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## Judicial Treatment of Aboriginal Peoples' Oral History Evidence: More Room for Reconciliation

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### Cover Page Footnote

This paper was awarded first prize for the 2019 J.S.D. Tory Award for legal writing.

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Judicial Treatment of Aboriginal Peoples’ Oral History  
Evidence: More Room for Reconciliation  
[Winner of 2019 Tory Legal Writing Prize]

Jimmy Peterson



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Jimmy Peterson\*

Judicial Treatment of Aboriginal Peoples'  
Oral History Evidence: More Room for  
Reconciliation

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*Oral history is the only past record in many Aboriginal groups in Canada. In 1997, in Delgamuukw, the Supreme Court of Canada recognized that the strict approach to evidence law with respect to oral history had to be relaxed for Aboriginal peoples to be able to pursue claims to Aboriginal rights or Aboriginal title. This was a necessary element of the attempt to achieve reconciliation between Aboriginal and non-Aboriginal peoples. Yet, while evidence law has become increasingly flexible when it comes to accommodating Aboriginal peoples, courts have struggled with how to value oral traditions. A review of the case law since Delgamuukw reveals that courts typically find oral testimony evidence admissible but give it little weight. They tend to favour written records when they conflict with oral testimony evidence. The Eurocentric preference towards written records is undermining the potential for reconciliation.*

*L'histoire orale est la seule consignation du passé pour de nombreux groupes autochtones au Canada. En 1997, dans l'arrêt Delgamuukw, la Cour suprême du Canada a reconnu que l'approche stricte du droit de la preuve en matière d'histoire orale devait être assouplie pour que les peuples autochtones puissent revendiquer les droits ancestraux ou le titre autochtone. Il s'agissait là d'un élément nécessaire pour l'effort de réconciliation entre les Autochtones et les non-Autochtones. Pourtant, bien que le droit de la preuve soit devenu de plus en plus souple lorsqu'il s'agit d'accueillir les peuples autochtones, les tribunaux ont eu de la difficulté à apprécier les traditions orales. Un examen de la jurisprudence depuis l'arrêt Delgamuukw révèle que les tribunaux jugent généralement que les témoignages oraux sont admissibles, mais qu'ils leur accordent peu de poids. Ils ont tendance à favoriser les documents écrits lorsqu'ils entrent en conflit avec les témoignages oraux. La préférence eurocentrique pour les documents écrits mine le potentiel de réconciliation.*

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*Introduction: the place of oral history in evidence law*

Documents are the most common type of real evidence.<sup>1</sup> The rule established in the 1700s governing documents was the “best evidence rule”, which required that only the best evidence available for a particular fact be admissible in court.<sup>2</sup> It was created to avoid possible errors as a

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1. Ron Delisle et al, *Evidence: Principles and Problems*, 12th ed (Toronto: Thomson Reuters, 2018) at 825.

2. CED 4th (online), *Evidence*, “Documentary Evidence: Best Evidence Rule: Introduction” (VIII.2.(a)) at § 419.

result of copying or oral stories. The rationale was that if the wording of a document is changed either by accident or design, its meaning may be fundamentally altered.<sup>3</sup>

However, the best evidence rule has declined in importance over time, particularly relative to the overarching principle that all relevant evidence should be admitted.<sup>4</sup> In *R v Betterest*, the BC Court of Appeal stated that an “over-technical and strained application of the best evidence rule serves only to hamper the inquiry without at all advancing the cause of truth.”<sup>5</sup> Today, the only vestige of the rule is that the original document must be produced if it is available.<sup>6</sup>

Part of this flexibility has been spurred by access to justice concerns in the Aboriginal rights context.<sup>7</sup> Until recently, oral history (or oral tradition) was not accepted as evidence by Canadian courts. This effectively barred Aboriginal title claims because oral stories are the only past records in many Aboriginal groups.<sup>8</sup> Oral traditions serve as a “repository of historical knowledge” and express cultural values.<sup>9</sup> They are usually maintained by community elders who are the most respected members of Aboriginal communities. Thus, oral stories are authoritative in Aboriginal societies. Oral histories are passed down from generation to generation and are validated by each generation.

In 1997, in *Delgamuukw*, the Supreme Court of Canada (“SCC”) recognized that oral history should be accommodated and placed on an “equal footing” with documents.<sup>10</sup> To enable Aboriginal peoples to be able to pursue claims under the *Constitution Act, 1982*, s 35(1), a strict approach to evidence law had to be relaxed.<sup>11</sup> The SCC realized that oral history has features that would undermine its admissibility and weight if the SCC took a traditional approach to evidence law. Typically, evidentiary principles

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3. David M Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law Inc, 2015) at 502.

4. CED, *supra* note 2 at § 419.

5. *R v Betterest Vinyl Manufacturing Ltd et al* (1990), 52 CCC (3d) 441 at 448, [1990] 2 WWR 751 (BCCA), Taggart J, citing *United States v Manton*, 107 F (2d) 834 at 845 (2nd Cir 1938).

6. Paciocco, *supra* note 3 at 502.

7. *Ibid* at 10.

8. CED 4th (online), *Aboriginal Law*, “The Canadian Legal Framework: Constitutional Protection for Aboriginal Peoples: Section 35 of the Constitution Act, 1982: Aboriginal Rights: Proof of Aboriginal Rights: Evidentiary Issues” (II.5.(a).(ii).B.4) at § 317.

9. Clay McLeod, “The Oral Histories of Canada’s Northern People, Anglo-Canadian Evidence Law, and Canada’s Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past” (1992) 30:4 *Alta L Rev* 1276 at 1279.

10. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 87, 153 DLR (4th) 193 [*Delgamuukw*].

11. *Ibid* at para 84; Jack Woodward, *Native Law* (Toronto: Thomson Reuters, 1989) (loose-leaf revision 2018-6), ch 2, s 260 at 2-11.

dictate that second-hand information, which cannot be checked for its accuracy, is inadmissible because it is unreliable as hearsay. The fact that oral history is predominantly comprised of out-of-court statements would generally make it hearsay. Moreover, because history, legend, politics, and morals are woven into oral tradition, it would ordinarily be viewed as tangential to determining the historical truth in evidence law. This would render oral history inadmissible or, if it was ruled admissible, it would be given little weight, which is the amount of emphasis granted to the evidence by the court. Overall, the SCC appreciated that reconciliation could not be achieved without a more purposive approach.

Reconciliation aims to establish a mutually respectful long-term relationship between Aboriginal and non-Aboriginal peoples.<sup>12</sup> In its 2015 Final Report, the Truth and Reconciliation Commission stated that this includes the rejection of racist and paternalistic attitudes.<sup>13</sup> It also means acknowledging the harmful impacts that residential schools and other colonial tools (violent and non-violent) have had. Reconciliation must be transformative and comprehensive, touching on virtually every aspect of Canadian life. The Report notes that a more flexible and purposive approach to Aboriginal peoples' oral stories is one component of this reconciliation.<sup>14</sup>

This paper first outlines the foundational cases that allowed for the use of oral evidence in Aboriginal rights claims. Then, it examines how subsequent courts have treated oral evidence and whether evidence law has been sufficiently flexible to help achieve the promise of reconciliation under the *Constitution Act*, s 35(1).

In evidence law, a document must be genuine in that the item tendered as an exhibit is authenticated to be what it is represented to be by its proponent.<sup>15</sup> Courts, such as *Wilder* and *Hirsch*, have confirmed that authentication is a low threshold requiring only minimal evidence.<sup>16</sup> Weakness in authenticity should generally go to weight, not admissibility.

Yet, while evidence law has become increasingly flexible when it comes to accommodating Aboriginal peoples, courts have struggled with how to value oral traditions. A review of the case law reveals that courts typically find oral testimony evidence admissible but give it little

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12. Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, vol 1 (Winnipeg: TRC, 2015) at 6.

13. *Ibid* at vi.

14. *Ibid* at 18.

15. Delisle, *supra* note 1 at 811.

16. *R v Wilder*, 2002 BCSC 1333 at para 288 [*Wilder*]; *R v Hirsch*, 2017 SKCA 14 at para 18 [*Hirsch*].

weight. They tend to favour written records when they conflict with oral testimony evidence. The Eurocentric preference towards written records is undermining the potential for reconciliation.

I. *The case-by-case approach to admitting Aboriginal peoples' oral histories as evidence*

Even prior to *Delgamuukw*, judges' understanding of oral history had been raised by academics and courts.<sup>17</sup> For example, in 1985 in *Simon*, Chief Justice Dickson overturned *Syliboy*<sup>18</sup> where the Court had held that the Cape Breton First Nations band did not have the capacity to enter into an enforceable treaty with the Governor.<sup>19</sup> Chief Justice Dickson noted that the language in *Syliboy* reflected the biases and prejudices of an old era that were no longer acceptable and was "inconsistent with a growing sensitivity to native rights in Canada."<sup>20</sup> He held that the Micmacs' oral history was admissible under the reputation exception to the hearsay rule. It met the requirements of necessity and reliability given that the "Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right."<sup>21</sup> Oral history therefore was admissible as hearsay evidence.<sup>22</sup>

Moreover, in 1996 in *Van der Peet*, a Sto:Lo First Nation member had been convicted of selling ten salmon without a licence and defended that she was exercising her Aboriginal right to fish based on oral history.<sup>23</sup> Chief Justice Lamer emphasized that courts must not undervalue oral evidence simply because it does not conform precisely with evidentiary standards that would typically be applied in a private tort law case.<sup>24</sup> Oral evidence should be approached with a "consciousness of the special nature of aboriginal claims."<sup>25</sup>

Nevertheless, in *Delgamuukw*, Chief Justice Lamer highlighted the difficulties with oral histories: "they are tangential to the ultimate purpose of the fact-finding process at trial" and they "largely consist of out-of-court statements, passed on through an unbroken chain across the generations,"

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17. Mary Locke Macaulay, *Aboriginal & Treaty Rights Practice* (Toronto: Thomson Reuters, 2000) (loose-leaf revision 2018-2), ch 9.2(c)(i) at 9-8.

18. *Rex v Syliboy*, [1929] 1 DLR 307, 50 CCC 389 (NS Co Ct) [*Syliboy*].

19. *Simon v The Queen*, [1985] 2 SCR 387 at 400-401, 24 DLR (4th) 390.

20. *Ibid* at 399.

21. *Ibid* at 408.

22. Macaulay, *supra* note 17 at ch 9.4(b) at 9-21.

23. *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*].

24. Shin Imai, *Annotated Aboriginal Law: The Constitution, Legislation, Treaties and Supreme Court of Canada Case Summaries: 2019* (Toronto: Thomson Reuters, 2018) at 967.

25. *Van der Peet*, *supra* note 23 at para 68.

which conflicts with the general rule against the admissibility of hearsay.<sup>26</sup> Consequently, their admissibility is assessed on a case-by-case basis.<sup>27</sup>

In 2001, *Mitchell* expanded on *Delgamuukw* and established a 3-part admissibility test for oral history: first, it must be useful to prove a relevant fact; second, it is reasonably reliable; and third, its probative value is not overshadowed by its prejudicial effects.<sup>28</sup> *Mitchell* affirmed the case-by-case approach noting that this did not “mandate the blanket admissibility of such evidence or the weight it should be accorded by the trier of fact.”<sup>29</sup> Oral history must be useful and reasonably reliable but is still subject to the exclusionary discretion of the trial judge. To be useful to prove a relevant fact, it should be the only available evidence on point and provide the Aboriginal perspective on the right claimed.<sup>30</sup> Further, the evidence will be reliable if the witness represents a reasonably reliable source of the particular people’s history.<sup>31</sup>

While Chief Justice McLachlin in *Mitchell* noted that the Western Eurocentric mindset against mythology, imprecise detail, and tangential material should not be used to discount oral histories as unreliable or unhelpful,<sup>32</sup> she emphasized that the fundamental principles of evidence law and common sense should not be disregarded.<sup>33</sup> There must be persuasive evidence brought by the Aboriginal group to demonstrate the validity of oral history on the balance of probabilities without artificially inflating the weight of such evidence: “Placing ‘due weight’ on the aboriginal perspective, or ensuring its supporting evidence an ‘equal footing’ with more familiar forms of evidence, means precisely what these phrases suggest: *equal* and *due* treatment.”<sup>34</sup>

Overall, subsequent case law reveals that this case-by-case evidentiary approach to Aboriginal peoples’ oral histories poses problems at two stages: admissibility and weight. There are concerns about authenticity, hearsay, and reliability. Judges have really struggled with the amount of weight that should be afforded to oral evidence, especially when it conflicts with written records. Some courts do not view oral testimony as having “precise historical accuracy.”<sup>35</sup> They sometimes factor into their decisions whether

26. *Delgamuukw*, *supra* note 10 at para 86.

27. *Ibid* at para 87.

28. *Mitchell v MNR*, 2001 SCC 33 at para 30 [*Mitchell*].

29. *Ibid* at para 31.

30. *Ibid* at para 32.

31. *Ibid* at para 33.

32. *Ibid* at para 34.

33. *Ibid* at para 38.

34. *Ibid* at para 39 [emphasis in original].

35. *Squamish Indian Band v R*, 2001 FCT 480, 100 ACWS (3d) 520, Simpson J [*Squamish*].

there is external corroborating evidence and emphasize that Aboriginal communities' oral stories are passed down informally without "proper" checks and balances.<sup>36</sup> Although oral history is supposed to be on an equal footing with documents, it is not at either stage of admissibility or weight. Because most Aboriginal groups have no written records, the failure of courts to place oral history on an equal footing creates an unworkable standard of proof for Aboriginal peoples. The effect is to render Aboriginal rights as meaningless and therefore frustrate attempts at reconciliation.

II. *Positive developments in subsequent case law applying Aboriginal peoples' oral histories as evidence*

1. *Courts have affirmed that Aboriginal oral testimony should be accommodated and given due weight without requiring corroborating external evidence*

In *Tsilhqot'in*, Justice Vickers discussed the history of oral stories as evidence in Canadian courts and how early case law did little to enhance Aboriginal peoples' trust within the legal system.<sup>37</sup> Chief William testified in the case that oral traditions are vital to Tsilhqot'in society, as the stories are told and retold at camps, gatherings, and at home.<sup>38</sup> Justice Vickers noted that many of the oral traditions he heard were woven with history, legend, politics, and moral obligations, presented a "marked departure from court's usual fare and [posed] a challenge to the evaluation of the entire body of evidence."<sup>39</sup> He stated that the objective truth was more elusive with oral evidence. He accepted an anthropologist, Jan Vansina, as an expert on oral tradition as well as an anthropologist and ethnohistorian, Dr. von Gernet. Justice Vickers accepted Vansina's testimony that oral stories should be viewed as hypotheses given that they change through transmission.<sup>40</sup> That being said, Justice Vickers found that Dr. von Gernet was wrongly inclined to give no weight to oral tradition evidence without corroborating evidence from an outside source. Justice Vickers affirmed that the "goal of reconciliation can only be achieved if oral tradition evidence is placed on an equal footing with historical documents."<sup>41</sup>

Conversely, the plaintiff's expert, John Dewhirst, a cultural anthropologist, correctly gave oral testimony independent weight.<sup>42</sup> Justice

36. *Canada v Benoit*, 2003 FCA 236, leave to appeal to SCC refused, [2003] SCCA No 387 [*Benoit*].

37. *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700, aff'd on other grounds 2012 BCCA 285, rev'd on other grounds 2014 SCC 44 [*Tsilhqot'in*].

38. *Ibid* at para 145.

39. *Ibid* at para 137.

40. *Ibid* at para 147.

41. *Ibid* at para 152.

42. *Ibid* at para 159.

Vickers emphasized Dewhirst's findings that the Tsilhqot'in method of oral transmission reflects their non-hierarchical society with no formally recognized experts. This informality did not detract from the weight of the oral testimony.<sup>43</sup> Justice Vickers concluded that the Lhin Desch'osh, a central Tsilhqot'in myth, demonstrated the Tsilhqot'in people's territorial familiarity with the land prior to European contact.<sup>44</sup> He admitted all of the evidence, as it remained consistent.<sup>45</sup> He noted that he would consider it from the Aboriginal peoples' perspective, but that if it was insufficient on its own to reach a conclusion of fact, anthropological, archeological, and other documentary evidence would be necessary to corroborate it. In the end, Justice Vickers did not make a declaration of Aboriginal title, but he did find that title existed in large portions of the claimed territory and that the Tsilhqot'in had rights to hunt and trap that were infringed unjustifiably by the province.

In *Jacobs*, Justice Macaulay found that the *Customs Act*<sup>46</sup> and the *Excise Act*<sup>47</sup> did not exhibit a clear and plain intent to extinguish the Aboriginal right to obtain tobacco for uses integral to Sto:lo society.<sup>48</sup> The Sto:lo elders claimed that they had an unextinguished right to trade goods, including tobacco, across the Canadian border without conforming with customs regulations.<sup>49</sup> Their oral testimony was that tobacco use and trade were central to the band's culture and traditions before European contact. Justice Macaulay highlighted the significant limitations of oral history including reliability concerns about recollection of information obtained and observed many decades ago, and European cultural and legal influences that came into play post-contact and altered or obliterated aspects of pre-contact culture.<sup>50</sup>

However, Justice Macaulay was persuaded by the oral testimony and stressed that it must be accommodated and given due weight without applying evidentiary principles too strictly.<sup>51</sup> He highlighted that it was legitimated through the process of "oral footnoting" wherein there must be respect accorded by the community to elder speakers and their lineage back to the story's source.<sup>52</sup> The community controlled for the stories' accuracy

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43. *Ibid* at para 167.

44. *Ibid* at para 175.

45. *Ibid* at para 196.

46. *Customs Act*, RSC 1985, c 1.

47. *Excise Act*, RSC 1985, c E-14.

48. *R v Jacobs*, [1999] 3 CNLR 239 at para 110, [1998] BCJ No 3144 (SC) [*Jacobs*].

49. Macaulay, *supra* note 17 at ch 9.4(d)(iv) at 9-37.

50. *Jacobs*, *supra* note 48 at para 9.

51. *Ibid* at para 84.

52. *Ibid* at para 57.

by not inviting a speaker back at a future public gathering if he or she did not provide proper footnoting. Justice Macaulay noted that the legends were accurate, as grandparents passed them on to their grandchildren, with the telling of the story stopping after the child fell asleep and continuing the following night until the child could recall the story comprehensively.<sup>53</sup>

In *Callihoo*, Justice Hillier dismissed the Crown's motion to strike the pleadings based on a lack of documentary evidence.<sup>54</sup> The Aboriginal plaintiffs claimed that their treaty and *Charter* rights were violated. Justice Hillier held that the lack of documentary evidence was not fatal to an Aboriginal claim where oral testimony was relied on to prove that the plaintiffs had an unbroken ancestry.<sup>55</sup> He cited *Delgamuukw* and *Mitchell* for the principle that: "oral history may be important to enable the Court to reach conclusions about the intentions of the Indians."<sup>56</sup> Justice Hillier highlighted the importance of revealing the Aboriginal context to documentary and oral history. Respect for the Aboriginal perspective is critical to reconciliation.

These cases demonstrate that courts are being more flexible when it comes to Aboriginal peoples' oral evidence within evidence law. Oral stories do not require corroborating documents. There is a recognition that there are checks and balances within Aboriginal groups with respect to the reliability of oral stories, as the stories are told constantly and checked for accuracy at public gatherings. This flexibility is what the SCC intended when it spoke to placing Aboriginal peoples' oral history evidence on an "equal footing" with documents in *Delgamuukw* in order to take meaningful steps towards reconciliation.

2. *Courts have emphasized that Aboriginal peoples' oral testimonies must be respected to be able to hold federal and provincial governments accountable in Aboriginal rights cases*

In *Wesley*, the issue was whether historical facts were the unique province of historical experts in an Aboriginal rights case.<sup>57</sup> Canada's representative was examined, but Canada objected to questions put to him on the basis that the questions required speculative interpretation of a document. Canada and Alberta contended that the questions would require the representative to "speak about history beyond living memory and to provide what they maintain is an opinion on historical matters, the latter within the sole

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53. *Ibid* at para 58.

54. *Callihoo v Canada (Indian Affairs and Northern Development)*, 2003 ABQB 1044 [*Callihoo*].

55. Woodward, *supra* note 11, at ch 20.4(b.1) at 402.16.

56. *Callihoo*, *supra* note 54 at para 31.

57. *Wesley First Nation v Alberta*, 2015 ABCA 76 [*Wesley*].

province of an expert.”<sup>58</sup> However, the Court emphasized that the rules of evidence are relaxed for Aboriginal rights cases following *Mitchell*.<sup>59</sup> The Court held that a lay or government representative can be questioned about historical documents.<sup>60</sup> It reasoned that “since most aboriginal law cases present broad historical aspects, to adopt [the government’s] position would effectively render oral discoveries useless in cases dealing with aboriginal rights and treaty rights.”<sup>61</sup>

In *Ahousaht*, there was a *voir dire* on the admissibility of oral evidence.<sup>62</sup> Canada defended that the plaintiffs’ witness, Victoria Wells, who gave oral evidence was unreliable because she could not identify the source of each piece of information she testified to and because of how she educated herself in the Ehattesaht history, culture, and traditions.<sup>63</sup> Wells was the band manager of the Ehattesaht First Nation in the 1990s but had picked up knowledge from her previous schooling in Vancouver and from books that she had read. Justice Garson found her oral testimony admissible, as the “fact that some living people contributed to her general knowledge does not...render inadmissible all her knowledge where she cannot attribute certain knowledge to one particular source.”<sup>64</sup> Justice Garson concluded that these concerns were more appropriately focused on weight, not admissibility. Thus, Justice Garson did not view written sources of information as tainting the reliability of knowledge gained through oral sources.

This line of cases properly treats Aboriginal peoples’ oral stories as historical documents. In doing so, the courts hold the federal and provincial governments more accountable in Aboriginal and treaty rights cases. The witness’s testimony needs only be reasonably reliable pursuant to *Mitchell*. Further, this is consistent with *Hirsch* in that concerns about the source of the oral testimonial evidence should go to weight, not admissibility. Authentication should remain a low threshold requiring only minimal evidence, as it does in the case of written historical documents. Lastly, these cases are realistic in recognizing that there has been substantial interaction between Aboriginal and non-Aboriginal peoples but that this does not undermine the reliability of the Aboriginal peoples’ perspective.

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58. *Ibid* at para 10.

59. *Ibid* at para 9.

60. Imai, *supra* note 24 at 968.

61. *Wesley*, *supra* note 57 at para 12.

62. *The Ahousaht v Canada (AG)*, 2008 BCSC 769 [*Ahousaht*].

63. *Ibid* at para 11.

64. *Ibid* at para 17.

3. *The process for admission of oral history evidence in Aboriginal title cases is more informal and a voir dire is not required*

In *William*, the defendants objected to the admission of Tsilhqot'in and Xenigwet'in oral history evidence in an Aboriginal rights and title claim without a process that would inquire into their admissibility and reliability.<sup>65</sup> The oral stories related to genealogy, past practices, and customs. Justice Vickers rejected BC's application to have a *voir dire* to determine the evidence's admissibility.<sup>66</sup> He emphasized the plaintiff's affidavit evidence of John Dewhirst, an anthropologist and archaeologist, and was persuaded by Dewhirst's evidence that the Tsilhqot'in people are reluctant to give oral history unless they are confident they can accurately recount the event.<sup>67</sup> Justice Vickers noted that trial judges have discretion to order inquiries into the reliability of the witness.<sup>68</sup> He substituted an informal process wherein the court could test reliability in order to more effectively pursue the promise of reconciliation under the *Constitution Act, 1982*, s 35(1).<sup>69</sup> This would involve a preliminary examination of the witness regarding<sup>70</sup>:

- (a) Personal information concerning the attributes of the witness relating to his or her ability to recount hearsay evidence of oral history, practices, events, customs or traditions.
- (b) In a general way, evidence of the sources of the witness, his or her relationship to those sources and the general reputation of the source.
- (c) Any other information that might bear on the issue of reliability.

Justice Vickers continued that this would not be an "elaborate" procedure.<sup>71</sup> He concluded that the weight of such oral testimonial evidence can always be debated in closing arguments. His approach is generally consistent with how documents are authenticated and that questions regarding authenticity can always be brought forward at the next stage of weighing the evidence. Justice Vickers' decision is important for reconciliation purposes because a more informal process to test the reliability of oral history can make such evidence more commonplace and acceptable. By not distinguishing oral tradition evidence from other hearsay evidence so formally, courts can make the notion of oral history

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65. *William et al v British Columbia et al*, 2004 BCSC 148 [*William*].

66. Woodward, *supra* note 11, at ch 20.4(b.1) at 402.16.

67. *William*, *supra* note 65 at paras 7-9.

68. *Ibid* at para 10.

69. *Ibid* at para 16.

70. *Ibid* at para 28.

71. *Ibid* at para 29.

evidence in the legal system a less “foreign” idea. Justice Vickers’ approach to analyzing oral history for necessity and reliability is similar to the procedures in other cases involving non-Aboriginal peoples’ evidence. This consistency establishes oral history as having more of an equal footing with written documents, which in turn promotes reconciliation.

### III. *The limits to acceptance of Aboriginal peoples’ oral history evidence*

#### 1. *Aboriginal peoples’ oral histories are more likely to be admissible when the opposing party does not provide contradictory documentary evidence*

In *Sappier*, Justice Bastarache held that an Aboriginal right to harvest wood for domestic uses on Crown lands by the Pabineau Nation existed.<sup>72</sup> A Mi’kmaq elder and historian, Mr. Sewell, had been declared an expert by the trial judge on oral customs passed down through generations on the issue of gathering wood by Mi’kmaq on the lands. Mr. Sewell concluded that “[s]o, as far back as I can read in history or the oral tradition that has been passed down to me, it’s been—we’ve been always gathering and we’ve been always using wood as, as, as a way of life.”<sup>73</sup> His evidence detailed the many uses to which wood was put by the Mi’kmaq. This was proof that harvesting wood for domestic uses was integral to the Mi’kmaq’s pre-contact way of life. Justice Bastarache emphasized multiple times that Mr. Sewell’s evidence was not contradicted by the Crown on cross-examination or by other documentary evidence.<sup>74</sup> The problem with this type of reasoning is that it discredits oral history evidence to an extent because it implies that had contradictory documentary evidence been presented, the oral history is much less likely to be found admissible. The analysis maintains a Eurocentric perspective on evidence, which mitigates the potential for reconciliation to be transformative and comprehensive.

#### 2. *Oral evidence is admissible to prove genealogy, but is not given much weight*

Courts have typically allowed Aboriginal parties to use oral evidence to prove genealogy.<sup>75</sup> In *Wilson*, Justice Sigurdson cited *Delgamuukw* for the principle that oral histories should not be undervalued.<sup>76</sup> The appellant applied to be registered as an Indian under the *Indian Act*,<sup>77</sup> and

72. *R v Sappier; R v Gray*, 2006 SCC 54 at para 53 [*Sappier*].

73. *Ibid* at para 31.

74. *Ibid* at paras 15, 29.

75. Macauley, *supra* note 17 at ch 9.4(d)(i) at 9-29.

76. *Wilson v Indian Registry (Registrar)* (1999), 71 BCLR (3d) 145 at para 29, 92 ACWS (3d) 556 (SC) [*Wilson*].

77. *Indian Act*, RSC 1985, c I-5 [*Indian Act*].

presented oral history concerning his paternal heritage. Justice Sigurdson held that a registrar of the Indian Registry should not require independent confirmation of oral history evidence pertaining to relevant historical facts before giving it weight. Therefore, the registrar erred because she had required independent corroboration of the applicant's oral history evidence showing that his great-great-grandfather lived and died in the area of the Penelakut Tribe.<sup>78</sup> The matter was remitted for reconsideration.

Although generally admissible to prove genealogy, oral stories may not be given much weight. In *Snake*, Justice Gibson highlighted that the evidentiary concerns about Aboriginal oral stories from *Delgamuukw* and *Mitchell* applied to both admissibility and weight.<sup>79</sup> He admitted most of the plaintiffs' oral history evidence regarding ancestry as reliable, particularly where he had the opportunity to observe the witness's demeanour in testimony.<sup>80</sup> However, the testimony of one witness was not admissible. Justice Gibson found that witness's evidence unreliable because he learned much of the information about family history from an elderly historian, who was not before the court and could not be evaluated.<sup>81</sup> Overall, little weight was attributed to the admitted oral testimonies and the plaintiffs failed to show that they were direct descendants in unbroken lines of Band members. Justice Gibson distinguished *Delgamuukw* because "precise historical accuracy" was important whereas in *Delgamuukw* it was about broad and general considerations.<sup>82</sup> The problem with this distinction is that it makes oral history a type of second-class evidence. Unlike with written documents, oral history evidence has value only in limited contexts, which frustrates the objective of reconciliation.

### 3. Courts struggle with how much weight to give oral testimony

In *Ironeagle*, the Aboriginal defendants were charged with marketing fish.<sup>83</sup> Much of their defence was based on oral history. Justice Moxley noted that while such evidence is routinely accepted as admissible and as an exception to the hearsay rule, judges struggle with how much weight to attribute to it.<sup>84</sup> He decided that the oral evidence at hand was admissible, but that it should not be given any weight. Justice Moxley noted that a party seeking to rely on oral testimony evidence must show that the witnesses

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78. *Wilson*, *supra* note 76 at para 48.

79. *Snake v The Queen*, 2001 FCT 858 at para 54, 209 FTR 211.

80. *Ibid* at para 57.

81. *Ibid* at para 58.

82. *Ibid* at paras 51-52.

83. *R v Iron eagle* (1999), 186 Sask R 131, [2000] 2 CNLR 163 (PC) [*Ironeagle*].

84. *Ibid* at para 3.

providing it are members of a culture that kept no written history.<sup>85</sup> He continued that the evidence must raise facts that are sought to be proven, rather than being simple anecdotes.<sup>86</sup> The defendant needed to raise more specific evidence regarding the Pasqua Cree for the judge to find that the Pasqua Lake was part of the Pasqua Reserve.<sup>87</sup>

In *Squamish*, the plaintiff Squamish, Musqueam, and Burrard bands alleged that the federal government breached its fiduciary duty to them by improperly allocating a property on its reserve, mismanaging the reserve, and surrendering the reserve when it should have been leased over the long term.<sup>88</sup> Justice Simpson distinguished the Aboriginal and treaty cases like *Delgamuukw*, where broad questions covering a long time period were at issue, compared to the case at hand where factual determinations had to be made about events at specific periods of time.<sup>89</sup> She found that the oral evidence was directed at precise historical truths at given dates and places, it was not the only available evidence on the issue, and it was sometimes contradictory.<sup>90</sup> Consequently, because precise historical accuracy was at issue on narrow, specific questions, the weight given to the oral testimony was reduced. Furthermore, Justice Simpson noted that in determining oral testimony evidence, several factors should be considered: competing oral history, documentary evidence, any external corroboration, the source of the information, and changes that could have distorted the evidence.<sup>91</sup>

Here, there are cracks in the application of the *Mitchell* test. The courts are being very strenuous on the reasonable reliability component of admissibility, especially in genealogy cases. Courts are also giving oral testimonial evidence lesser weight than other documents because they believe they lack precise historical accuracy. Justice Gibson's and Justice Simpson's distinction that the oral evidence in *Delgamuukw* was merely for broader general purposes related to Aboriginal rights undermines the value of oral history in other contexts. Courts can simply reframe their cases as requiring precise historical accuracy to minimize the weight of Aboriginal peoples' oral history evidence. Moreover, allocating zero weight to Aboriginal peoples' oral testimony, as Justice Moxley did in *Ironeagle*, makes the evidence meaningless and *de facto* inadmissible. Increased judicial training on oral history and the appointment of more

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85. Woodward, *supra* note 11, at ch 20.4(b.1) at 402.15.

86. *Ironeagle*, *supra* note 83 at para 10.

87. *Ibid* at para 11.

88. *Squamish*, *supra* note 35.

89. *Ibid* at para 32.

90. *Ibid* at para 36.

91. *Ibid* at para 40.

independent experts could help judges to overcome these Eurocentric biases. Greater education of lawyers through provincial law societies may also assist courts to appreciate the value of oral history in the reconciliation process.

4. *Written records often convince courts more than oral evidence does*

In *Marshall*, Justice Curran found “the massive written record...far more convincing than the minimal oral evidence.”<sup>92</sup> Chief Augustine, an Aboriginal history researcher and acting Curator of Eastern Maritime Ethnology at the Canadian Museum of Civilization in Hull, Quebec, had testified about Mi’kmaq oral tradition. Justice Curran found that he was qualified to testify. Chief Augustine testified about stories passed down to him by his family, including one about an ancient connection between the Mi’kmaq and their territory as well as the ancient roots of the seven districts into which that territory is divided, passed on to him by his grandmother when he was young. He told the story at Grand Council meetings.

Chief Augustine also testified that a wampum belt at the Vatican Archives was a representation linking the Mi’kmaq with Christianity in the early 1600s, but the Crown’s witness Dr. von Gernet found conclusive evidence delinking the belt to Nova Scotia or the Mi’kmaq. As a result, Justice Curran considered that error in weighing Chief Augustine’s other evidence.<sup>93</sup> Dr. von Gernet testified that Aboriginal peoples’ memories are not biologically superior to those of non-Aboriginal peoples and that there was a lack of training and group validation used by Chief Augustine and the Mi’kmaq to improve the accuracy of the oral traditions. Justice Curran then cited from *Delgamuukw* that oral tradition was not better than documentary evidence and that the smallest amount of oral tradition by a single witness should not be accepted over a mountain of documentary evidence.<sup>94</sup> He also reasoned that he did not know whether Chief Augustine’s testimony was influenced by his own literacy or that of his forebears compared to the 1700s British and French documents containing no evidence of seven districts or a ground council.

In *Benoit*, Justice Nadon overturned the trial judge’s finding that oral traditions showed that the Cree and Dene peoples believed that a tax exemption promise had been made by the Crown even though the treaty was silent on taxation.<sup>95</sup> Justice Nadon concluded that the hearsay nature

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92. *R v Marshall*, 2001 NSPC 2 at para 65, [2001] 2 CNLR 256, aff’d on issue at 2005 SCC 43 at paras 120-125.

93. *Ibid* at para 61.

94. *Ibid* at para 64.

95. *Benoit*, *supra* note 36.

of the oral evidence was unreliable. He reasoned that the trial judge had crossed the line *Mitchell* warned about in being overly generous with oral history and artificially giving it more weight than it reasonably supports.<sup>96</sup> He stressed that evidence creating suspicion, surmise, or conjecture is insufficient.<sup>97</sup> Justice Nadon rejected the trial judge's community standard test to determine whether oral evidence is useful and reliable, and stated that an objective standard must be used.<sup>98</sup> The community's perspective can be a relevant factor, but not determinative. Justice Nadon stated that the evidence was not reliable because it lacked the checks and balances in *Delgamuukw* where specially-appointed people at community events told the oral stories and their authenticity was ensured because others could object if the stories were told inaccurately.<sup>99</sup> Here, the stories were passed on informally from individual to individual. Moreover, Justice Nadon quoted Dr. von Gernet, the Albertan anthropologist, who strongly criticized the weight of Aboriginal oral stories because Aboriginal peoples have no special memories compared to non-Aboriginal peoples.<sup>100</sup>

Thus, courts have signalled that they typically prefer written documents over oral history. Aboriginal oral history evidence is more likely to be ruled admissible and given more weight when the opposing side does not contradict it with written documentary evidence. However, when conflicting written documents are in evidence, oral history evidence is given far less weight. The standard to assess the weight of oral evidence also increases when there are conflicting written documents.

Courts heed the warning from *Delgamuukw* to not be overly generous towards Aboriginal peoples' oral evidence. But they have gone too far in that direction. The low standard for authenticity is being raised with respect to the reliability of the sources of oral histories. This has spilled over too much into the weighing of such evidence. It has led some courts, such as in *Benoit*, to follow experts like Dr. von Gernet who argue that Aboriginal peoples' oral history evidence is unreliable because it is too informal. These were the exact stereotypes that *Delgamuukw* tried to break when placing Aboriginal peoples' oral stories on an "equal footing" with documents. These limitations on the use of oral history evidence are unwarranted given its reliability and legitimacy. They mitigate the chances for successful Aboriginal claimants, which hinders the commitment to

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96. *Ibid* at para 23.

97. *Ibid* at para 25.

98. *Ibid* at para 102.

99. *Ibid* at para 109.

100. *Ibid* at para 112.

reconcile Aboriginal peoples' perspectives with non-Aboriginal peoples' views in the legal system and the opportunity to move forward.

IV. *Courts are doing a mixed job of incorporating oral testimonial evidence within the legal system*

There are mixed results in the case law after *Delgamuukw*. Courts typically find that oral testimony evidence is admissible, but struggle with what weight to give it. Oftentimes, as in *Ironeagle*, judges will confuse the analyses and give little or no weight to such evidence because of Eurocentric concerns about admissibility. In addition, courts can easily frame cases as requiring precise historical accuracy, instead of broader questions, in order to reduce the weight given to oral testimony as in *Squamish*.

Furthermore, courts tend to favour written records when in conflict with oral testimony evidence. They are more likely to find oral testimonial evidence admissible when there is no contradictory documentary evidence presented, as in *Sappier*. Some judges even defer to anthropologists such as Dr. von Gernet, in *Benoit*, who consistently testifies for the government to the tune that Aboriginal peoples have no special memory capacities and oral testimony requires independent corroboration.

University of Victoria Law Professor Val Napoleon contends that case law involving evidence of oral histories to support Aboriginal rights claims since *Delgamuukw* has varied widely.<sup>101</sup> Napoleon argues that *Benoit* "is a chilling example of the continuing problems encountered by aboriginal claimants when tendering oral histories as evidence."<sup>102</sup> She posits that case law has become increasingly restrictive since *Delgamuukw* on accommodating Aboriginal oral histories and there has been no paradigm shift in the treatment of oral histories.<sup>103</sup>

Since Napoleon's critique that there has been no improvement since *Delgamuukw* in her 2005 article, courts have routinely found Aboriginal peoples' oral history evidence as admissible. Although they do struggle with weight, there have been numerous positive cases such as *Tsilhqot'in*, *Jacobs*, *Callihoo*, *Wesley*, *Ahousaht*, and *William*.

In discussing oral history evidence, University of Victoria Law Professor John Borrows argues that *Delgamuukw*'s caveat that reconciliation must not be done in a manner that "strains the Canadian legal and constitutional

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101. Val Napoleon, "Delgamuukw : A Legal Straightjacket for Oral Histories?" (2005) 20:2 CJLS 123 at 133.

102. *Ibid* at 133.

103. *Ibid* at 136-137.

structure” creates a major challenge for Aboriginal peoples.<sup>104</sup> This rejects the potential for legal pluralism and creates challenges for later courts applying *Delgamuukw*’s evidentiary standard. Borrows contends that the SCC’s test for oral evidence subordinates Aboriginal traditions within the common law and constitutional regime, thereby not granting it an equal footing. Oral traditions may not be respected because they are often controversial in undermining the Canadian legal system’s claim to legitimacy by shedding light on past unconscionable Crown behaviour.<sup>105</sup> Misunderstanding also stems from fundamentally differing cultural perceptions of space, time, historical truth, and causality.<sup>106</sup> In addition, the questioning of elders is often problematic because it is tantamount to discrediting their reputation and standing in an Aboriginal community. This would be akin to questioning judges in common law systems after each of their decisions.<sup>107</sup> Finally, there are few Aboriginal peoples within positions of power and the court system, further hastening linguistic, legal, and cultural differences.<sup>108</sup>

The importance of incorporating Aboriginal peoples’ oral stories as evidence cannot be understated. In *Delgamuukw*, the valuing of the “oral over the written” was essential to recognizing that Canada is a country “where there is more than one source for intellectual thought.”<sup>109</sup> The respect for oral stories as being equal to documents as evidence signalled the existence of choice and legitimate legal systems beyond the old European linear perspective. The founding part of Canada, Aboriginal peoples, have every right to their own ways of imagining civilization and this fact can help to reimagine the whole.<sup>110</sup> Oral storytelling is not only a crucial means for Aboriginal peoples to continue to build the relationship with non-Aboriginal peoples, but it also preserves and refreshes oral history that represents the communities’ institutional memory.<sup>111</sup> Retelling is central to all stories in Aboriginal communities, as stories take on their meaning through retelling. They take much of their authority from the expression

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104. John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 87.

105. *Ibid* at 88.

106. *Ibid* at 90.

107. *Ibid* at 91.

108. *Ibid* at 92.

109. John Ralston Saul, “A Different Model of the Nation-State: Canada in the World and the Aboriginal Influence” (2012) 75:1 Sask L Rev 3 at 9.

110. *Ibid* at 10.

111. Kerry Wilkins, “Reasoning with the Elephant: The Crown, Its Counsel and Aboriginal Law in Canada” (2015) 13:1 Indigenous LJ 27 at 62.

of Aboriginal voices, not just the experience of Aboriginal peoples.<sup>112</sup> As the Truth and Reconciliation Commission states, reconciliation is fundamentally about mutual respect. Therefore, incorporating Aboriginal peoples' oral stories as evidence is essential to building this respect.

V. *Aboriginal peoples' oral story evidence is reliable and authentic like written documents*

The premise that documents generally have some scientific basis is debatable. Written records may not be any more objective or inherently reliable than oral history.<sup>113</sup> The meaning of written documents must be understood in their context based on who wrote it, for whom, and why.<sup>114</sup> In fact, significant portions of documentary records began as oral history.<sup>115</sup> Written and oral history are both subject to revisions and changes over time. These changes may not necessarily reflect how interpretive transmission occurred, but rather may be due to the social and cultural context informing people who engage in such transmission.<sup>116</sup> In fact, oral traditions sometimes facilitate significant changes to the written record.<sup>117</sup>

Aboriginal oral history evidence is reliable and authentic. The risk of error due to generational transmission is low. Oral tradition is premised on fact, not imagination, and there is a fundamental necessity to accurately recount oral stories within Aboriginal communities.<sup>118</sup> Elders are the most respected members of society. They are authoritative like judges in a common law system. They carefully and deliberately pass on stories to young children until the children know these stories verbatim.<sup>119</sup> Moreover, it is often the communities, not just individuals alone, that piece together the stories in a comprehensive manner. These stories are told at ceremonial gatherings and are consistently tested for their accuracy by community members. Even in the Aboriginal groups without ceremonial gatherings, the elders are very careful about how stories are passed on to their children and grandchildren to remain accurate.

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112. J Edward Chamberlin, "Culture and Anarchy in Indian Country" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 1997) 3 at 18.

113. Russell Binch, "'Speaking for Themselves' Historical Determinism and Cultural Relativity in Sui Generis Aboriginal and Treaty Rights Litigation" (2002) 13:1 NJCL 245 at 258.

114. David Milward, "Doubling What the Elders Have to Say: A Critical Examination of Canadian Judicial Treatment of Aboriginal Oral History Evidence" (2010) 14:4 Intl J Evidence & Proof 287 at 306.

115. John Borrows, "Listening for A Change: The Courts and Oral Tradition" (2001) 39:1 Osgoode Hall LJ 1 at 15-16.

116. *Ibid* at 17.

117. *Ibid* at 19.

118. Rachel Awan, "Native American Oral Traditional Evidence in American Courts: Reliable Evidence or Useless Myth?" (2014) 118:3 Penn St L Rev 697 at 703.

119. *Ibid* at 704.

Studies have confirmed that Aboriginal oral histories provide reliable accounts of history, displaying few differences from anthropological, archaeological, or historical conclusions.<sup>120</sup> Geographers have benefited immensely from Aboriginal oral histories, for example.<sup>121</sup> Oral histories have validated earthquakes along the coast of the Pacific Northwest from hundreds of years ago and provided geographers and historiographers with additional information about the impacts of these earthquakes on humans.

Additionally, the fact that oral stories may contain references to terms that are not in written treaties does not mean that those references are inaccurate. Instead, they may be representations by Crown officials during negotiations, which the Crown decided to not write down for its own advantageous strategic purposes.<sup>122</sup>

However, in making distinctions between precise historical accuracy and generalized events, courts have viewed Aboriginal oral stories as primarily describing generalized events and group opinions. This does not sufficiently respect Aboriginal peoples' oral stories as reliable or authentic and differs from using them to ascertain the truth about actual facts and events.

*Conclusion: greater acceptance of oral history evidence is fundamental to reconciliation*

Evidence law has become increasingly flexible in incorporating Aboriginal peoples' oral history. Oral history evidence is typically accepted as admissible and it has great weight when there is no contradictory documentary evidence brought by the government or the opposing party. Courts have affirmed that corroborative external evidence is not required to give it weight and that to maintain a flexible approach towards oral history is essential to holding governments accountable in Aboriginal rights cases. In addition, the process for accepting oral history evidence in Aboriginal title cases is relatively informal and does not require a *voir dire*.

However, overall, to achieve long-term, meaningful reconciliation between Aboriginal peoples and non-Aboriginal peoples, oral history should be given more weight by the courts. The adversarial system presupposes that parties have relatively equal bargaining power, but this is not true in most Aboriginal rights claims. The state has vast resources compared to most Aboriginal claimants. Thus, to favour written documents over oral history when they conflict only multiplies the unfairness within the system. Moreover, courts should not be so quick to reframe cases as

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120. Milward, *supra* note 114 at 288.

121. *Ibid* at 309.

122. *Ibid* at 289.

requiring precise historical accuracy to reduce the weight of oral history evidence. Furthermore, they should not rely on experts like Dr. von Gernet who contend that oral history evidence is unreliable without external corroborative evidence. This is exactly what courts have rejected after *Delgamuukw*, at least in principle.

University of Victoria Law Professor, David Milward, proposes several other solutions to these problems including the education of judges on the accuracy and reliability of oral history evidence, increased judicial notice of historical facts and geography, expanded inference for treaty terms not in the text of the treaty, and appointing more independent experts.<sup>123</sup> In particular, court-appointed experts could have an open dialogue with Aboriginal oral historians to move towards the truth. They would also avoid the problems associated with partisan experts who have interests to advocate for the party that is paying their fees.<sup>124</sup> However, experts selected by the court should be open-minded and aware of the legitimacy and reliability of oral history evidence. Furthermore, judicial education could include more than just basic seminars organized by the National Judicial Institute of Canada on Aboriginal law, which include oral history evidence as small components.<sup>125</sup> Inviting Aboriginal law scholars to lead the seminars is a positive step. Incorporating Aboriginal lawyers and elders to speak about their experiences would also provide necessary context for and knowledge regarding the consistent tests for accuracy of oral stories in Aboriginal communities.

Successful Aboriginal title claims, such as *Tsilhqot'in*, are critical to reconciliation. They help to change the narrative and facilitate the reimagining of the Canadian system. Underlying reconciliation is mutual respect. This involves breaking down Eurocentric notions about Aboriginal peoples. It also implies greater respect for and deference to oral history evidence within the courts.

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123. Milward, *supra* note 114 at 288-289.

124. *Ibid* at 324.

125. *Ibid* at 313.