-119.
- 48 *Ibid.*, p. 120.
- 49 *Ibid.*, p. 126.
- 50 The distinction between these types of documents is further explained below in an analysis of band Certificates of Possession. See Duranti, "Diplomatics: New Uses for an Old Science (Part II)," p. 8.
- 51 *Regina v. Jack et al.*, 1975, in Douglas Sanders ed., *Cases and Materials on Native Law*, 3rd ed. (n.p., December, 1976), pp. 507-509. See also *Jack et al. v. Regina*, Canadian Native Law Reporter, 2 (1979), pp. 25-42.
- 52 *Jack et al. v. Regina* (1979), p. 27.
- 53 *Regina v. Jack et al.* (1975), pp. 508-509.
- 54 *Jack et al. v. Regina*, p. 36.
- 55 *Regina v. Jack and Charlie*, Western Weekly Reports 5 (1982), pp. 193-210.
- 56 *Ibid.*, pp. 194-195.
- 57 Ann Hayward, "*R. v. Jack and Charlie* and the Constitution Act, 1982: Religious Freedom and Aboriginal Rights in Canada," in *Current Issues in Aboriginal and Treaty Rights* (Ottawa, 1984), pp. 44-45.
- 58 *Ibid.*, p. 35.
- 59 Harry Slade, "Aboriginal Title; Aboriginal Land," *Legal Services Society Schools Program Newsletter* 2, 4 (April 1987), p. 7. This decision was affirmed by the Supreme Court of Canada in 1990.
- 60 *Attorney General for Ontario v. Bear Island Foundation et al.*, pp. 1-118.

- 61 Ibid., p. 16.
- 62 Ibid., p. 19.
- 63 *Delgamuukw v. Her Majesty the Queen in Right of the Province of British Columbia and The Attorney General of Canada*, The Supreme Court of British Columbia, Unreported Decisions: 5 August 1987, #8-20; 18 February 1988, #2-143; 29 March 1988, #3-40; 5 October 1988, #10-33; 14 November 1988, #11-27; 10 May 1989, #5-20; 14 July 1989, #7-30; and 15 August 1989, #8-15; [Delgam] *Uukw v. Her Majesty the Queen in Right of the Province of British Columbia and The Attorney General of Canada*, The Supreme Court of British Columbia, Western Weekly Reports 6 (1987), pp. 155-170. See also Hugh Brody, "On Indian Land: The Gitksan-Wet'suwet'en," *Legal Services Society Schools Program Newsletter* 2, 4 (April 1987): 8-9; Jackson, "Introduction" and "Delgamuukw v. The Province of British Columbia and the Attorney General of Canada," in Michael Jackson ed., *Native Peoples and the Law*, pp. iii, 1-69; and Louise Mandell, "Gitksan-Wet'suwet'en Land Title Action," *Canadian Native Law Reporter*, 1 (1988): 14-16.
- 64 [Delgam] *Uukw v. Her Majesty the Queen in Right of the Province of British Columbia and The Attorney General of Canada*, (1987), pp. 155-170.
- 65 The final *Reasons for Judgment of The Honourable Chief Justice Allan McEachern* for the case of *Delgamuukw v. B.C.* was issued on 8 March 1991 (No. 0843, Smithers Registry, Supreme Court of British Columbia.) See Addendum to this article.
- 66 Sanders, *Cases and Materials on Native Law*, pp. 413-414.
- 67 Ibid., p. 415.
- 68 Ibid., p. 416.
- 69 Duranti, "Diplomatics: New Uses for an Old Science (Part II)," pp. 7-8.
- 70 Similarly, the documents by which Inuit customary adoptions are registered would be probative. See Douglas Sanders, "Pre-Existing Rights: The Aboriginal Peoples of Canada," in Gerald-A. Beaudoin and Ed Ratushny, eds., *The Canadian Charter of Rights and Freedoms: A Commentary*, 2nd ed. (Toronto, 1989), pp. 710-711.
- 71 T. R. Schellenberg, *Modern Archives: Principles and Techniques* (Chicago, 1956), pp. 139-140.
- 72 Colvin, p. 9.
- 73 Noel Lyon, "Aboriginal and Treaty Rights in the Charter of Rights and Freedoms," in *Current Issues in Aboriginal and Treaty Rights* (Ottawa, 1984), p. 6.
- 74 Paul Emond, "Alternative Resolution Processes for Comprehensive Native Claims," in *Current Issues in Aboriginal and Treaty Rights* (Ottawa, 1984), p. 104.
- 75 Michael Jackson, ed., *Native Peoples and the Law: Supplementary Materials to Native Rights in Canada*, pp. 10-11.
- 76 Ibid.
- 77 Minesque, "Explaining the Objectives of Land Claims Settlement," *Legal Services Society Schools Program Newsletter* 2, 4 (April 1987), p. 11.
- 78 Lyon, "Aboriginal and Treaty Rights in the Charter of Rights and Freedoms," p. 10.
- 79 Douglas Sanders, *Address to the Union of Nova Scotia Indians and the Union of New Brunswick Indians Joint Meeting on Legal Status of Indians in the Maritimes, October 16, 1970* (Toronto, 1970), p. 21.
- 80 Colvin, p. 8.
- 81 Ibid., p. 18.
- 82 Ibid., p. 28.
- 83 Association of Iroquois and Allied Nations, *The Indian Land Claims Resolution Process (An Information Paper)*, 1980, p. 7. In Colvin, p. 15.
- 84 Emond, pp. 85-86.
- 85 Ibid., pp. 87-88.
- 86 Jackson, ed., *Native Peoples and the Law: Supplementary Materials to Native Rights in Canada*, pp. 3-4.
- 87 Hayward, pp. 41-43.
- 88 Emond, p. 99.
- 89 Ibid.
- 90 Ibid., p. 100.
- 91 See Sanders, "Pre-Existing Rights: The Aboriginal Peoples of Canada"; Lyon, "Aboriginal and Treaty Rights in the Charter of Rights and Freedoms," see also, for example, L.C. Green, "Aboriginal Peoples, International Law, and the Canadian Charter of Rights and Freedoms," *Canadian Bar Review* 61, 339 (1983); Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights," *Queens Law Journal* 8, 232 (1983); David C. Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Kingston, 1989); Douglas Sanders, "An Uncertain Path: The Aboriginal Constitutional

- Conferences,” in J.M. Weiler and R.M. Elliot, eds., *Litigating the Value of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto, 1986).
- 92 Noel Lyon, “Section 25 of the Canadian Charter of Rights and Freedoms,” in *Current Issues in Aboriginal and Treaty Rights* (Ottawa, 1984), pp. 2-3.
- 93 Lyon, “Aboriginal and Treaty Rights in the Charter of Rights and Freedoms,” pp. 4-5.
- 94 Between ca. 1600 and 1820, there were from twelve to sixteen linguistic families in what is now Canada, and most of them contained several languages and many dialects. Harris, plates 18, 69.
- 95 *Re Paulette’s Application, etc.* [N.W.T.], 6 September 1973, *Western Weekly Reports* 6 (1973), pp. 148-149.
- 96 *Reasons for Judgment, Delgamuukw v. B.C.*, pp. 57-59.
- 97 *Ibid.*, p. 52.
- 98 *Ibid.*, p. 17.
- 99 *Ibid.*
- 100 *Ibid.*, pp. 48-49.
- 101 *Ibid.*, p. 2.
- 102 Jackson, “*Delgamuukw v. The Province of British Columbia and the Attorney General of Canada*,” p. 9.