Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition as Evidence in *Delgamuukw v. B.C.*

JULIE CRUIKSHANK

In the case of *Delgamuukw v. B.C.*, three anthropologists were among the witnesses asked to provide expert testimony. One purpose of their evidence was to provide the court with a minimal context for understanding how indigenous oral traditions demonstrate Aboriginal land ownership in northwestern British Columbia. Chief Justice Allan McEachern overwhelmingly rejected the evidence from anthropology. Then he went on to invent his *own* anthropology, proposing it as a framework for assessing evidence presented by Gitksan and Wet'suwet'en hereditary chiefs.[1]

Richard Daly, Antonia Mills, and Hugh Brody were the anthropologists who individually prepared detailed testimony. Each was cross-examined at length in court. The judge provided no serious discussion of either their written evidence or their sworn testimony; in fact, only Daly's evidence receives more than a sentence in the final judgment. The judge offers two complaints about Daly's evidence: first, that he shows bias because he cites the Statement of Ethics of the American Anthropological Association[2] and, secondly, that his evidence is "exceedingly difficult to understand" (McEachern: 51). Mills is likewise dismissed as being too closely identified with the plaintiffs and, for no apparent reason, Brody seems to have dropped out of the judgment entirely. In this way, more than 1,000 pages of written evidence and of three weeks' cross-examination are dismissed without further reference.

[1] Like many other observers of the courtroom drama, I am alarmed by the way principles of anthropology are distorted in the judgment. And like others who are contributing to this volume, I feel that some response to the decision is needed and offer this paper as commentary rather than as a fully developed research paper. Analysis of oral traditions actually presented as evidence to the court has been made by others more familiar with Gitksan and Wet'suwet'en histories. I thank Dara Culhane, Bob Galois, and Virginia Appell for comments on an earlier draft of this paper.

[2] This code, which was presumably agreed upon by a significant majority of North American professional anthropologists, states that "in research, an anthropologist's paramount responsibility is to those he studies. When there is a conflict of interest, these individuals must come first. The anthropologist must do everything in his power to protect their physical, social and psychological welfare and to honour their dignity and privacy." (cited in McEachern: 50).

The judge then goes on to invent his own anthropology which can be summarized briefly because, unlike Dr. Daly's submission, it is not complex. Its *foundation*, rooted in nineteenth century positivism, is a simplistic progressive evolutionary model with his own society occupying the apex and hunting societies occupying "a much lower, even primitive order" (McEachern: 31). Its *object* is his searching inquiry about the nature of society (which provides little cause for optimism, based as it is in speculations about the nature of "primitive society"). Its *evidence* comes from his comparison of written archival documents with the oral traditions presented by Gitksan and Wet'suwet'en hereditary chiefs.

Ultimately, Justice McEachern also dismissed the oral traditions he heard from hereditary chiefs as inadequate to meet the demands of the court. In his *Reasons for Judgment*, he stated that "much evidence must be discarded or discounted not because the witnesses are not decent, truthful persons but because their evidence fails to meet certain standards prescribed by law" (McEachern: 49). Later he added more specifically, "I am unable to accept adaawk, kungax and oral traditions as reliable bases for detailed history but they could confirm findings based on other admissible evidence" (McEachern: 75).

The thesis advanced in the following pages is that the court's decision to present and evaluate oral tradition as positivistic, literal evidence for "history" is both ethnocentric and reductionist, undermining the complex nature of such testimony because it fails to address it on its own terms. The paper begins by examining how the judge ignores established bodies of knowledge in his invention of anthropology. It then examines specific applications of his invented anthropology — first his evaluation of what constitutes "evidence," and then his evaluation of why oral tradition fails to meet his criteria. Finally, it shows how current anthropological approaches to the understanding of oral tradition contrast strikingly with those offered in the judgment.

The Anthropology of Judge McEachern

The anthropology articulated by Justice McEachern does not emerge from a void; he begins with some of the same questions and prejudices that were pivotal in the development of anthropology more than a century ago. It is worth briefly summarizing the directions the discipline has taken in the intervening century to show both how profoundly the debate has changed and how the judge ignores established bodies of knowledge and methods of inquiry.

Academic anthropology is undeniably the product of a western intellectual tradition, bringing with it all the problems inherent in attempts to objectify knowledge. Notably, it emerged in opposition to the certainty of nineteenth century Christian doctrine: by the mid 1800s, archaeological discoveries were posing challenges to beliefs about a single creation and the fixity of species, and colonial voyages were crossing and recrossing oceans, returning with accounts about varieties of ways of being human.

Radical though it seemed at the time, nineteenth century anthropology was embedded in its own cultural premises, particularly the assumed cultural superiority of the observer. Victorian anthropologists constructed a pyramidal evolutionary model with their own culture occupying the apex and all others ranked on an ascending scale from hunting to farming to industrial society. The assumption that non-industrial societies were inevitably destined to ascend that pyramid was implicit.

But by the turn of the century, the contradictions inherent in this paradigm were clear and it was being rapidly dismantled. Franz Boas and others challenged evolutionary models of culture by shifting their focus to the investigation of customs in their historical context without reference to any universal standard. Attention shifted to detailed ethnological studies of small-scale societies, often described with scant reference to the larger world economy in which they were embedded. During the 1950s anthropologists once again began paying considerable attention to developing worldwide, comparative, cross-cultural typologies of social institutions with the objective of testing hypotheses about social organization. A post-war emphasis on "modernization" led to predictions that small-scale societies would inevitably be swallowed up by national industrial economies, and during the 1960s an acculturation model came to dominate much of the literature. A decade later, though, indigenous peoples were becoming more vocal about their own views of their society. Many, like the Gitksan and Wet'suwet'en chiefs, argue that theirs are not societies on an inevitable treadmill to industrial society but societies strongly committed to maintaining aspects of their ways of life. Across northern Canada, attention to land claims issues has sparked a corresponding anthropological interest in documenting cultural *persistence* (Feit 1982; Asch 1982). Aboriginal societies seem not to be vanishing after all, despite earlier prognoses. Anthropology has contributed to the documentation of that persistence.

Anthropology continues to grapple with controversial questions about the role of environment, of history, of power relations, of symbolism, of language in human social organization. If anthropology can claim one general accomplishment, it is to have proven the inadequacy, the flawed

premises, the racism inherent in models that attempt to rank cultures hierarchically or to claim superiority for one's own culture. Simple evolutionary models are an artifact of the past, or so we tell students when we discuss such models in introductory anthropology classes by way of demonstrating their inadequacies. Models of unlineal progressive evolution, we like to say, are fossils laid to rest and useful only as a reference point to demonstrate the evolution of a *discipline*, rather than the evolution of societies. How startling, then, when this century-old paradigm appears, resurrected as a cornerstone of the Gitksan and Wet'suwet'en land claims judgment, restated as the "common sense" of twentieth century jurisprudence.

A critical issue for the judge centres on the definition of social organization (McEachern: 45-52). The judge's struggle with the concept of "organized society" neatly side-steps the puzzling issue of what an *unorganized* society might look like, and once again his understanding is guided by a nineteenth century evolutionary paradigm. It is unclear why the plaintiffs are expected to prove that they were an organized society in the first place, since land claims negotiations occurring across Canada take social organization to be a given rather than at issue; however, the judge certainly pursues his question vigorously. In court, the Province of British Columbia consistently argued that the Gitksan and Wet'suwet'en were *not* sufficiently organized prior to contact with Europeans to have concepts of land ownership, and that social organization came hand in hand with the fur trade. The judge appears to take this argument seriously.

Justice McEachern uses the term "primitive" with remarkable unself-consciousness when he refers to Aboriginal social organization. The criteria he uses to evaluate levels of social organization are eclectic but clear, and he repeats them several times lest there be any doubt: writing, the wheel, and the horse.[3] He concludes his summary of Part 2 of his judgment with the now infamous words that "there is no doubt, to quote Hobbs [*sic*], that aboriginal life in the territory was, at best, 'nasty, brutish and short.'" (McEachern: 13).

In this formulation, the judge resurrects an idea widespread in nineteenth century England that hunting peoples' progress to what Europeans

[3] The judge restates this on three separate occasions: "The plaintiffs' ancestors had no written language, no horses or wheeled vehicles" (McEachern: 13). A few pages later, "the evidence suggests that the Indians of the territory were, by historical standards, a primitive people without any form of writing, horses or wheeled wagons" (McEachern: 25). And again, "the absence of any written history, wheeled vehicles, or beasts of burden ... suggest the Gitksan and Wet'suwet'en civilizations, if they qualify for that description, fall within a much lower, even primitive order" (McEachern: 31).

called "civilization" would be hastened if they could be encouraged to give up nomadic lifestyles and made initially to farm and ultimately to become part of an urban, industrial labour force. The features he relies on — wheels, beasts of burden, and written language — are all cultural features signifying the emergence of cities in Mesopotamia, Egypt, and Central America (the very word "civilization" stemming from the Latin "cives" or "city"). The application of these criteria to societies in resource-rich northwestern North America, where annual salmon runs provided an economic base probably both more reliable and more productive than agriculture, is unclear.[4] The testimony of Arthur Ray, cited in the judgment, notes that "the people (on the middle and upper Skeena) subsisted largely off their fisheries which, with about two months of work per year, allowed them to meet most of their food needs" (cited in McEachern: 73).

Now, as then, this emphasis on the "civilizing" influence of agriculture has continued to serve the interests of colonial expansion. Throughout history, agrarian ideology has been used to justify the repression of other ways of life in the service of expanding cities eager to tap the resources of the hinterland. It does this by promoting perceptions of emptiness and marginality. Showing a tendency to repeat points he considers significant, the judge affirms this "emptiness" of lands claimed by the Gitksan and Wet'suwet'en, thereby dismissing their claims that these territories were and continue to be owned and used. In his judgment, he notes: "The total territory is a vast, almost empty area . . ." (McEachern: 11); "the most striking thing one notices in the territory . . . is its emptiness" (McEachern: 12); and, again, "the territory is, indeed, a vast emptiness" (McEachern: 12).

It is clear that the judge's evaluations of social organization use a normative model. He questions the relationship between normative rules and objective behaviour, taking variety of behaviour as evidence that rules are absent. The judge concludes that "there are far too many instances disclosed in the evidence where the Indians themselves did not act in accordance with the crest system for me to elevate it to the high levels attempted at trial" (McEachern: 31). Here, he seems to demand of the Gitksan and Wet'suwet'en a rigorous conformity that he would scarcely expect to find in his own society, possibly because of an assumption that

[4] Aboriginal North Americans, in fact, regularly confounded western academics on this issue of the primacy of agriculture over hunting: numerous Plains tribes actually gave up settled agricultural life for the risky, but presumably more interesting, hunting life after the introduction of the horse (which Justice McEachern conflates with the notion of "civilization") (see Strong 1933; Hoebel 1960, 1977; Oliver 1962).

often accompanies the evolutionary model, that Aboriginal communities somehow are, or should be, homogeneous in behaviour and ideas.

A basic principle in social science suggests that all societies enunciate rules about ideal behaviour that may be generally shared but not necessarily followed in every instance; that, in fact, social organization is usually riddled with contradiction, that people are quite likely to say one thing and do another, and that rules are confirmed as much in the breach as in the enactment. Far from negating the social reality of rules, challenges to those rules actually demonstrate their validity. To cite an example more familiar to the courts, robbing a bank sets in motion a performance of law to demonstrate the rule, "bank robbing is forbidden." It is by experimenting with rules that the rules become clear.

Justice McEachern ultimately concludes that the Gitksan and Wet'suwet'en had social organization of some kind but finds no proof that they had "institutions and governed themselves" or that they had occupied territories for a period of time long enough to establish Aboriginal rights (McEachern: 49, 226). In order to buttress the argument which he claims to offer *in support of* social organization, he turns not to social sciences but to a 1919 legal decision made by the Judicial Committee of the Privy Council in England with respect to a case heard in the courts in Rhodesia. That decision concluded that "some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society" (McEachern: 226). "I have no doubt," Judge McEachern states, referring to the Gitksan and Wet'suwet'en, that "life in the territory was extremely difficult, and many of the badges of civilization, as we of European culture understand that term, were indeed absent...." (McEachern: 31). Citing no evidence, he speculates that "warfare between neighbouring or distant tribes was constant, and the people were hardly amenable to obedience to anything but the most rudimentary form of custom" (McEachern: 73).[5] Given the judge's dismissal of anthropological evidence, it is alarming to see him turn to decisions justifying apartheid or to his imagination for examples from which to frame his judgment.

On balance, though, the judge accepts the argument (which he tried to dignify with the term the "borrowing theory" [McEachern: 32]) advanced by the Crown's witness, Sheila Robinson, that social relations surrounding land tenure and resource management diffused along with

[5] The manner in which the judge relies selectively on oral tradition to formulate his conclusions about warfare is discussed later in this paper in the section discussing how he evaluates oral traditions and written records (see especially page 36).

European trade goods from Europeans to the Gitksan and then, through trade, from Gitksan to Wet'suwet'en (see Culhane, this volume, for further discussion of this point). Again, this neatly fits an evolutionary paradigm, theoretically laying the groundwork for assumptions about the inevitable diffusion of European cultural forms.

Evaluating Evidence: When Documents "Speak for Themselves"

The Gitksan and Wet'suwet'en claim ownership and jurisdiction over specific areas of land, and make this claim under the authority of their House and clan system. There are four Gitksan clans and five Wet'suwet'en clans, and each clan encompasses a number of Houses.[6] Each House group provides the locus of land and resource ownership. Territorial ownership is expressed and validated through the performance of oral histories and traditions at feasts (see Gisday Wa and Delgam Uukw: 24-32 for a detailed discussion of this).

The judge agreed, after some consideration, that oral traditions presented by hereditary chiefs would be heard as actual evidence, and that these traditions were not limited by the hearsay rule (McEachern: 46, 57). For a brief time during the proceedings, this seemed to set the stage for a remarkable convergence of knowledge systems—a case study of how indigenous and western intellectual traditions might be combined to resolve a problem that has been described as central to British Columbia's history (Tennant 1990). Yet, passing this hurdle seems to have catapulted oral tradition from a thicket of legal argument about admissibility into an equally complex question of what constitutes "historical evidence." Ultimately, very little of the chief's testimony seems to have had any bearing on the final judgment which, when rendered, adhered to Euro-Canadian legal arguments and precedents with scant reference to much of the evidence submitted by the plainiffs.

The judge's comment most clearly summarizing his approach to evidence is his pronouncement that certain documents "speak for themselves" while others fail to do so. Those that do, in his view, are written documents, notably the records of Hudson's Bay Company traders in the region during and after the 1820s. Those that do not, come from oral history. While this position has the advantage of providing a set of simple categories which conveniently classifies large and sometimes unwieldy bodies of evidence, it is seriously flawed.

[6] A House is a matrilineage of people who can trace their common relationship, whereas the members of a clan know that they are related but may not be able to trace all the details of that relationship.

Of the chiefs' evidence, he states, "When I come to consider events long past, I am driven to conclude, on all the evidence, that much of the plaintiffs' historical evidence is not literally true" (McEachern: 49). Of anthropologists, he adds, "apart from urging almost total acceptance of all Gitksan and Wet'suwet'en cultural values, the anthropologists add little to the important questions that must be decided in this case. . . . I am able to make the required important findings about the history of these people, sufficient for this case, without this evidence" (McEachern: 51). Reducing historians to mere gatherers of documents, he continues: "Generally I accept just about everything they put before me because they were largely collectors of archival, historical documents. . . . *Their marvellous collections largely spoke for themselves*" (McEachern: 52, my emphasis).

From the evidence in support of social organization presented at the trial, the one piece that particularly excites the judge's interest comes from the written statement of a Hudson's Bay Company trader in 1822. When trader Brown first arrived on Babine Lake, he observed large settled villages composed of nobles and commoners linked in a regional trade network with other villages and recorded his observation in his journals (McEachern: 73-75).

The idea that a hand-written entry culled from a trader's journal "speaks for itself," while a living Gitksan or Wet'suwet'en hereditary chief speaking in the courtroom does not, has to be understood within the context in which it is made. Early in the judgment (pp. 45-52), the judge pauses to insert a personal comment on the evidence. He makes it clear that his filters for evaluating evidence are (a) jurisprudence and (b) "common sense" rooted, I would argue, in nineteenth century positivism. While one would expect a chief justice to be familiar with jurisprudence, "common sense" is a notoriously crude instrument in the hands of those who have the power to define it.

All notions about self-evidence develop in a particular cultural context, in this case the relatively restricted framework of western jurisprudence. Lawyers are familiar with written documents and so those documents may seem easy to understand because they pose questions, frame arguments, and draw conclusions in certain ways. Oral testimony — passed from one generation to another by word of mouth and embedded in different assumptions — is more easily dismissed as unreliable because it is subject to what the judge calls "cultural values." Notably, it is these very cultural values the judge criticizes anthropologists for advancing (McEachern: 51), yet he never addresses the hegemony of the cultural values operating so starkly in the courtroom. His perception that the court stands *outside*

cultural values is clear in his statement that ". . . I must assess the totality of the evidence in accordance with *legal*, not *cultural* principles" (McEachern: 49, my emphasis). Having summarily dismissed the assistance of anthropologists in analyzing conflicting and asymmetrical value systems in which he is so centrally placed himself, the judge — as we have seen — invented his *own* anthropology.

Language is important here. Judge McEachern consistently distinguishes between "fact" which he uses to refer to written historical accounts, and "belief" which he attributes to the plaintiffs.[7] For example, he refers to the "Gitksan *belief*, based almost entirely upon oral histories . . . [that they] lived *in some form of social organization* long before contact with European influences" (McEachern: 19, my emphasis). He notes somewhat condescendingly that "if I do not accept [the plaintiffs'] evidence it will seldom be because I think they are untruthful, but rather because I have a different view of what is fact and what is belief" (McEachern: 49). He uses words like "idyllic" (p. 32) and "romantic" (p. 48) to describe the plaintiff's position. He refers to "eking out" (p. 49) subsistence and makes reference to the "fierce Canadian winters" (p. 261) as an impediment to extensive land use.

Evaluating Evidence: Oral Traditions and Written Records

Aboriginal land claims cases are about relationships connecting people with land — about linkages between social organization and place. Ultimately such cases raise questions about privileged views of history by challenging conventional knowledge or "common sense." The difficulty for Aboriginal groups claiming the right to be heard on this issue lies in presenting their argument in a manner that convincingly demonstrates alternative ways of viewing a complex problem. The difficulties are compounded when these arguments are made in a court of law which has institutionalized procedures for resolving conflicts.

Aboriginal oral tradition differs from western science and history, but both are organized systems of knowledge that take many years to learn. Oral tradition seems to present one way to challenge hegemonic history. It survives not by being frozen on the printed page but by repeated retellings. Each narrative contains more than one message. The listener is part of the storytelling event too, and a good listener is expected to bring different life experiences to the story each time he or she hears it and to learn different things from it at each hearing. Rather than trying to spell out

[7] See especially pp. 48-49, where he attributes numerous "beliefs" to the Gitksan and Wet'suwet'en.

everything one needs to know, it compels the listener to think about ordinary experience in new ways. Storytelling is possibly the oldest and most valued of the arts and encompasses a kind of truth that goes beyond the restricted frameworks of positivism, empiricism, and "common sense."

But no matter how thoughtfully oral tradition is performed, an appreciation of its messages anticipates — and requires — a receptive audience. In this instance, the Gitksan and Wet'suwet'en took the enormous risk of trying to state their relationship to land on their own terms, from their own perspective, using long-standing traditions as a medium for presenting their case to the court. They publicly enacted narratives that have usually only been performed within a community where their meaning would certainly have been "self-evident" to observers and participants. They saw this as an opportunity not only to present their case but also to control the representations of their culture both to the outside world and to their own communities. In retrospect, they were overly optimistic about the ability of their listeners — the court — to recognize the linkages among narrative, song, dance, and place. And their challenge was unsuccessful (see Ridington, this volume).

The thrust of their legal argument was necessarily framed to match the requirements of the court. Their assertions were (a) that they, the Gitksan and Wet'suwet'en, lived in organized societies in this region before contact with Europeans; (b) that they continue to live in organized societies, with specific reference to House and clan; and (c) that the linkage between past and present social organization can be demonstrated through oral traditions (see McEachern: 45). They further contended that oral tradition was a declaration of title to the land and went on to specify *how* their oral traditions demonstrate that title (ibid.). Minimally, they said, oral traditions provide evidence for scholars like archaeologists, anthropologists, linguists, and historians who are studying the past. But, they continued, oral traditions are far more than literal history, and the case before the Supreme Court did *not* depend merely upon the literal accuracy of these histories to establish connections between social organization and land tenure (ibid.). They illustrated this with reference to two particular kinds of oral history — the Gitksan *adaawk* and the Wet'suwet'en *kungax*.

Adaawk are central to the social organization of Gitksan Houses just as *kungax* are central to Wet'suwet'en Houses. They are the oral histories that document House ownership of land and resources and their performance at feasts publicly validates those claims. In performing their *adaawk* and *kungax*, the hereditary chiefs were offering narratives with roots in two distinct traditions of storytelling. The Gitksan describe their

adaawk as a collection of sacred reminiscences about ancestors, histories and territories. The Wet'suwet'en speak of the *kungax* as "a song or songs about trails between territories" (p. 57), the songs tying them to the land and impressing on listeners the importance of place. These songs, dances, and performances, lacking arbitrary beginnings or endings, may flow into one another, like a trail or a stream.

The Statement of Claim made to the court asserts that the *expressions of ownership* of land come through the *adaawk*, *kungax*, songs and ceremonial regalia; that the *confirmation of ownership* comes through the totem poles erected to give those expressions a material base; and that the *assertion of ownership* of specific territories is made to the court through specific claims. In other words, there exists a complex relationship linking history, the performance of *adaawk* and *kungax*, and the land.

The judge devoted several pages of discussion to the *adaawk* and *kungax*. He explained his initial optimism that he might be able to sort "real" matters from "myth" and his inability to do so. He refers to both the *adaawk* and *kungax* as "vague and lacking in ... particularity" (McEachern: 57). He finds that "the *adaawk* are seriously lacking in detail about the specific lands to which they are said to relate" (McEachern: 58), that "these *adaawk* are sprinkled with historical references, making them suspect as trustworthy evidence of pre-contact history [because] they refer to such matters as guns, moose, The Hudson's Bay Company and other historic items" (McEachern: 58).[8] He reiterated his concern that the *adaawk* and *kungax* expressed "belief" rather than "fact."

He contrasts oral tradition with what he considers to be "good" evidence — the written reports of traders and Indian agents. Such records were introduced as evidence and analyzed by historian Arthur Ray, and indeed it could be argued that these records actually constitute interesting confirmations of testimony presented by the Gitksan and Wet'suwet'en. The judge, however, goes directly to the documents because they so clearly "speak for themselves." He inverts the plaintiffs' intentions by setting these documents as the *standard*, and criticizes the oral testimony when it does not confirm the written record.

For example, he is particularly impressed by the records of trader William Brown, who established Fort Kilmaurs on Babine Lake in 1822: "As required by his employer, trader Brown filed numerous reports which are a rich source of historical information about the people he encountered

[8] Significantly, scholars of oral tradition identify this incorporation of historical events into long-standing narratives as one of oral tradition's strengths — pointing to its interpretive possibilities (McClellan 1963; 1970; Vansina 1985).

at his fort and on his travels. I have no hesitation accepting the information contained in them" (McEachern: 73). He cites Brown's observations about very complicated questions of social organization on the Skeena River in the 1820s without question, for example: "... there are references in the journals and reports of Brown that suggest the chief's control of territories was not exclusive, but was limited in some cases to beaver exploitation which was used for ceremonial purposes by the Carrier ..." (McEachern: 74).[9] The judge goes on to suggest that issues of social organization discussed in oral testimony carry less weight because Brown does not mention them in his writings. For example, without even addressing the issue of what language Brown and the Wetsuwet'en might have used to communicate complex concepts of social organization, he states, "It is significant that trader Brown does not mention Indian Houses in his records. He seems to use the terms tribe, band, clan and family interchangeably, or perhaps imprecisely, but I am left in considerable doubt about the antiquity of the House system" (McEachern: 75).

Curiously, while rejecting the value of oral tradition as evidence for social organization and land ownership, the judge embraces it selectively as evidence for warfare. For example, his statement that, "warfare between neighbouring or distant tribes was constant" (McEachern: 73) is made without reference to any evidence. Presumably, though, his source here *is* oral tradition. Along much of the northern northwest coast, clan history conventionally includes detailed accounts of journeys and battles, narratives told to provide an interpretation of how territorial claims came to be established. The *Epic of Nekt* and various versions of the *Lagaic* narrative, for example, figured prominently in oral testimony presented to the court to explain the complex relationships between clan history, land ownership, and social history. Under cross-examination by the Crown, though, these explanatory narratives were transformed into a series of mere "facts" — a series of battles — cited to demonstrate the "savage" nature of Gitksan and Wet'suwet'en societies prior to the fur trade. (See Culhane, this volume, for discussion of this.) The selectivity with which the judge uses what he hears to frame his judgment suggests that what we read in his *Reasons for Judgment* represents ideology rather than scholarly analysis.

Ultimately, the judge seems to be putting oral tradition, itself, on trial. He concludes that, compared with the written documents, oral traditions

[9] This is not an insignificant point. If proven, it would suggest that the control of chiefs over territories is a post-contact phenomenon. But the issue has been the subject of a lengthy debate in anthropology (Speck 1915; Helm 1965) and cannot be settled by the observations of a Hudson's Bay trader in 1822.

do not constitute historical evidence adequate to meet the requirements of the court, or "literal truth."

The irony of this triumphant conclusion is that it is not a conclusion at all. It is the point with which the Gitksan and Wet'suwet'en preface their Statement of Claim by stressing that their traditions must *not* be understood exclusively in a literal sense (Gisday Wa and Delgam Uukw: 38-42). And just as the judge repeatedly reminds us that there is a body of law from which interpretation of legal issues must come, so there is in anthropology an extensive body of literature which guides scholarly analysis of oral tradition; in that literature, concerns about "literal truth" of oral traditions were superseded almost a century ago. Since that time, anthropology has developed precise ways of discussing some of these issues.

Again, it is worth summarizing some of the central themes of the anthropological contributions before commenting further on the judge's idiosyncratic construction of the issues. To restate the thesis of this paper, dismissal of oral tradition with reference to positivism, historicism, or "common sense," as the judge does, indicates a very limited understanding of the critical role oral tradition has played and continues to play in cultural maintenance for indigenous societies undergoing pressure from expanding industrial economies.

Anthropological Approaches to Analysis of Oral Tradition

Anthropology, like law, has developed practices, methods, and procedures for making observations and discussing problems. It is worth briefly outlining the history of approaches to the analysis of oral tradition, if only to show once again that statements the judge presents as conclusions in 1991 are the very questions that served as a springboard for the development of anthropology a century ago. Instead of considering whether his questions have been asked before or how they might have been addressed, he branches off, as if into uncharted territory. While there is no clear consensus about the value of oral history for ethnohistorical research, the terms of the debate are very different from those set out by the judge.

In the short history of anthropology, oral traditions were originally treated as *objects* to be collected; then attention shifted to trying to understand them with reference to the *context* in which they were told. More recently some ethnographers have made greater efforts to understand oral traditions on their own terms rather than as illustrations of some other process, for example, as a way of providing coherent interpretations of the past.

In the 1880s, scholarship was understood to be an activity essentially conducted from the armchair in the grand tradition of philology, where written documents provided the ultimate form of "truth." The earliest anthropologists and folklorists, like E. B. Tyler and James Fraser, though brilliant in some of their speculations, were essentially embedded in a Eurocentric tradition. As colonial expansion began to challenge European definitions about what it meant to be human, stories from other traditions were initially recorded and collected like so many archival documents to be stored, sifted, and evaluated from an European perspective.

The judge's evaluation of oral tradition stems from this idea that they can be treated as collections of words and compared with archival documents. While he acknowledges that oral traditions may have other meanings, he is primarily concerned with their "reliability" and makes this his reference point. Their value is seen exclusively in terms of their contribution to a positivistic reconstruction of "what really happened," and that in turn has to be evaluated against other forms of "more reliable" (i.e., documentary) evidence which the judge feels he is able to evaluate because of his capacity to read the "self-evident."

The problems of equating orally narrated accounts about the past with western notions of history are not new for anthropology.[10] There is growing attention to the question of how researchers can incorporate such oral traditions to reconstruct a picture of the past more balanced than the one that comes to us exclusively from written records. Scholars now pay more attention to the ways people *use* orally narrated accounts to talk about their past. More important than the search for a body of orally narrated texts deemed accurate within a restricted western discourse, they say, is the question of how historical consciousness is constructed in societies where essential knowledge has always been passed on by word of mouth.

Examples of scholarship incorporating a range of sophisticated approaches to use of oral tradition occur throughout the world; for example, in Africa (Netting 1987; Cohen 1989), in the South Pacific (Rosaldo 1980; Sahlins 1985), in New Zealand (Binney 1987), in South America

[10] Early in this century, Robert Lowie argued that oral traditions had no value as historical evidence because their narrators had no sense of history (Lowie 1917: 165, 166-67). This perspective was superseded by Malinowski and Radcliffe Brown, who each argued that the issue was more complex and that narrative accounts were not actually about the past anyway; that they served primarily as charters to justify the present social order (Malinowski 1926; Radcliffe Brown 1952). More recently structuralists have argued that oral traditions are statements about the human mind rather than about the past, that they provide ways of working out complex problems that cannot be resolved in the sphere of human activities (Lévi-Strauss 1966: 66, 232-37).

(Nash 1979; Hill 1988), in North America (Basso 1984; Fogelson 1989) to cite only a few. They reflect growing attention to these issues in anthropology, ethnohistory, archaeology, and linguistics. As the dividing line between written and oral sources becomes less clear, historians working exclusively with written documents pay closer attention to symbolic aspects of documents. Ginzberg (1976), Davis (1983), and Darnton (1984), for example, each do this brilliantly in their discussions of sixteenth and seventeenth century European trial records.

As ethnohistorians look more closely at orally transmitted testimonies, they are becoming increasingly attentive to ideological, symbolic, and metaphoric meanings in oral narrative. But at the same time they are becoming sensitive to ethnocentric bias in western writings, more cautious in their handling of *written documentary* sources, aware that written records do not "speak for themselves" and that, like oral testimonies, they must be understood within the context in which they were and are produced. Both oral traditions and written accounts are deeply embedded in social process, as observers have seen in this court case, raising questions about the privileged status of documentary evidence as a reference point for establishing "truth," "falsehood," or "fact." The suggestion that a document written in 1822, by a trader new to the area, "speaks for itself" begs the question of the history, context, and ideology in which those statements were written.

The lessons to be drawn from comparing oral with written accounts are not about the cultural relativity of texts, but about power and domination. This legal judgment reflects the expansionist propaganda of progress, development, and social evolution — the same constructions anthropology has devoted a century to dismantling. Both written and oral accounts rely on conventional, culturally specific narrative genres that help members construct, maintain, and pass on an understanding of how the world works or ought to work. Some accounts become embedded in written works and become part of the hegemonic literature. Regrettably, *Reasons for Judgment: Delgamuukw v. B.C.* is bound as a book and may well emerge in school curricula.

Oral Tradition, History and Land

In their decision to perform their *adaawk* and *kungax* for the court, the Gitksan and Wet'suwet'en tried to make their claim in a way that allowed them to control the representation of their culture to the world as well as to themselves. They enacted the *adaawk* and *kungax* as performances bound to an understanding of the relationship between human history and

landscape, expressing connection to land and attachment to place. They understood these performances to be a restatement of their Declaration of Title.

Oral traditions, in this view, are performances to be seen, heard, and witnessed, not documents to be collected, compared, or stored. They are cultural forms that organize perceptions about the world and are not, in the words of anthropologist Renato Rosaldo, "containers of brute facts" which can be plundered for veracity, because all "facts" are culturally mediated in the first place (see Rosaldo's discussion of this process in the Philippines 1980: 91, 92). By evaluating the authenticity of these oral traditions exclusively within the framework of western jurisprudence, the judge is basically denying Gitksan and Wet'suwet'en versions of how their lives have changed over the years.

The Crown in this case presented a materialist understanding of relationship between humans and landscape—a kind of environmental determinism predicated on such criteria as "fierce Canadian winters" (McEachern: 261). Gitksan and Wet'suwet'en claims about themselves and about their relationship to the land locate temporal relationships in space, on a map that is followed in one's head rather than on paper, rolled out in performance like a "trail of songs." The judge was unwilling to accept that how indigenous people perceive, think about, and talk about the relationship between people and land has relevance to the court's understanding of that relationship.

In his study of narrative discourse and historical consciousness, Hayden White suggests that in human history there is a close relationship between historical self-consciousness, law, and the impulse to tell and retell narratives. He suggests that any narrative representation of reality invokes a social system which is, in turn, a system of human relations governed by law. There is considerable incongruity here between the judge's searching commentary about the existence of "organized society" prior to the European fur trade and the clarity with which the oral traditions convey the laws that governed and continue to govern social organization. *Both* oral accounts about the past in this region and the judge's interpretation based on his analysis of written documents, moralize the events by constructing, manipulating, and recasting those events. This is the essential nature of historical understanding, and each set of narratives resonates with symbolic statements about culturally appropriate behaviour.

For the land claims process in Canada to have a reasonable outcome, a way of incorporating indigenous perspectives about land ownership and territorial jurisdiction into legal discourse must be achieved. Because oral

and written accounts are all deeply embedded in social process, they suggest points of entry for analysis, but the court shuts down the possibility of investigation by trying to enforce closure. The current judgment of the Supreme Court of British Columbia does not provide an acceptable solution. It points out the need for a social process that is at least potentially available through negotiation of land claims rather than decision by court fiat. Where a judgment must be absolute, indigenous knowledge cannot easily fit because it is more akin to a model for investigation than a way of finding closure — a set of questions rather than a set of answers. At this point, and in this court process, the Supreme Court judge and the hereditary chiefs seem to be addressing different sets of questions.

In conclusion, the judgment rendered in *Delgamuukw v. B.C.* is regrettable for many reasons. One of those reasons is the way anthropological evidence is misused. The judge in this case has shown a curious disregard for established bodies of knowledge that have direct bearing on his decision. His conclusions, though, are not conclusions. They are the positions that anthropology has shown to be ethnocentric and self-serving. The judge's anthropology reflects a primitive understanding of the concept of culture which he claims to comprehend. The judge's anthropology does, indeed, "speak for itself," but it does not speak for anthropology.

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