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Oral Traditions And Treaty 8[1]

By Tom Flanagan

Abstract *Aboriginal oral traditions are of increasing importance in land-claims litigation involving Treaty 8 and the other Numbered Treaties. Aboriginal litigants now routinely argue that the true meaning of treaties is to be found not in the written text but in the oral traditions passed down in Aboriginal communities. Although the Delgamuukw decision dealt with aboriginal rather than treaty rights, its favourable view of oral traditions may well be extended to treaty litigation. Oral traditions, however, cannot be accepted uncritically; they should be subjected to the same process of critical analysis that is applied to other forms of evidence. The provenance of oral traditions must be investigated; and their logical coherence must be tested, as well as their consistency with other sources of information. If the critical process is omitted, the use of oral traditions will interfere with the search for truth in both historiography and the judicial process.*

In celebrating the centennial of Treaty 8, it is important not to forget that it belongs to the eleven Numbered Treaties. Although these were signed at different times over a period of fifty years, and each has unique features, such as Treaty 8's provision for reserves in severalty, the Numbered Treaties as a group are very similar to one another. Today Treaty 8 is caught up in a broad movement affecting all the Numbered Treaties, and indeed all land-surrender agreements in Canada, to transform the nature of these treaties, to devalue the written text and impose new interpretations based on aboriginal oral traditions. This paper argues that oral traditions can be a useful source of information in interpreting the treaties, but only if they are subjected to the same type of critical analysis routinely employed on other forms of evidence, both in historiography and in the judicial process.

Transforming The Treaties

Contemporary jurisprudence has broadened the understanding of treaties beyond the obvious meaning of the written text. A recent law-journal article on Treaty 8 summarizes some of the main developments with concise quotations from leading decisions:

[1]This paper consists mainly of extracts from my book. *First Nations? Second Thoughts*, McGill-Queen's University Press, forthcoming.

> It is well accepted by the courts that treaties and statutes relating to Aboriginal peoples "should be given a fair, large and liberal construction in favour of the Indians." Ambiguities and doubtful expressions in the text of treaties must be resolved in favour of Aboriginal interests, and "any limitations which restrict the rights of Indians under treaties must be narrowly construed." As the honour of the Crown is at stake in its dealings with Aboriginal peoples, the Crown is assumed to intend to uphold its promises, and no appearance of "sharp dealing" will be sanctioned by the courts. The treaties must therefore be interpreted in a manner consistent with the Crown's fiduciary duty. "... Written terms alone often will not 'suffice to determine the legal nature of the document.'" In *R. v. Sioui,* the Supreme Court suggested that the analysis should never be confined to the written text of a treaty .... In ascertaining the obligations arising from a treaty, then, the courts place particular emphasis on the Aboriginal understanding of its terms. The written text is thus only one element of the terms of a treaty. It records "an agreement that had already been reached orally and ... [does] not always record the full extent of the oral agreement."[2]

At least for the time being, however, the treaty text is still paramount. In the 1988 *Horse* decision, the Supreme Court held that treaties should be interpreted in accordance with the normal rule for contracts, "that extrinsic evidence is not to be used in the absence of ambiguity."[3] Even though the Supreme Court reaffirmed this principle in *Sioui,* aboriginal advocates detest the *Horse* decision and frequently invite the Supreme Court to overrule it.[4] Their goal is to promulgate a

[2]Monique M. Ross and Cheryly Y. Sharvit, "Forest Management in Alberta and Rights to Hunt, Trap and Fish under Treaty 8," *Alberta Law Review* 36 (1998), 98-100.

[3]R. *v. Horse* [1988] 2 W.W.R., 300.

[4]E.g., Ross and Sharvit, "Forest Management in Alberta"; Alan Pratt, "The Numbered Treaties and Extinguishment: A Legal Analysis, "Discussion Paper for the Royal Commission on Aboriginal Peoples, May 1995, 41-3; Royal Commission

transformed understanding of treaties in which the written words of the agreement are not determinative because "the written text expresses only the government of Canada's view of the treaty relationship: it does not embody the negotiated agreement"[5] as the elders remember it.

For the Royal Commission on Aboriginal Peoples (RCAP), treaties are "nation-to-nation" agreements, "sacred and enduring."[6] They are neither international agreements nor ordinary contracts; they are *sui generis,* i.e., unique "because their central feature makes them irrevocable. The central feature of almost all the treaties is to provide for the orderly and peaceful sharing of a land ... Once this has been acted upon, it cannot be reversed."[7] They are "part of the Canadian constitution," and "fulfilment of the treaties is fundamental to Canada's honour."[8] But, unlike other parts of the constitution, they cannot be interpreted by analyzing the written terms. "The commission believes that the unique nature of the historical treaties requires special rules to give effect to the treaty nations' understanding of the treaties. Such an approach to the content of the treaties would require, as a first step, the rejection of the idea that the written text is the exclusive record of the treaty."[9]

The real target in all of this is extinguishment, that is, the surrender of aboriginal title.[10] The wording of Treaty 8 is typical:

> AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that is Her

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on Aboriginal Peoples, *Report* (Ottawa: Minister of Supply and Services, 1996), vol. 2, 29.

[5]Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective," in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (Vancouver: Unversity of British Columbia Press, 1997), 173.

[6]RCAP, *Report*, vo. 2, 18.

[7]Ibid., 19.

[8]Ibid., 20-1.

[9]Ibid., 35.

[10]Michael Asch and Norman Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations," in Asch, *Aboriginal and Treaty Rights in Canada,* 209.

> desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to Her Majesty may seem meet .... the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her majesty the Queen and Her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits....[11]

But, according to RCAP, "the treaty nations maintain with virtual unanimity that they did not agree to extinguish their rights to their traditional lands and territories but agreed instead to share them in some equitable fashion with the newcomers."[12] The term "sharing" has become the mantra of treaty revisionism. "Our ancestors did not sign a real estate deal as you cannot give away something you do not own. No, the treaties were signed as our symbol of good faith to share the land."[13]

RCAP concedes that "the text of the post-1850 treaties clearly provides for the extinguishment of Aboriginal title" but argues that we cannot rely upon the text because "the people of the treaty nations reject that outcome."[14] Moreover, aboriginal people could not have surrendered their title because they did not understand the legal language of the treaties and their own cultures and languages did not contain concepts like rights, surrender, and extinguishment. "Thus, it is possible that Aboriginal title continues to coexist with the Crown's rights throughout the areas covered by treaties, despite the Crown's intention to include a cession of Aboriginal title."[15]

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[11]Dennis Madill, *Treaty Research Report: Treaty Eight* (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986), 128.

[12]RCAP, *Report*, vol. 2, 45.

[13]Chief Harold Turner, testimony before RCAP, 20 May 1992, cited in Norman Zlotkin, "*Delgamuukw* and the Interpretation of the Prairie Treaties," Fraser Institute, "The Delgamuukw Case: Aboriginal Land Claims and Canada's Regions," Conference, Ottawa, May 26-27, 1999, 7.

[14]RCAP, *Report*, vol. 2, 45.

[15]Ibid., vol. 2, 47.

RCAP's conclusion is that Canada should henceforth act on the basis of this novel and untested legal theory and regard aboriginal peoples as co-owners of all land, even though they signed agreements extinguishing their land rights, have received substantial benefits for doing so, and continue to seek punctilious fulfilment of those treaty clauses from which they draw benefits. The Commission's call for the "implementation and renewal of treaties"[16] comes down in the end to a one-sided reading of the treaties. Implementation means that clauses conferring benefits must be fulfilled to the letter, while renewal means that clauses by which the Indians gave up something must be ignored, reinterpreted, or replaced.

An early victory of this view of treaties was achieved in the campaign against Treaty 11. In 1973, sixteen chiefs in the Northwest Territories and northern Alberta attempted to register a caveat on about 400,000 square miles [1,000,000 square kilometres] of land ceded by Treaties 8 and 11. They succeeded in persuading Justice William Morrow of the Supreme Court of the Northwest Territories that "notwithstanding the language of the two Treaties there is sufficient doubt on the facts that aboriginal title was extinguished that such claim for title should be permitted to be put forward by the caveators."[17] At trial, the would-be caveators produced a series of elders who had been present (mostly as children) at the signing in 1921 and who testified, in the words of Chief François Paulette: "No lands have ever been surrendered or ceded in the first treaty. It was sort of a peace treaty ... No land was mentioned. That peace treaty was with regard to whether the white people can come in without any conflict with the Indians and the Indians have no conflict with the white people."[18]

This view of the treaty was widely disseminated through the book *As Long as This Land Shall Last,* written by Father René Fumoleau, an Oblate missionary in the north. Morrow's decision in the *Paulette* case was overturned on appeal, but the political victory had been won. The federal government entered into negotiations with the Dene and Métis of the Northwest Territories (but not Alberta) for a new land-claim agreement. More recently, the Minister of Indian Affairs signed a memorandum of

[16]Ibid., 50.

[17]René Fumoleau, *As Long as This Land Shall Last* (Toronto: McClelland and Stewart, n.d.), 13.

[18]Trial transcript, p. 157. Glenbow Alberta Institute, William G. Morrow Papers, M 1865, box 1, file 1.

understanding with the "Treaty 8 First Nations of Alberta ... to establish a formal bilateral process to ... implement an inherent right of self-government consistent with the spirit and intent of the Treaty relationship."[19] Whether the renovation of Treaty 8 will amount to repudiation remains to be seen.

The repudiation of treaties has not yet spread to other parts of Canada, perhaps because conditions in the Mackenzie Valley were unique. Land there was still part of a federal territory, so a provincial government did not have to agree to give up control of its Crown lands. Also, reserves had never been taken up, relatively little land had been alienated to private owners, and native people were still a demographic majority outside of Yellowknife.

In the absence of wholesale "renovation" of the treaties, what we are likely to see is guerrilla warfare in the courts, in which aboriginal advocates attempt to undo extinguishment by gradually undermining the Crown's control of public lands and natural resources. A recent example is a case decided by the Provincial Court of Saskatchewan on August 26, 1998, which acquitted two Dene from Buffalo Narrows of the charge of hunting moose illegally on the Primrose Lake Air Weapons Range. Basing this part of his judgment largely on Dene oral tradition, the judge held that Treaty 10, even though it contains the usual clause about surrender of title to the land, actually meant that "the land would thereafter be *shared* along principled lines."[20] If not overturned on appeal, this decision means that Saskatchewan may lose its control over resource development on Crown land and may have to get permission from one or more Indian bands every time a project is contemplated. There would also seem to be major implications about compensation for past developments in which the Crown acted as if it had a clear title.

Another example is the *Rio Alto* case initiated by the Fort McKay First Nation. RioAlto Exploration sought and obtained permission in the normal way from the Ministry of Environmental Protection to run some seismic lines in the Treaty 8 area. The Fort McKay First Nation, alleging that the seismic exploration would interfere with its members' traplines,

[19]Declaration of Intent by the Treaty 8 First Nations of Alberta, as Represented by the Grand Chief, and Her Majesty the Queen in Right of Canada, as Represented by the Minister of Indian Affairs and Northern Development, 22 June 1998.

[20]*R. v. Catarat and Sylvestre,* Provincial Court of Saskatchewan, August 26, 1998, typescript, 39.

asked the Court of Queen's Bench for "an Order of Mandamus compelling the Minister of Environmental Protection to consult with the Applicants regarding the scope, nature and extent of the impact of all exploratory activities approved by that minister on the exercise of the Treaty and Aboriginal rights of the Applicants."[21] What the band is after is the right to approve, and receive compensation for, any economic development on Crown land in what it considers its traditional territory – in effect, a right of co-ownership with the province.

Inconveniently, Treaty 8 says that the Indians gave up all their rights and title to the land, but counsel for the band may base an argument on the Treaty's guarantee of the continued right to hunt and fish on Crown land. Again, the language of the treaty is inconvenient, because it says that hunting and fishing can continue "saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."[22] In response, the Fort McKay First Nation may quote the oral promise of the treaty commissioners: "But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it."[23] They may also bring forward various oral traditions purporting to show that their people never intended to give up their land rights.

On 26 February 1999, the campaign against the treaties was taken to a new level when two statements of claim were filed in Alberta. The Samson Cree Nation now holds that in 1877, when they adhered to Treaty 6, they "agreed only to share the surface of the Traditional Lands with Her Majesty the Queen." They "did not surrender by *Treaty No. 6* their aboriginal title and aboriginal rights in and to the Natural Resources."[24] In a separate action, all Treaty 7 bands "deny they ceded, released,

[21]Originating Notice, *Ahyasou et al. v. Rio Alto et al.*, February 13, 1998, s. 5.

[22]Madill, *Treaty Research Report: Treaty Eight*, 128.

[23]Ibid., 122-3.

[24]Statement of claim, s. 12, cited in Ken Tyler, "Will *Delgamuukw* Eclipse the Prairie Sun? The Implications of the Supreme Court's Decision for the Prairie Treaties," in Fraser Institute, "The Delgamuukw Case," 5.

surrendered or yielded up their Aboriginal title or right over the Treaty 7 Territory," claiming instead that "they were agreeing to share the Treaty 7 Territory with the Crown."[25] If actions of this type are successful, they will totally transform the treaties.

This is not just a challenge for western Canada. Treaty 3 extends into Ontario, and more than two-thirds of the province is covered by Treaty 9, negotiated in 1905-06, and the adhesions signed in 1929-30. University of Toronto law professor Patrick Macklem, a rising star in the field of aboriginal rights, recently published an article arguing that the extinguishment of aboriginal title in Treaty 9 is only "apparent."[26] According to Macklem's "expansive interpretation of the right to hunt, trap, and fish,"[27] the province cannot undertake or authorize any development that would cause aboriginal hunting, fishing, and trapping to become less successful than they have been, "measured by reference to the fruits of past practice."[28]

If extinguishment is undermined in the courts by an "expansive" interpretation of hunting rights, it will produce an awkward duplication of property rights. Indian bands will not receive ownership rights as such, but rather veto rights, or perhaps the right to be consulted, on economic development projects that might affect hunting, fishing, and trapping in "traditional territories" whose boundaries are at present not defined. Provinces will lose the ability they now have to undertake or authorize projects on their own authority. It is, moreover, predictable that bands will have overlapping conceptions of their traditional territories, so that provincial authorities may have to deal with two or more bands, not just in major projects like dams, but in minor projects like seismic lines. If it came to that, it would be better to grant Indian bands title in fee simple to larger tracts than to end up with an impossibly cumbersome system of dual or multiple property rights that can only stultify economic activity.

Oral Traditions

[25]Statement of claim, ss. 39-40, cited in ibid., 6.

[26]Patrick Macklem, "The Impact of Treaty 9 on Natural Resource Development in Ontario," in Asch, *Aboriginal and Treaty Rights*, 97.

[27]Ibid., 116.

[28]Ibid., 133.

The Indian societies north of Meso-America were not literate, although some made use of devices such as pictographs and wampum as mnemonic aides. They relied heavily on oral traditions to preserve the memory of their past, so they naturally conserved oral traditions about the treaties. More recently, researchers employed by Indian organizations have made systematic efforts to collect these traditions and commit them to writing, partly out of intrinsic interest, but also to use them as weapons in their struggles to seek compensation and transform the treaties. Two books of such material have been published in Alberta,[29] and parallel efforts are going on in other provinces.[30]

Prior to the 1990s, oral traditions played only a limited role in native-rights litigation. In the 1935 *Dreaver* case, the Exchequer Court heard testimony from Chief Dreaver, who had been present at the signing of Treaty 6 in 1876, and allowed him to state his understanding of the "medicine chest" clause in that treaty.[31] In *Paulette* in1971, Justice Morrow heard oral evidence from Indians who had witnessed the signing of Treaties 8 and 11. But neither of these cases had high legal (as compared too political) impact. Justice Morrow's decision was overturned on appeal, and *Dreaver* remained little known and was not even reported until the 1970s. Moreover, both cases exemplified not oral traditions in the true sense of stories passed down across generations, but witnesses recounting their own memories of events witnessed decades ago.

The Supreme Court of Canada said in the *Horse* case (1988) that treaties should be interpreted in accordance with the normal rule for contracts, "that extrinsic evidence is not to be used in the absence of ambiguity."[32] In other words, the *Horse* rule was that oral traditions could

[29]Richard Price, *The Spirit of the Alberta Indian Treaties* (Montreal: Institute for Research on Public Policy, 1979); Treaty 7 Elders, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996).

[30]E.g., the Saskatchewan oral history program described in Blair Stonechild and Bill Waiser, *Loyal till Death: Indians and the North-West Rebellion* (Calgary: Fifth House, 1997).

[31]Delia Opekokew, "Review of Ethnocentric Bias Facing Indian Witnesses," in Richard Gosse, James Youngblood Henderson, and Roger Carter, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich, 1994), 197.

[32]*R. v. Horse* [1988] 2 W.W.R., 300.

be used as an aid to interpretation where courts found the wording of a treaty unclear. More recently, the Supreme Court's *Badger* decision (1996) opened the door even more widely to the use of oral traditions. Mr. Justice Cory wrote:

> The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement ... The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages ... of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing.[33]

The Court's decision in *Badger* did not turn entirely, or even chiefly, on oral tradition, but it did make use of oral tradition, as recounted by a Cree elder, to help interpret the words of Treaty 8 as well as the accompanying promises made by government representatives during the negotiations.

The judicial standing of oral traditions received a further boost in 1997, when the Supreme Court of Canada handed down its *Delgamuukw* decision. The technical reason why the Court ordered a new trial was that, although the trial judge had admitted the oral histories of the Gitksan and Wet'suwet'en peoples as evidence, he "went on to give these oral histories no independent weight at all."[34] Chief Justice Lamer laid down the following principle: "Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and

[33]*R. v. Badger* [1996] 133 D.L.R. (4th), 344.

[34]*Delgamuukw v. British Columbia* [1997], 153 D.L.R. (4th), 235.

placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents."[35]

Alexander von Gernet, an anthropologist making a special study of the use of oral traditions in aboriginal litigation, has recently offered a penetrating criticism of the *Delgamuukw* ruling on oral traditions. In von Gernet's view, the trial judge (Allan McEachern, Chief Justice of the British Columbia Supreme Court) had handled the oral evidence properly. "By admitting oral documents into evidence, recognizing that they are not *prima facie* proof of the truth of the facts stated in them, taking note of the context in which they were generated, evaluating them for internal consistency, comparing them with other available evidence, and carefully weighing them, the judge did precisely what his critics suggest he should have done with written documents."[36] The Supreme Court of Canada then incoherently demanded that oral traditions be put "on an equal footing" with other types of evidence, even though that is what the trial judge had done when he subjected the oral evidence to the types of critical tests routinely used on written evidence. "The rejection of McEachern's critical analysis will almost certainly be regarded by some not merely as an effort to level the field or lower the standard, but as an outright abandonment of the rigorous scrutiny that is essential to any fact-finding process. When taken to its logical conclusion this would seem unworkable in conflict resolution and, as others have noted, it would open the way for a radical re-invention of the law itself."[37]

There are, to be sure, differences between *Delgamuukw* and treaty litigation. In *Delgamuukw*, there was no text to interpret because there was no treaty; the Indian plaintiffs were offering their oral traditions as evidence about their occupancy of land prior to the time when white settlers were present to write down their observations. In contrast, treaty cases focus on the interpretation of a text, and Indian oral traditions recount events which are also recorded in conventional documents. For those who live in the Treaty 8 area, the central issue is what was said in the Treaty 8 negotiations in 1899. Not only is there an abundance of written sources

[35]Ibid., 232. For a critique, see Alexander von Gernet, "What My Elders Taught Me: Oral Traditions as Evidence in Aboriginal Litigation," in Fraser Institute, "The Delgamuukw Case," 16-23.

[36]Von Gernet, "What My Elders Taught Me," 16.

[37]Ibid., 22

describing the events, the Indian cultures themselves had already entered the early stages of literacy.

In 1836, the Methodist missionary James Evans had developed a syllabic form of writing for the Cree language.[38] Syllabics were quickly adopted by missionaries of other faiths and adapted to other native languages of the north, such as Dene and Inuktitut. Father Henry Faraud, who founded the first Oblate mission at Fort Chipewyan, used syllabics from the outset as a tool of evangelization.[39] After Indian converts learned to read Christian texts and hymns in their own languages, they used syllabics for secular purposes, such as sending letters.[40] Father Fumoleau's book contains a photographic reproduction of a letter written in syllabics in 1883 by two Chipewyan chiefs.[41]

To be sure, only a relatively small number of northern native people were literate in any language by 1899, but they would all have understood the importance of writing. Those who had converted to Christianity attended religious services involving the Bible, prayer books, and hymnals. All aboriginals, whether Christian or not, had been dealing with fur traders for over a century and so had come into contact with written contracts, bills of sale, and account books. According to the documentary evidence of the treaty negotiations, the Indians understood the importance of the written treaty and were anxious to obtain copies of it. Keenoshayo said at Lesser Slave Lake: "We want a written treaty, one copy to be given to us, so we shall know what we sign for."[42]

Despite these differences, the *Delgamuukw* decision is bound to raise the status of oral traditions in treaty litigation, even if we cannot yet predict exactly how that will take place or what all the consequences will

[38]Regna Darnell, "Cree Syllabics," *The Canadian Encyclopedia* (Edmonton: Hurtig, 1985), vol. 1, 438-9.

[39]Henry Faraud, *Dix-hit ans chez les sauvages* (Paris: Régis Ruffet, 1866), 117-8, 155.

[40]Telephone interview with Raymond Huel, Department of History, University of Lethbridge, June 22, 1998.

[41]Fumoleau, *As Long*, 32-3.

[42]Charles Mair, *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899* (London: Simpkin, Marshall, Hamilton, Kent & Co., 1908), 62.

be. One can sympathize with the Supreme Court's desire to recognize aboriginal oral traditions. Although Chief Justice Lamer was wrong when he wrote that oral traditions "for many aboriginal nations, is the only record of their past"[43] (disciplines such as archaeology, linguistics, and palaeobotany have much to contribute), it is true that oral traditions are important to many aboriginal litigants. If they cannot introduce them as evidence, they may not be able to make out much of a case. Nonetheless, to adapt the rules of evidence so that oral traditions "can be accommodated and placed on an equal footing"[44] with other forms of evidence is a difficult, perhaps impossible task. It all depends on what the phrase "equal footing" is thought to mean. The Chief Justice's dictum that recognition of oral traditions as evidence "must be undertaken on a case-by-case basis" merely postpones confronting the difficulties.[45]

There is a profound similarity between the judicial process and modern historiography, even though the judicial process contains some concepts, such as legislative intent, and rules of evidence, such as the prohibition of extrinsic evidence, that do not apply to the writing of history. Both share common assumptions, such as the following:

- The passage of time is a linear, irreversible process in which events can be dated precisely.
- Causation follows time's arrow. A later event cannot be the cause of an earlier event.
- There is an objective core of fact that in principle can be discovered by sifting the evidence (sometimes, of course, the necessary evidence is missing).
- Not all evidence is equally worthwhile. First-hand evidence is usually more reliable than hearsay. Contemporary statements are usually more reliable than those elicited long after the event. Human memory is fallible, and people sometimes do not tell the truth, so it is essential to seek corroboration from multiple sources.

The underlying similarity of historiography and the judicial process is not surprising, because both are products of post-Enlightenment Western

[43] *Delgamuukw v. British Columbia* [1997], 153 D.L.R. (4th), 231.

[44] Ibid., 232.

[45] Ibid., 232-3.

civilization. Within that context, both aim at establishing the truth about what happened in the past. Oral traditions, in contrast, differ from both historiography and the judicial process in important ways. As RCAP has emphasized, the oral traditions of aboriginal peoples are based on a cyclical rather than a linear view of time,[46] and a different understanding of time implies a different view of causation and agency. As in the Australian "Dreamtime," the stories that make up Indian traditions often involve the Creator and other supra-human beings who move in and out of time. Oral traditions express the perceived meaning of existence in an ordered cosmos; they do not reflect the Western concept of objective fact tested by evidence. In particular, oral traditions do not discriminate among types of evidence according to criteria of reliability and closeness to the event. One authority (herself quite favourable to oral traditions) has written that "the contradictions in what constitutes history - oral and written - cannot be resolved. The narratives can be juxtaposed ... but not necessarily reconciled into a seamless whole."[47] Below are three concrete examples of the difficulties.

First, aboriginal oral traditions often contradict Western conceptions of rationality and knowledge. When the Cree elder John Buffalo was asked in 1975 about the disappearance of the buffalo from the prairie, he replied, "Some old men said that the buffalo entered the earth somewhere, but I do not know. It must be true, as there are none left."[48] Saying that the buffalo entered the earth may be an emotionally moving, mythic or poetic way of describing their disappearance, but it is not compatible with the rational explanations sought in the judicial process as well as in the writing of history.

Second, oral traditions often contradict facts that can be established by overwhelming documentary evidence. Another Cree elder, Fred Horse, was asked if the Indians who signed Treaty Six had any knowledge of earlier treaties:

> *Interviewer:* Before Treaty Six was signed, there were about four treaties signed in Eastern Canada. Did the

[46] RCAP, *Report,* vol. 1, 34-5.

[47] Julie Cruikshank, "Oral Tradition and Oral History: Reviewing Some Issues," *Canadian Historical Review* 75 (1994), 410.

[48] Price, *Spirit of the Alberta Indian Treaties,* 122.

Indians in this part of the country know anything of the treaties coming to them?

Horse: No, they were not aware of a treaty that was to be signed. It was only when it was here they realized what was happening.

Interviewer: Did the elders or ancestors know of the treaties in the United States?

Horse: No, they did not know of them. They only knew of what was taking place with them.

Interviewer: Did the Indians at the time want the treaty?

Horse: Well, it was brought to them and that is how they negotiated with the Queen's commissioners. That is how it was completed.[49]

But we know from many sources that the Treaty Six Indians had discussed earlier treaties with their relatives in other bands and tribes, were well informed about these treaties, and used that knowledge to prepare the demands articulated during the negotiations at Fort Carlton.[50]

Third, aboriginal traditions often contradict each other. Consider the following statements about Treaty 8 made by various elders. Chief François Paulette, from Fort Smith, testified before Justice Morrow in 1973: "No lands have ever been surrendered or ceded in the first treaty. It was sort of a peace treaty . . . No land was mentioned. That peace treaty was with regard to whether the white people can come in without any conflict with the Indians and the Indians have no conflict with the white people."[51] Compare Paulette's testimony to this conversation of Jean-Marie Mustus with interviewer Richard Lightning in 1975:

[49]Ibid., 126.

[50]Tom Flanagan, Analysis of Plaintiffs' Experts' Reports in the Case of *Chief Victor Buffalo v. Her Majesty the Queen et al*, 17-18.

[51]Trial transcript, p. 157. Glenbow Alberta Institute, William G. Morrow Papers, M 1865, box 1, file 1.

Lightning: Do you know how much land was given up or sold to the white man?

Mustus: The amount of land they gave up was written down on paper. I am wondering whether it was one foot underground or more. It was written down, but I do not know where the paper could be found.

Lightning: And you do not know how much was to be used?

Mustus: No, I do not know, but whatever they selected for themselves they kept; the rest was taken. I do not recall my grandfather telling me about the depth underground.

Lightning: Did he ever tell you anything about underground minerals or oil?

Mustus: Yes, these things were mentioned, as was the timber within the reserve; the Indians had a right to anything underground.[52]

Contradictions to both Paulette and Mustus will be found in this interview of Richard Lightning with Felix Gibot of Fort Chipewyan:

Lightning: When the commissioner came here to make treaty, were his intentions to sign treaty on a friendly basis or was it to acquire the land?

Gibot: That is something that always puzzles me when I think of it. It appears as though he wanted to claim the land, to own the land for the government. That is why they took that action.

Lightning: Did the Indians of long ago ever imagine or think that anything valuable would be found underground?

[52]Price, *Spirit of the Alberta Indian Treaties*, 146.

Gibot: You mean the elders of long ago? No, they never mentioned anything about *money* [gold or minerals] to be found underground or even petroleum to be found below the surface. I never heard my grandfather, although he was intelligent, mention anything. Even after my grandfather died, I never heard anything mentioned.

Lightning: They never told stories of the commissioner discussing these things?

Gibot: No, the commissioner never mentioned them. The only thing he mentioned was how the people would be cared for by the government as promised in the treaty.[53]

The oral traditions proffered by these three informants differ markedly with respect to the core meaning of Treaty 8. Paulette says it was only a treaty of peace and friendship and had nothing to do with the land. Mustus says the Indians surrendered the surface of the land but retained the mineral rights. Gibot says the government acquired the land while minerals were never discussed. These contradictory versions of history cannot all be true at the same time.

In 1996, the Department of Indian Affairs commissioned Professor von Gernet to carry out an extensive review of the literature on oral traditions. He found that oral traditions, while sometimes demonstrably true, are not consistently so: "When independent evidence is available to permit validation, some oral traditions about events centuries old turn out to be surprisingly accurate. . . . [However], there is . . . overwhelming evidence that many oral traditions do not remain consistent over time and is either inadvertently or deliberately changed to meet new needs. Aside from the fallibility of human memory and inter-individual transmission, the factor that most contributes to the changing expression of any given oral tradition is the social and political context of the 'present' in which it is narrated."[54]

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[53]Ibid., 159.

[54]Alexander von Gernet, *Oral Narratives and Aboriginal Pasts: An Interdisciplinary Review of the Literature on Oral Traditions and Oral Histories*, (Ottawa: Research and Analysis Directorate, Indian and Northern Affairs Canada,

The three factors cited by von Gernet are all applicable to aboriginal oral traditions. First, oral traditions are held in the human memory, and everyone's memory is fallible. "Contrary to common belief," notes von Gernet, "there is no evidence that people who depend more on orality have inherently better memories."[55] Writing was a tremendous advance precisely because it transcended the limitations of individual memory.

Second, an oral tradition is a memory of a memory, so the chances of mistake are multiplied. Oral traditions depend on person-to-person telling and retelling, which offers more opportunities for omission, distortion, and error to creep in. As the noted anthropologist Bruce Trigger has said, oral traditions "frequently reflect contemporary social and political conditions as much as they do historical reality and even in cultures where there is a strong desire to preserve their integrity, such stories unconsciously may be reworked from generation to generation."[56]

Third, context can have a crucial effect. For example, the oral traditions published in the book *The Spirit of the Alberta Indian Treaties* was collected "by a team of staff and consultants of the Treaty and Aboriginal Rights Research (T.A.R.R.) group of the Indian Association of Alberta."[57] In other words, the work was sponsored by an aboriginal political organization under the highly evocative label of "treaty and aboriginal rights." Given the close-knit character of Indian communities, it is impossible that the partisan spirit of the enterprise would not communicate itself to those who were interviewed and exercise an influence upon their memories.

None of this means that oral traditions are always unreliable. In any particular instance, an oral tradition may have much to teach us. However, it does mean that oral traditions cannot be accepted as factual without undergoing the critical scrutiny that both historians and courts apply to all other kinds of evidence, including archaeological remains,

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1996), 20.

[55]Ibid., 16.

[56]Quoted in Brian J. Gover and Mary Locke Macaulay, "'Snow Houses Leave No Ruins,'" *Saskatchewan Law Review* 60 (1996), 67.

[57]Price, *Spirit of the Alberta Indian Treaties*, xiv.

written records, electronic data, and photographic images.[58] Critical scrutiny implies investigating the provenance of sources, asking questions such as who generated the sources, what were their motives, how knowledgeable were they about the events they witnessed, how were the sources transmitted, are we sure we have authentic versions, and so on. It also means comparing sources against each other to establish the most likely account of what happened - what in civil litigation might be called "the balance of probabilities." This, in my view, is the proper interpretation of Chief Justice Lamer's dictum that oral traditions must be placed "on an equal footing" with other forms of evidence. Equality means treating all forms of evidence in the same way.

The use of aboriginal oral traditions in treaty litigation will be constructive as long as these procedures are observed and as long as oral traditions are treated as one of many kinds of historical evidence. However, advocates of the aboriginal world view often speak as if oral traditions were intrinsically different from other forms of evidence, containing a superior truth not amenable to empirical testing. In that perspective, equality would mean "separate but equal", and would demand the suspension of normal historical methods. If the Supreme Court's *Delgamuukw* decision is interpreted in that spirit, the treaties will be transformed from intelligible, enforceable agreements to unpredictable relationships in which everything is up for renegotiation.

[58]See also von Gernet, "What My Elders Taught Me."