

**TAKING CULTURE TO COURT:
ANTHROPOLOGY, EXPERT WITNESSES AND
ABORIGINAL SENSE OF PLACE IN THE
INTERIOR PLATEAU OF BRITISH COLUMBIA**

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ABSTRACT

This thesis examines the way in which indigenous oral knowledge is treated in court by Crown anthropological expert witnesses. I argue that the theoretical frameworks that guide these expert opinions are in defiance of widely taught contemporary academic cannons. My specific focus is indigenous sense of place, an issue that is intensely scrutinized in Aboriginal rights and title cases. I begin with a review of relevant academic anthropological literature on this topic, followed by a discussion about the role of anthropological expert witnesses and their expertise. The thesis continues with an analysis of three case studies of Crown expert witnesses who have frequently appeared in Aboriginal rights court cases involving Aboriginal peoples of the Interior Plateau of British Columbia. As I show, their evidence ignores contemporary academic paradigms and practices, and furthermore denies all indigenous cultural, social, and historical contexts of oral histories of place. My thesis concludes with some questions and reflections about alternate ways of treating such evidence, which would do better justice to indigenous ways of constructing meaning, rather than alienating and distorting it.

Keywords: Anthropological Expert Evidence, Aboriginal sense of place, Interior Plateau of British Columbia, legal Anthropology

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DEDICATION

*To Badger, Jenny-Wren, Bullfinch and Triumph,
who stood by me from
the beginning, and are there still.*

CHAPTER 1: DEFINING THE PROBLEM

Aboriginal litigants who set out to prove Aboriginal title or Aboriginal rights in court are required to meet certain legal evidential tests to support their assertions. Such tests require them to produce evidence of their long-held occupation of distinct lands, exclusivity of use of those, distinctiveness as a people, and/or the existence of traditional cultural practices integral to their way of life at the time when the Crown asserted jurisdiction in their lands. The Aboriginal litigants typically, carry vital parts of this information in the form of oral histories by their elders and ancestors, although present and past ethnographers may have made attempts to capture some of it through ethnographic research rendered into written texts. Despite the existence of such written texts, from the perspective of Aboriginal communities, the most vital knowledge of land use and place use remains in the oral archives of a community and its members.

In the 1991 *Delgamuukw v. R*, Supreme Court of BC decision, Chief Justice Alan McEachern heard as evidence the oral histories of the Gitksan and Wet'suwet'en, but discounted them in favour of historical documentary evidence provided by the Crown. In his reasons for judgement, the Chief Justice justified his reasons for dismissing oral evidence noting that the Gitksan and Wet'suwet'en *adaawak* and *kungax* (stories describing land tenure systems and laws that govern these) “were not literally true” (McEachern, Reasons for Judgment, *Delgamuukw* 1991). He also found that these oral histories confused “what is fact and what is belief... [and] included some material that might be classified as mythology,” and that these elements combined to “project a ‘romantic view’ of the history of the claimants” (McEachern, *RFJ Delgamuukw* 1991: page no). The case was appealed to the BC

Supreme Court of Appeals, which in 1993 upheld Justice McEachern's findings on oral history; however, in 1997, Justice Lamer of the Supreme Court of Canada ruled that McEachern had erred and that oral histories as evidence in Aboriginal rights and titles cases were indeed an admissible and valuable kind of evidence, integral to Aboriginal accounts of the past which should be given equal weight with other types of evidence (Rush 2003:2). Justice Lamer stated that there must be no distinction between oral and documentary history and that independent weight must be given to oral evidence, and wrote in his reasons for judgement that:

I fear that if [the trial judge's] reasoning were followed, the oral histories of aboriginal peoples would be consistently and systematically undervalued by the Canadian legal system, in contradiction of the express instruction to the contrary in *Van der Peet* that trial courts interpret the evidence of aboriginal peoples in light of the difficulties inherent in adjudicating aboriginal claims (Justice Lamer, *Delgamuukw* 1997:10).

Further, Justice Lamer found that McEachern's out of hand rejection of Gitksan and Wet'suwet'en present-day personal accounts and knowledge of their traditions and practices, land and resource use, and laws for governing, as evidence of pre-contact existence was in error: Justice Lamer asserted that "if oral history cannot conclusively establish pre-sovereignty occupation of the land, it may still be relevant to demonstrate the current occupation has its origins prior to sovereignty" (cited in Rush 2003:11).

As the incidents of taking culture to court increase, so the pressures on Aboriginal evidence to be convincing to the trial judges are ever increasing, as Crown legal counsel and their experts mount continuous challenges to the legal acceptance of Aboriginal oral histories. In this case, place naming, place knowledge and the attendant sense of place articulated by Aboriginal peoples in the struggle to prove rights in court have immense value to support evidence for long-term occupation of homelands, but as this information is usually transported and transmitted orally, and intergenerationally, it will more frequently be assailed

by the Crown as insignificant, or untrustworthy, and not on a par with written information. In this thesis I intend to show that the anthropological study of place knowledge and sense of place is a significant and worthwhile research area, and that understanding how people remember and transmit this knowledge is integral to presenting an accurate picture of Aboriginal occupation.

However, as I maintain, there exists a conflict between the ways in which anthropology is practised in the field by contemporary anthropologists in the academy, and the way anthropological enquiry is carried out by practitioners *purporting* to practise anthropology as a discipline in the courts. This divergent reality exists in, and has lasting impact on, expert witness testimony in Aboriginal claims cases and criminal court proceedings (Cruikshank 1992:25; Culhane 1998, 1992: 71; Daly 2005:6; Fisher 1992:64; Mills 1994:20, 1996:46; Ray 2006, 2003; Reilly 2000; Ridington 1992:12; Wilson-Kenni 1992). The problem that I address in this thesis involves the contradiction between the theory and methods around the study of indigenous place expounded by contemporary social and cultural academic anthropologists on the one hand, and the conceptual treatment of indigenous place by anthropological Crown expert witnesses on the other. The contradicting ways in which academic anthropologists on the one hand and anthropological crown expert witness on the other have examined sense of place and occupation of territory have been directly affected by research motive and perspective, which in turn have influenced method and technique (Basso 1984; Rosaldo 1989; 1993). In so far as Crown anthropological expert opinions are concerned, they have influenced research findings which become expert opinions in court practice.

Despite the ideal of objectivism in social sciences, numerous case studies have shown that differences in theoretical perspective, in turn often influenced by the researcher's ideological positioning often lead to researchers arriving at different conclusions regarding

the same body of data. Either the researcher's theoretical perspective or his/her purpose can lead to certain data being highlighted at the cost of other data (e.g. Culhane 1998:156-157; Freeman 1983; Lee 1992; Mead 1973; Wilmsen 1989:). Moreover, the manner in which data are interpreted, filtered, and presented in court evidence, in government funded studies or private industry funded reports differ according to the philosophical, social and political camp of the researcher. Also inherent in this dichotomy is the alienation of aboriginal storied knowledge from its specific cultural, historical and linguistic context into decontextualized and seemingly objective data that can be put to use in re-fitted and re-interpreted form to serve its presenters (Elias 1993; Ray 2006; Usher 1993).

At the crux of this opposition is the fact that academic cultural anthropology takes the perspective that the voices of its indigenous subjects must be phenomenologically represented, celebrated and respected. Anthropological expert witness work in court however, denies the validity and necessity of the indigenous voice in favour of presenting the indigenous subject as decontextualized, removed from its own voices and subject to the forensic enquiry of the opposing expert witness(es). Speaking with Edward Said, the latter can know that subject – at least insofar as knowing it in a legally valid sense is concerned – better than the indigenous subject can know or present itself (see Said 1978). By identifying the differences between these approaches, I also identify areas of the relationship between anthropology and the legal system that require urgent review, revision and re-education, if this discipline is to retain not only its scientific integrity in the face of legal and social challenges, but also its usefulness in representing Aboriginal interests as these are expressed *by Aboriginal people* (Deloria, 1969; Manuel and Posluns 1974; Smith 1999; Stevenson 1998:14-18; Watkins 2000; Yellowhorn 2002).

Elements at Play

At the heart of this dichotomy, between anthropologists and other expert witnesses are issues that include epistemological and ethical perspectives, research design, method and practice, and the treatment, or uses of the resulting data in contexts of authority over the subject (see Culhane 1998:127-130;). Design and perspective issues also have impact on the quality of information being produced, the perception and function of the study of people, practically and academically, and the effect of information on the public, in government and industrial policy, and in law making. While, since the early 1970s, the *practice* of anthropology espoused in the literature has focused on the ethical production and application of its research data to varying degrees (see Daly 2005:xxiv), there are legal and logistical limits to this, and anthropologists cannot control the ways in which their research data are re-interpreted and used in litigation once they become publicly accessible. As the examples of Richard Daly (2005) and Antonia Mills (1994), key anthropological expert witnesses in *Delgamuukw*, have shown, anthropologists who carry out primary research towards an anthropological expert opinion have no control over the way a judge evaluate their research findings, given the adversarial nature of court proceedings.

To add to the complexities of taking culture to court is that a paradox presents itself in the transforming of texts from one environment to another. In this case, Aboriginal place knowledge and sense of place, typically expressed in the form of oral traditions, can become de-contextualized, legally deconstructed, with the storytellers losing all control over their stories' meanings and messages (see Cruikshank 1981, 1993; Simpson 1999). Moreover, in order to prepare research that is acceptable in the courtroom, an anthropologist is required to lift knowledge from its original oral context, and compartmentalise ethnographic information that was once familiar to its purveyors, and transform it into disconnected, and in some cases,

therefore unrecognizable, or unrealistic features, or facts (“evidence”), for the consumption of strangers. The paradox here is that for Aboriginal litigants to show their connectedness to their land, they and their expert witnesses are required to disembodify this knowledge, and to disconnect it from indigenous narrative practices, in order to make it palpable for the tests set out by the legal system (Ray 2002; Ridington 1992; Thom 2001).

While the Aboriginal plaintiffs in *Delgamuukw* set out to represent their cultures on their terms and within the conventions of their own narratives of place and society (see Daly 2005; Mills 1994), legal scholars J. Borrows (2001), D. Hanna (2000), V. Napoleon (2005), concur with anthropologist Brian Thom (2001) who echoes the observations of Joel Fortune (1993) when he says, “The introduction of a significant body of oral tradition into the court record was a challenge to the judiciary. It presented them with the problem of dealing with Aboriginal societies on their own terms” (Thom 2001:4). Even though some progress is being made intermittently and at the discretion of certain judges, courts are not yet prepared to comprehend the infinite and highly convoluted contextual web that situates and explains the very facts sought by legal process. No comprehensive analyses of the challenges of taking culture to court is complete without examining the incongruities of court-room process that somehow necessitate and facilitate handy-work of legal advisors, specifically the revision of research reports and testimony, which leads to the potential for jurists to misconstrue history, culture and anthropology (Culhane 1998:74-75).

Although Chief Justice McEachern’s treatment of primary research based anthropology in *Delgamuukw v .R* (1991) is perhaps an extreme example, it illustrates the ongoing potential of anthropologists who carry out primary research in close proximity of their Aboriginal subjects to be disqualified as having “gone native” (McEachern in *Delgamuukw* 1991; Daly 2005:xxiii), whereas experts who are at arm’s length and merely “peer review” others’ work being considered truly scientific (Ray 2006:3). Cases since

Delgamuukw v. R that have involved expert witnesses have illustrated this dilemma (see cases *R. v. Powley, 2003; R. v. Marshall, 1998; R. v. Van der Peet, 1996*). Most importantly, a wealth of North American and Australian literature exists about the role of expert witnesses who work *for* Aboriginal litigants (see Glaksin 2004; Morphy 2006; O'Reagan 1989; Stead 2002; Sutton 2001; Trigger 2004. With the exception of Dara Culhane's notable analysis of Crown witness Sheila Robinson's evidence in *Delgamuukw* (1992:66-92), and passing reference to her opinion and qualifications by other anthropologists (see BC Studies 1992), very little has been written about the nature of Crown expert anthropological opinions, including the type of anthropology they represent, and the way they seek to establish scientific authority over the Aboriginal subject in front of the Judge. This thesis addresses this gap.

Central Research Questions

In consideration of the current treatment of oral history as evidence by Crown expert witnesses in court, anthropologists have been put in the position of representing the discipline while transforming research data into valid and reliable evidence, which a judge will favourably consider in his or her decision. The central questions, in this thesis are: *What are the central tenets of contemporary cultural and social anthropology, with particular respect to indigenous sense of place and occupation of land? How has place knowledge, embedded as it is in orality and in specific cultural, linguistic and historical contexts, been treated in court as evidence by the Crown?* This thesis aims to explore the study of Aboriginal place, place knowledge and senses of place as viable subjects of anthropological inquiry. I provide a literature overview of relevant anthropological work in this area, and discuss how this research has implications in expressing Aboriginal knowledge of occupation in response to challenges posed by Crown in land claims and rights litigation. My research also aims to

determine to what degree, and in what format the information generated by Crown expert witnesses is representative of an anthropological approach, and to provide awareness to those anthropologists who may be called to court as expert witnesses.

The second primary objective of this thesis is to analyse the anthropological study of Aboriginal place, place name and sense of place, and to relate its importance to Aboriginal cultural identity and relationship to homelands. All of these are concepts which are challenged in court during Aboriginal title and rights cases. To that end I conduct a review of relevant theoretical and methodological literature. My third point of inquiry establishes a definition of what contemporary academic anthropology understands as “good anthropology”, so that I can employ these criteria towards assessing the veracity of Crown expert witnesses, and what it is they offer as purported practitioners of anthropology. Specifically, given Justice Lamer’s 1997 ruling on the admissibility of oral history as evidence, I will analyse in this thesis what post-*Delgamuukw* Crown expert witnesses do with Aboriginal oral history and narrative as they formulate their research data in expert reports and formulate their anthropological opinions. Interestingly, legal guidelines for oral history evidence that deal with the “necessity and reliability [sic] of such testimony” were only recently formulated by Justice Vickers in a land title case whose plaintiff was the Tsilhqot’in Nation. (Justice Vickers, *Reasons for Judgement, Tsilhqot’in Nation v. BC, 2004, BCSC 106, 2007*).

I also aim to explore the fundamental positioning of anthropology as a discipline equal to the job of acting as cultural broker between Aboriginal knowledge, the legal system, and the Crown. I argue that the positioning of Crown expert witnesses, purporting to offer anthropological evidence, and operating from a supported, ostensibly authoritative place, equipped with ample time and resources, fail to present new anthropological research. Instead, they focus on two objectives: first to undermine the evidence of the claimant, and

second, to serve interests of the Crown, by eschewing anthropology altogether, in favour of historical and textual analysis, and generalizations from antiquated social theory. Finally, through a critical examination of the work of three Crown expert witnesses, I attempt to show the differences between academically acceptable anthropology, and the evidence presented at court by these three witnesses.

Theoretical Orientation

My ontological perspective is informed by the writings of theorists who have provided me with a conceptual framework for scrutiny and critical analysis of research as it is presented by Crown Expert Witnesses. Antonio Gramsci (1978;1985), who guides my interest in maintaining vigilance for inequalities of power and hegemony in the design and implementation, and uses of research, in terms of whose interests are served by which methods of data collection, interpretation and uses of the material. Michel Foucault (1980), is instrumental for understanding the power of legal discourse, and the positions from which this discourse originates to influence courts, law, and consumers, as well. The social situating of legal discourse, with its perceived mystery, authority and wisdom and the very physical and visual structures in which this discourse exists, maintains the status quo. Here Foucault is instructive in understanding the relationship of colonialism between Canadian law and the discourse of “knowledge” about Aboriginal peoples and culture that is provided at court by its Crown expert witnesses, and the predisposition of jurists and observers to accept this knowledge and discourse uncritically (Foucault 1980).

Mikhail Bakhtin (1968; 1981) emphasizes the potential for correction of such power imbalances from within the indigenous community, using reflexive social research methods, particularly those that facilitate the re-presentation of local knowledge through local voices. Michel de Certeau (1984) directs me to look at what people *actually* do when they discuss

places, and how they interpret their landscape. This would mean that material gathered in existing studies should contain the everyday behaviours of remembering place, and perhaps show less emphasis on specific ritual or special event behaviour. In addition, Pierre Bourdieu (1988; 1991; 1995) contributed here as a guide, through his theoretical critique of social science perspectives evolving in the 1970's that attempt to explain complex social and cultural relationships and phenomena through a singularly post-structuralist lens.

Structuralism, as Bourdieu (1995) argues, can lead to the reduction of meaning into self-satisfying, recognizable, and convenient categories familiar to the outside researcher, but revealing little of the intrinsic meaning and internal context of the phenomenon (such as place name significance), as it is understood by the subject group itself. Clifford Geertz (1973; 1983) further refined the significance of allowing local voices to remain authoritative, and to remain central and constant throughout the research, as opposed to merely augmenting, illustrating selected cultural phenomena, or providing a backdrop for reduced geographic data. Further, the facilitation of multivocality, according to these theorists, would better inform the data, owing to the fact that place-name knowledge is shared within a community of individuals, where a diversity of age, gender and personal experience contribute to shaping a sense of place, and membership within it.

Contemporary anthropology has the capacity to understand comprehensively the web of relationships between Aboriginal sense of place, territorial identity, history and orality, and the phenomena and recording of post-contact events, perceptions and observations by strangers. In addition, as a critical tool, anthropology can simultaneously understand the cultural and political orientation of European observers, and keep these in perspective when objectively assessing the validity and authenticity of documentation authored by such newcomers. Finally, expanding on the capacity to self-critique, anthropology is able to test

and assess theoretical models, that purport to explain human behaviour, for their reliability as interpretive tools, as used by Crown Expert Witnesses.

Methodological Approaches

The methodology I employed in my analysis for this research was based on two investigative tools. I conducted a literature review of relevant academic anthropological works on the study of place naming, sense of place including the ontology and epistemology, and the relationship with oral history. In addition I examined relevant literature on the subjects of oral history as evidence in court, court procedure, expert witness function, ethnohistorical method and human geography, as well as historiographical reconstruction. I also conducted a critical textual analysis of the Crown expert witness reports and court transcripts from cases relevant to Interior Plateau cultures, and others from across Canada. The purpose of this literature review was to synthesize what a sampling of three Crown expert witnesses base their research on, what the content of their research is, the presence or absence of any trends in the treatment of oral history as evidence as a result of these trends, and the degree to which the research enlightens the legal or anthropological academies at any level.

My methods for analysing the performance of the three Crown experts consisted of the collection and in-depth reading of several court case transcripts and Expert Witness Reports, in which the testimony of the Crown expert witnesses is recorded verbatim. I developed criteria and posed specific questions of the testimony, designed to a limited degree, identify trends in Crown expert research and to help illuminate what research methods and perspectives were used in the preparation of Crown's "anthropological data". I outline below the criteria I used for this analysis:

- 1 *Crown Witness Qualifications: Educational and Professional credits*
- 2 *Does the Crown's Expert Witness Report Cite or quote contemporary or accepted methods and theories of the discipline of Anthropology?*
- 3 *What are the stated or implicit theoretical assumptions in the Testimony or Report, about the nature of society, culture and human organization?*
- 4 *Does the method address the legal question(s)?*
- 5 *To what degree has fieldwork been conducted that provides recent or relevant information in the testimony or report?*
- 6 *To what degree does the research conducted address the culture groups specifically?*
- 7 *To what degree does the curriculum vita reflect Professionalism?*

In order to conduct the research directed by these criteria, I utilized the Kamloops Provincial Court Law Library, sought brief personal communications with legal counsels who practice Land Claims and Aboriginal rights cases, and with academics who have been directly involved in court cases as expert witnesses. I was also fortunate to be given access to a number of unpublished works by both legal counsels and anthropologists, which I rely on through out the body of this thesis. This method of research is useful in providing an explanation of the complex relationship between the practice of anthropology and the expectations of the court where cultural data becomes evidence.

Research Limitations

My research is limited to the availability of expert witness reports, court transcripts, and the scarcity of legal literature *about* anthropological expert witnesses. Much on this subject that is available within my resources is written or discussed by the expert witnesses themselves, and is therefore restricted to their experiences. Limitations lie also in my own biases, as they are based on the assumption that “good” anthropological research seeks to understand and

explain human behaviour, accurately and respectfully. Further, and specifically, that such research demands the preservation of the integrity of the data it finds, as well as the contexts in which these data are typically embedded, to the extent that the two cannot be usefully separated. It is also a bias of mine that given the importance of the decisions made in court with respect to Aboriginal rights and title cases, no jurist and no expert witness can be too well informed about Aboriginal culture, anthropological theory and method, or court-room processes and tactics, for that matter.

Research Significance

Since the 1970s, when Aboriginal rights and title cases and land claims resolution processes began to come to the fore, anthropological research concerning indigenous concepts and practices of land tenure and knowledge of place has been a significant issue for Aboriginal communities, applied anthropologists and in the academic community throughout North America (Brody 1981). However, it has only been since the Supreme Court of Canada decision by Justice Lamer, in *Delgamuukw v. R* (on appeal 1997) that oral histories have had legal standing in Canada as admissible evidence in rights and title cases. Oral histories that carry Aboriginal knowledge of place and landscape, sense of place, territorial ownership and laws of access, speak directly to the questions of an Aboriginal group's territorial identity, occupation and human activity within its traditional homelands.

As specialists in the description and analysis of indigenous practices and knowledge, anthropologists have played key roles in presenting and analysing oral histories on these topics as expert witnesses for either the Aboriginal side, or as witnesses for the Crown, with varying levels of success (see, e.g. Cove 1996; Culhane 1998; Miller

1992). In addition, anthropologists have added to the discussion in scholarly publications (see Culhane 1997; Miller 1992, Mills 1994; Paine 1996). Anthropologists have recognized the importance of their role to record, understand, synthesize, interpret and re-present indigenous knowledge, traditions and practices such as place-naming and territorial occupation and ownership, in a way that maintains the context and integrity of the oral history and data, while still being able to withstand the rigors of courtroom examination.

Especially the *Delgamuukw* (1991) case, following Chief Justice McEachern's initial ruling, which for the most part disqualified the anthropological expert testimony for the Aboriginal plaintiffs, led to much reflection and debate about anthropology in the courts (see Asch 1992; Culhane 1992, 1998; Daly 2005; Elias 1993; Mills 1994, 1996; Usher 1993). Specifically, the aim of my research is to determine to what degree, and in what format the information generated by Crown expert witnesses is representative of an anthropological approach acceptable to the contemporary discipline – or not. Since Dr. Sheila Robinson's testimony in *Delgamuukw v. The Queen, 1991*, further interesting expert witness work for the Crown has been produced in Aboriginal title and rights cases. The significance of my own research, while minimal, may at least serve as a cautionary tale for other anthropologists who are called upon to provide their expertise at court.

Thesis Outline

Following this introductory Chapter, *Chapter Two* discusses the fundamental reasons why anthropology is better situated as a discipline of inquiry into Aboriginal identity than, for example, a specifically historical approach. In addition, it looks at what constitutes “good

anthropology”, as produced in an academic context on one hand, and what is acceptable in court as “anthropological” Crown expert witness reports on the other.

Chapter Three explores anthropology and Aboriginal people in the courts, gives a brief overview of the history of *taking culture to court*, and offers some background and collective experience of bringing sensitive oral knowledge into the adversarial courtroom. I include here a section which reports on the *study* of the meaning of place names, sense of place and the connectedness of these elements to Aboriginal identity.

Chapter Four discusses the roles and functions of anthropologists as expert witness at court, and the ways they are positioned through this adversarial environment *visa vi* Aboriginal claimants, and Crown. *Chapter Five* also includes a critical analysis of the performances of three Crown expert witnesses, for their treatment of anthropological evidence as presented by anthropologists and claimants, and examines Crown expert witness reports, and court transcripts. I have limited these cases to those that refer, or are relevant to BC’s Interior, in an attempt to reveal the theoretical and methodological underpinnings of the particular brand of cultural research and explanation actually presented by Crown through its experts.

Chapter 6 concludes the thesis with a discussion of the analyses and major findings of the research. Finally, I propose ideas about what anthropologists might consider in the struggle to resolve these lacunae between perspectives and actions, rhetoric and reality.

How I Came to Be Here

One of my first paid research jobs was to record and map indigenous Secwepemc sites and trails onto BC Forestry District maps using archaeological, historical, ethnographic literature, and archival data, pre-selected and provided to me by an

archaeological consultant and a local historian. I was initially thrilled to be conducting what I thought was meaningful fieldwork, that would make a difference to the collective knowledge, and at the same time help me fine-tune some of my heretofore rather expensive but as yet untried research skills. The 1999 project was an Archaeological Overview Assessment ultimately intended to inform commercial timber extraction activities in the Kamloops/Clearwater Forest Districts.

Almost immediately upon attempting to plot these trails, it became apparent that a certain level of local authenticity, cultural linkage or meaning was absent from the resulting distribution of dots and lines. Within the first three days of applying dots that indicated “potential” and “confirmed” archaeological sites, as defined through the archaeological lens, and trails that were well documented in the fur-trade and exploration archives, my maps were taking on a decidedly non-indigenous theme. Though much of the data could be seen to indicate old routes and sites, very little credit was awarded to the local sources from which the landscape knowledge originated. In fact, the resulting visual product appeared to be anonymous, and in a sense, it could have been a map of anywhere, save for a few impersonal grid lines and numerical coordinates. Because of the physical size of the project, which included somewhere in the neighbourhood of 40 NTS maps that had to be laid out all at the same time, my work occupied the entire floor space in the Tribal Council building’s empty cafeteria room, which could be accessed by curious passers by. One of those passers by was the late Bob Manuel of Neskonlith, who studiously looked over my work, asked me what it was about and noted that there seemed to be an absence of important places locally known in Secwepemc culture, their proper names (in Secwepemptsín), and routes between them. He looked up and then shook his

head slowly. He asked if I had spoken to any of the Elders about places and their real names. My turn to shake my head, “No budget for that”, I replied. Then he looked back at the maps, and then at me and said, “This is not right”. Those four words stuck with me from that day to this, and inspired my quest to find out what *is* right.

Prior to deciding on this topic and an approach for my thesis, I listened to Elders and other community members on both sides of the issue of recording, protecting and sharing knowledge like this, and I was made to ponder the eventual fate of much of what Aboriginal communities had already “shared” with outsiders. I wrestled for some time over the ethics of recording traditional knowledge for shared usage among governmental departments and possibly corporate or public consumers, and in particular, in the adversarial setting of the courtroom in view of the *Delgamuukw 1991* treatment of such knowledge.

Throughout my research for this thesis, I looked into the pros and cons of developing better practices for the recording of ancient knowledge, like the names and meaning of place and places, and I asked a lot of questions, largely about where to look for relevant information. I heard from consultants, mappers and professional research proposal wizards, field technicians and data entry clerks, and I spoke to legal eagles, scholarly mentors, professors and colleagues. I further pondered why government funded, legal or any other external research *shouldn't* concern itself more about an “Aboriginal” perspective, and to include a locally articulated sense of it in research design, especially through an anthropological or interdisciplinary lens, especially if such inclusion might illuminate the ways that people know their homelands and ancient territories. Why isn't this a feature of such research?

In consideration of the clearly articulated instructions for gathering data for the AOA sites and trails project that I had worked on, I began to wonder about the great number of other existing studies and projects, and those soon to be launched, that were similarly funded and designed. I reasoned that in all likelihood an absence of “Aboriginal” perspective might well prevail, in all manner of studies, irrespective of the current rhetoric and protocol of government, legal and other funded studies, if the methods I had used were standard for conducting research into place and place names. And, what of this amorphous perception of “anthropological” method and perspective? I wondered if methods that are typically employed in anthropology have been used in studies *without* accompanying “anthropological perspective” – what ever that is. It remained a challenge to arrive at a satisfying definition of anthropological perspective that would be generally accepted and useful to this kind of research. As one of the focal points of my inquiry, I worked on just such a definition, which I present later in this thesis

CHAPTER 2: THE ANTHROPOLOGICAL ARGUMENT

When we look back at the *Delgamuukw* case in its entirety (1985-1996), many of the lessons that arose from it speak directly to the issues about the ways in which anthropological research is conducted, its theoretical positions, its methods and its ethics. An anthropological approach to studying Aboriginal peoples operates from the premise that the more that can be learned about the subject people, the more can be understood and explained, and that a comprehensive and interdisciplinary use of multiple methods provides a multi-dimensional understanding (Waldram, et al 1992:312). Further, this multi-dimensional approach is able to present data in their cultural, environmental and historical context more effectively than any other single disciplinary approach to studying human behaviour (Morphy 2006:136). Moreover, anthropology is able to act as a vehicle for marginalised Aboriginal voices in the correction of perceptions of history, and territorial identity by providing supporting research for oral histories in court (Culhane 1998; see Cove 1996: 54; Mills 1996:46; Rush 2003:12).

By contrast, the history of Aboriginal rights and title litigation since *Delgamuukw* shows that the Crown has steadfastly resisted the holistic and comprehensive nature of contemporary anthropological research, let alone the premise that field research among the subjects is the optimal way of finding out information, and instead has put forth Expert Witness opinions that present a single methodological approach based on the analysis of existing data that can project an illusion of scientific authority and detachment from the subjects (Culhane 1992; Cruikshank 1992:26; Miller 1992:62; Ridington 1992; Waldram, et al 1992:314). According to the findings of Judges, most notably Chief Justice McEachern in *Delgamuukw*, anthropology is held in contempt as a “soft” human study, which can be

manipulated by claimant interests; the assumption asserts that “hard” sciences like archaeology, biology, geography, history, statistics and economics can somehow explain culture by viewing it “objectively”, from a position of detachment from the subjects (see von Gernet 1999:4, point 5.2.1). As I will show later in this thesis, Crown expert witnesses offer opinions early in their testimony that feature lengthy critiques of proven contemporary anthropological research and methods, (see Robinson *Billy & Johnny* 2000; von Gernet *Mi’kmaq* 2000, *Tsilhqot’in* 2004) which may have the effect of casting doubt on the viability of field research based and emically oriented anthropological approaches, and their findings from the outset of the presentation of arguments. The anthropological expert opinions for the Crown thus are geared to represent “truths” based on written documents rather than statements by members of the claimant group or their ancestors. They aim at establishing quasi-scientific authority over both the discipline of anthropology and its human subjects, namely the Aboriginal group in question. In following this path, Crown witnesses portray themselves as rooted in detachment and science, and, in speaking to the judge, as having truth (rather than bias or “myth”) on their side. However, as I maintain, we need to take responsibility for the tools we have as anthropologists. We need to use the tools for researching and explaining culture more effectively when our research is being presented to people who are not familiar with either the subject matter, or the ways in which the data is gathered, and moreover in an extremely adversarial context (Kew 1993-94:87; Maddock 1989:162; Paine 1996:62). Having said that, however, I argue that anthropology remains the most effective discipline for the job.

What Ideas and Approaches Identify “Good Anthropology”?

“Good anthropology”, as I understand it to be, is scientific, in that it concerns itself with measures of reliability and validity, its hypotheses are testable, and its theories and methods

involve systematic and methodical enquiry whose results can be verified or refuted by data and re-analysis. While ideally, anthropological research is accompanied by multi-disciplinary approaches and methods that can shed further light on data, or put them in perspective and context. As a discipline, it has undergone theoretical and methodological metamorphoses and has evolved as a discipline with an ethical conscience vis-à-vis its subjects, notably its indigenous subjects who have been dispossessed from their lands, laws and political and social autonomy (Clifford 1986: 21-54; Geertz 1973; Marcus and Fisher 1986). “Good” anthropology, thus, is also able to advocate for marginalised groups’ cultures (Kirby and McKenna 1989:28), shed light on misrepresented history and misconceived notions about this subject (Culhane 1998:19-20, 127-130) when used in ways that seek to enlighten and educate.

What is meant by “Anthropological Perspective”?

Underlying contemporary anthropological perspectives, methods and practices are some essential epistemological, ethical and methodological elements that distinguish this perspective from other, perhaps more problematic approaches to studying Aboriginal peoples, past as well as present. As both Richard Daly and Antonia Mills explained in their *Delgamuukw* opinions for the Aboriginal plaintiffs, practicing North American anthropologists working in the area of Aboriginal cultural research are bound by the ethical tenets of their professional associations to protect the welfare of their subjects. In this context, Daly (2005) himself quoted the American Anthropological Association’s Statement of Ethics itself, particularly where it stresses the anthropologist’s obligations “to the people, species, and materials they study and to the people with whom they work” (AAA, [1976] <http://www.aaanet.org/committees/ethics/ethcode.htm> 2007), and “...to do everything within his power to protect the physical, social and psychological welfare of those studied and to

honor [sic] their dignity and privacy” (*ibid*: AAA, [1991]). However, while it is evident that membership in the AAA does not in and of itself guarantee that every member in good standing will act in accordance with its code of ethics, most reputable anthropologists conducting work in the field are guided by the fact that they are answerable to the people they work with, and sometimes speak for (Daly 2005:14; Van Willigen 1993:53-54; Waldram et al, 1992).

Several theoretical themes and methodological implements are inherent in contemporary anthropology. When combined in research design they work together to bring out cultural meaning and context to facts and observations of actions, explanations and story. Among these are cultural relativism, participant observation or practical fieldwork, oral historical and archival historical research, ethnographic and literature review. Within the larger anthropological collective, however, is the genuine concern with professional fitness, or the ways in which academic, professional and research ethics and practices are maintained through peer review. Below, I will briefly expand on these points.

Cultural Relativism

Primary among these elements is *cultural relativism*, a cornerstone concept in the understanding of researching of culture, and its complexities, and the diversity as well as commonalities between peoples in terms of beliefs and behaviours, and sense of place. In essence, a comprehensive approach to cultural relativism asserts the following:

- That while the culture from which the researcher originates may filter or mediate his or her perceptions and interpretations, all cultures are of equal value and need to be studied from a neutral point of view;
- Beliefs, aesthetics, morals, behaviour, traditions and other particular elements can only be judged through their relevance to their own culture; and
- That cultures should be studied thoroughly, one at a time, in depth, and while similarities and differences between one and another are important, valid singular abstract concepts of culture are tempting, but problematic and not scientifically reliable (Marcus & Fischer 1986; Bohannan and Glazer 1996:1-3)

Since Boas, anthropology has rejected Western ethnocentric perceptions and judgments of unfamiliar cultures, and similarly rejects evolutionist and essentialist thinking founded on European concepts of *stages of civilization*, as invalid when applied to Aboriginal cultures which have unique and complex histories (Asch 1992:225-226).

Ethnographic Fieldwork

The science of anthropology also relies on, among other methods, its ability to effectively conduct ethnographic fieldwork “*on the ground, where people live*” (R. Ignace 1997 *personal communication*), through a method known as *participant observation*. Fieldwork researchers *observe* not only the activities of their subjects, but participate in, and record situations where a people’s memories, stories, language, some of their secrets and sacred beliefs of their existence and practices on their land are articulated and enacted. In order to be an effective research tool, participant observation involves *participating* on the ground, engaging in the study of daily life with the subjects, using tested field methods appropriately determined between all parties. This work requires skilfully taking field notes by recording observations that may on one occasion require actual participation in an activity, and on another quietly listening to the songs and stories that explain the origins of a group, the meanings associated with places and past peoples’ action, or the genealogical connections among people, for instance (see Daly 2005; Mills 1994).

Still, on another occasion, the *participant observation* researcher may find themselves conducting *oral historical* research, the often painstaking recording transcription and translation of existing historical accounts initially told in an indigenous language, while attempting to retain their original meaning, context and substance, or recording the live re-telling of history(ies) and place knowledge. Often this work is conducted while being situated

in the places where the accounts occurred, in order to understand the dynamics, logistics and points of reference in the story (Culhane 1998:127-128; Cruikshank 1993; Rosaldo 1980). In short, in order to appreciably understand past and present cultural practices and the meanings associated with them from an *emic* perspective, researchers must necessarily establish a level of residence or at least visibility amongst, and trust with the people they are studying (Daly 2005:xxiii).

As a tool that facilitates understanding of cultural and social practices and dispositions, participant observation is thus a crucial methodological tool of the trade, and moreover adds legitimacy to the researcher and his work. One important feature of being present within and working from a central position within a community, is the existence and accessibility to information not otherwise available in official records or documents, that can help to understand the existence of certain other phenomena, such as genealogical or familial relationships, or the exclusivity of rights of some members to resources or positions. In other words, there is often a quantifiable variance between information gathered from observing actual human knowledge, meaning and action, and that which results from conclusions about them based on secondary and archival sources (see Cove 1996:54; Daly 2005:12). It follows, then, that practitioners of “good” contemporary anthropology make the effort to be present within the community of study, and to familiarize themselves with the current conditions of it, as well to obtain a sense of the known histories, perceptions of identity and place that people can articulate when they are found *in situ*, or as is, in their own setting (Cruikshank 1998; Daly 2005; Geertz 1983; Rosaldo 1980).

Aboriginal communities themselves, in choosing anthropologists to work for them as expert witnesses, tend to choose anthropologists with extended field research experience in their communities (Markey 2001:105). Interestingly, ever since Chief

Justice McEachern's disqualification of the plaintiffs anthropological witnesses in *Delgamuukw* (1991), in the adversarial setting of court cases, the Crown has(ve) tended to seek professional opinions from anthropologists who have NOT carried out extensive field research in Aboriginal communities. Indeed, Crown lawyers have also cross-examined Aboriginal groups' anthropological expert witnesses who have distinguished themselves with field research to expose them as inherently biased before the Judge as "biased" and as "advocates" for Aboriginal interests, rather than as objective researchers (Cove 1996:54-55; Daly 2005:18-20; Mills 1996:19,40)

Multi-disciplinary Approaches to Research Design

Combining research methods to produce the greatest potential for accuracy of fact (Tedlock 1993; Trigger (1982;1992), and the most comprehensive representation of Aboriginal knowledge, particularly of place knowledge, typically involves oral history research, geography, archaeology, linguistics, review of existing ethnographic studies and conducting of new field research, literature review, documentary and archival historical research and analysis (*see* J. Borrows 2001; Culhane, 1998:1-28).

Of specific interest to this holistic, integrated and multi-disciplinary approach is oral history research, defined here as the recording and analysis of historical information that is recounted through the spoken word. People's memories, experiences, stories are recorded as they are told (Cruikshank 1990), generally verbatim, and often later transcribed and entered into written text; (Vansina 1985). Where it becomes necessary, such stories are often verifiable, by comparative checking and crosschecking of other written accounts of the same histories, or dates, or phenomena, particularly where the stories are the experiences of members of a culture, which records such information in

written text. However, studying oral histories from cultures with an oral tradition, or those which do not typically record their histories in written text, presents unique methodological challenges. Over the last century, anthropological theory and method has provided a range of ideas about the validity and reliability of oral histories: While Boas and Lowie rejected the treatment of oral traditions/histories as historical facts, Malinowski (1948), emphasized their political and social function as “social charter”.

With Vansina came the “literalist” treatment of oral history (oral traditions, in his words), that established typologies and tests for which narratives could indeed be treated as historical documents (1965; 1985). Since the 1980s, both anthropologists (e.g. Rosaldo 1980) and historians (e.g. Tedlock 1993) have emphasized the cultural and social embeddedness of narrative, whether indigenous or western, and have advocated and practised approaches that emphasize social constructionist ways of dealing with narrative. As has been emphasized, the challenges of gathering and recording other peoples’ history, particularly where that history is carried largely in collective and individual memory and transmitted orally, and specifically *not written*, are best met with tools designed to accommodate not just the mining of documents for facts, but unveiling the meaning and context in which the story or account exists (see Cruikshank 1992; 1998; 2005; Tonkin 1992; Rosaldo 1980; Borrows 2003).

This issue of language represents particular challenges. Although subsequent research may use translations into English prose or academic text, or paraphrase lengthy stories for expedience, typically, oral history is best recorded verbatim, in the indigenous language, with all its nuances of meaning, and cultural conventions of discourse. The act of translation of knowledge from oral traditions to English written text, in preparation for

presentation to strangers, brings with it significant challenges to the maintenance of not just content, but of context as well. Such contexts may, for instance, include the intentions of the speaker to educate or inform, to provide specific or intimate reference about a place or an event, or practice for which a place is known. In addition, contexts can also vary according to the age and status of speakers and the listeners, each of which may have limitations, or restrictions on their roles and the circumstances under which they may participate in speaking or listening (Basso 1984, Cruikshank 1992).

In *The Social Life of Stories: Narrative and Knowledge in the Yukon Territories* (1998), Cruikshank asserts that the meaning of places and of *placement* in the landscape will have qualitatively diverse characteristics depending on individual experience, and further may be influenced by gender and age, political positioning within a community, genealogical relationships, and personal history. Casey (1996), after Clifford Geertz (1973;1983), along with Basso (1995) endorse the ethnographic and phenomenological use of hermeneutics in allowing the local voice to interpret and express local knowledge from a position of authority and authorship, and to actively engage a discourse that mediates between theory and practice, “other” and investigator, truth and fact. Reflexivity is seen as an important aspect of contemporary ethnographic approaches, “*in the sense of showing ourselves ... arousing consciousness of ourselves as we see ourselves.*” (Myerhoff, 1982:105; italics in original). Senses of place, then, are most effectively expressed and explained through the local voices of those whose place and senses are being studied, reflexively and self-consciously presented by the anthropologist.

In their pursuit to know and reveal both past and contemporary cultural activity on the land, Hanks and Winter (1986) for instance, show other archaeologists and anthropologists the functional nature of integrating approaches and perspectives in fieldwork.

Their approach is based on the notion that local knowledge informs not only ancient (pre-contact) cultural behaviour, but that it is vital to the understanding of historical and contemporary land tenure and occupation patterns, and also to the research of Aboriginal toponomy and other forms of ethnographic inquiry about people and places. The reconstructive qualities of *ethnoarchaeology* provide a graphic interpretation of ancient local knowledge of landscape and environment and corroborate much of the oral narrative that accompanies contemporary land use activities. Despite criticisms from within the discipline of archaeology itself, for its departure into the study of contemporary life, applied ethnoarchaeology is amenable to collaborative approaches with other disciplines, particularly in explaining past life-ways using the study of present land use through settlement and occupancy patterns (Gould 1989). In his landmark study of Nunamiut Inuit site formation and use in north-central Alaska, Louis Binford's *Willow Smoke and Dog's Tails* (1980), illustrates the connectedness of sites and purposeful re-use of adjoining trails for seasonal rounds and contingency activities. Binford goes so far as to suggest that ethnoarchaeologists need to integrate a "*detailed knowledge of the distribution of environmental variables*"(Binford 1980: 337), which can be extended to include ethnobotany and ethnozoological study, both of which in turn rely heavily on oral history and traditional environmental wisdom, as well as on archival and ethnographic literature.

The predisposition of the researcher towards the belief system, within which a storied truth may operate, may have influence over the presence or absence of appropriate and accurate place information in the final research product. Basso (1996) concurs with Geertz (1983) and Cruikshank (1981) on the potential for a dichotomy in positioning and cultural baggage of the researcher, and that of the studied community, in not just the development of research design, but also in the implementing of field methods and interpretations of data.

Basso's next and related assertion offers a reasonable answer to this juxtaposition of "truths"; that is that "the problem we face is a semiotic one, a barrier to constructing appropriate sense and significance" (Basso (1990:21). Contemporary ethnographic researchers need to learn about the role of semiotics - signs, visual description and symbolism – as an interpretive tool in understanding verbalized relationships with landscape. (For clarification the term *semiotics* is defined here as the "study of linguistic and non-linguistic COMMUNICATION (sic) and the way in which the patterning of human cultural behaviour constitutes forms of signification which may be interpreted according to common principles, usually by analogy with linguistic behaviour" (Smith 1999:41). Basso presents an understanding of semiotics in narrative form and the role it plays in knowing places and knowing what they mean, based on the Cibecue Apache model of storytelling, that " ...oral narratives have the power to establish enduring bonds between individuals and features of the natural landscape..." (Basso 1984:23). Using a number of interview quotes and field notes from extensive field work with Cibecue, he illustrates not only the value of place-knowledge for practical and logistical reasons, but also that the words that form place names depict clearly and immediately the specific characteristics of a place, and further that often these places have lessons and mnemonic stories of past events attached to them.

A Word on Ethnohistorical Method

Ethnohistory is the study of Aboriginal peoples that integrates the use of historical documents produced by outsiders with ethnographic method that allows for an emic understanding. As Fenton (1966:58) described it, it entails "the critical use of ethnological concepts and materials in the examination and use of historical source material," More recently, Trigger (1982) defined ethnohistorical method as integrating archaeological, historical and oral history data, and advocated it as as an important tool

in the study of post-contact Aboriginal history, where interface between Aboriginal people and non-Aboriginal people is evident. Schieffelin and Gewertz (1985), Simmons (1988) and others have specifically pointed to the holistic and at least partially emic approach of ethnographic and historical data integration in ethnohistory that allows it to be “joined to the memories and voices of living people” (Simmons 1988:). More recently, Wunder has articulated this one step further:

Modern ethnohistory must become involved with native peoples, their leadership, and their traditions regarding scholarship. In addition, given that these studies are place-based and that many indigenous peoples live near or on the ground where crucial events in their cultural history have transpired, modern native historical training requires studying the actual scene, as well as upstreaming and learning the dynamic stories of indigenous history known to the elders (Wunder 2007:594).

While, according to this contemporary holistic perspective on ethnohistory, written documents by Europeans about the Aboriginal group in question have a place, they are not the focal point anymore. Instead, ethnography and oral history from the perspective of the Aboriginal group play an important role. As I will show below, Crown expert evidence features a written document based ethnohistorical approach supported by vast amounts of archival documentation, often considered by the courts to be tangible, factual and thus scientific, and more easily verifiable than oral histories and an emic perspective which is deemed unscientific.

Professionalism

As a scientific discipline, anthropology has had the benefit of a century or more of maturation, from its origins as an imperialistic tool for studying peoples that were being

colonized, to acknowledging its role as a “handmaiden of colonization,” to anticipating the fact that the natives speak back, and to become a tool for those very peoples to respond to centuries of colonization (Clifford and Marcus 1986, Hammersley and Atkinson 1995:263). In addressing the ethical issues attached to this paradigm shift, anthropologists have contributed to the shaping of research design, applicable to other disciplines, guided by perspectives based on respect for their study group, and a willingness to treat people like people. In its various guises of “collaborative research,” “action research” or even as informed by the paradigm of “indigenous research” (Smith 1997), the anthropological perspective recognizes ethical research behaviour as collaborative and involving the indigenous community, without, on the one hand, patronizing it, or on the other, reducing it to a litany of quantifiable traits and convenient generalizations (Daly 2005:5).

Academic anthropologists who have done or do field research also write and publish much of what they learn in the field, in the way of textbooks, academic articles and books, as well as conference papers, presentations and lectures. Within academia, an important aspect of publication is *peer review*, which entails the vetting of research data and analysis by anonymous and independent academic experts in the field during the publishing process. Participation in such peer scrutiny is an expected professional obligation of essentially all academic researchers who work in fields involving the study of culture, so that perspectives, methods, techniques, interpretation and uses of data, the quality of research and the profession itself is kept in a state of constant self-reflexive monitoring, and thereby guards against narrowness of focus, politicization, lethargy, and inertia that might otherwise develop (see Daly 2006:10). In order to be recognized among peer academics, thus, contemporary anthropologists do not limit their studies and writings to the production of government or privately funded research reports or books, but particularly establish and maintain their expertise through *refereed* publication in peer-reviewed journals and academic publishing

presses which facilitate refereed books. While the same cannot be said of all applied anthropologists, some of them have participated in peer reviewed and refereed publications. Interestingly, the concept of academic peer review does not necessarily entail the review of research data by the Aboriginal subjects themselves, although university driven processes and practices of ethics review, and the intellectual property protocols increasingly enforced by Aboriginal communities tend to build in such vetting on the part of the subjects, especially where field research is involved (see for example, Smith 1997)

Contemporary anthropologists also tend to work in diverse settings, and their interests often lead them into areas of research that expand on, or intensify earlier work, so that over a long career, their work history -- different from the research history of early twentieth century anthropologists whose main body of research pertained to one "tribe" - reflect research with a great many communities, teaching at multiple educational institutions, and diverse publications. As Paine (1996) and Ray (2006) have pointed out, it has become rare in recent years that anthropologists whose work is founded upon accepted anthropological perspective and practice described above, have been retained, with any frequency, by government departments, Crown prosecution firms, or industry, throughout their careers, as their résumés reflect (see also Lovisek curriculum vitae in *Neskonlith*; Robinson curriculum vitae in *Billy & Johnny*; von Gernet curriculum vitae in *Tsilhqot'in* 2006). The primary reason for this is that, with what is at stake, the Crown's interest, given that it is generally in the role to deny, not to defend Aboriginal rights and title, is to minimize the cultural history, occupation of place, and viability of indigenous institutions of an Aboriginal group. In other words, the Crown's role is generally to reduce, discount or deny claims. An anthropologist whose career has focussed on collaborative and ethical research with Aboriginal people about their history is unlikely to be chosen to represent the interests of Crown as an Expert Witness. Instead, these interests are represented by persons

whose careers are reflective of monolithic methods of social science inquiry that produce material in *critique* of anthropological perspectives that support the existence and continuity of indigenous institutions, the continuing occupation of lands, and resistance to legal oppression. In doing so, they use outdated paradigms strongly influenced by Western ethnocentric perceptions of that history which in turn serve the interests of the State (Daly 2005:xxiii). As the following case studies reveal, the curriculum vitae of the Crown anthropologists in question reflect this trend.

In this chapter, I have attempted to determine, within my limited scope, elements of good anthropological practice, particularly where ethnographic research is central. The treatment of cultural knowledge, particularly place knowledge and the sense of place this conveys, may become crucial in the establishment of Aboriginal rights and title, as emphasis on *certain types* of orally transmitted data are scrutinized for deconstruction by Crown Expert Witnesses. In the following chapter, I try to show other factors that influence the outcome of taking culture to court, besides the quality of research undertaken in the areas of narrative and traditional knowledge.

CHAPTER 3: ANTHROPOLOGY AND ABORIGINAL PEOPLE IN THE COURTS

Courts, Anthropology and the Study of Place.

...academic seminar discussions operate under quite different rules than courts. Academics entering courts and expecting the same rules of evidence to apply in the courts as in the classroom will be rudely awakened. The best expert witnesses, in my view, are those who are able to understand fully the social context of the trial and the courtroom, (Personal communication, Michael Kew, June 20, 1997).

The findings of Justice Lamer, in *Delgamuukw v. The Queen, 1997*, wherein he essentially relaxed the “hearsay” rule, and admitted oral histories as evidence in court, has set precedent for not only Aboriginal witnesses carrying such knowledge to the stand, but for subsequent cases involving anthropological research and expert witness report development. Further, the establishment by Justice Vickers in *Tsilhqot’in 2004* of criteria for necessity and reliability of evidence sourced from oral history sets the challenges for anthropologists to meet in terms of their evidence regarding the use and interpretation, but even more their opinions regarding reliability and validity of oral history as sources about an Aboriginal group’s past. The study of place through oral history narrative, and its meaning to Aboriginal people, is relevant here, because stories of place, and living therein, are at the core of the Aboriginal evidence for territorial occupation, either presented by Aboriginal witnesses themselves, or by their expert witnesses. Given the adversarial nature of courtroom procedure and discourse, such knowledge of place articulated in oral histories will be under Crown scrutiny. Post-*Delgamuukw* trial records show that despite the Supreme Court of Canada’s validation of oral

histories, the Crown has continued to argue against oral histories of territorial occupation by Aboriginal plaintiffs or defendants being valid or reliable proof of territorial occupation (Braker and Company 2005; *Tsilhqot'in* 2006).

Material presented by the Aboriginal groups in court about place and sense of place, and how this may relate to legal questions, must be presented accurately, reliably and as highly convincing evidence. Its presenters – whether Aboriginal elders and lay witnesses, but even more so expert witnesses – must be very familiar with the data, and be able to explain the contents and significance of the data to the judge, as led by the Aboriginal group's counsel (Carlson *in* Lorincz-McRae 2001:4; Culhane 1998; Ignace *in* Lorincz-McRae 2001:3; Thom 2001:7). In the course of a trial, after the witnesses for the Aboriginal group have been led through the evidence by their own lawyer(s), it is the job of the Crown counsel(s) and at least implicitly the Crown's witnesses, to convincingly rebuke the evidence advanced by the Aboriginal claimants through cross-examination of witnesses. This is done by casting doubt on the validity, reliability and accuracy of the Aboriginal group's evidence as presented by its witnesses. In short, the material presented on behalf of the claimants must be able to endure vivisection on the stand.

Cross-examination of evidence in court is not governed by the same rules of ethics or peer-reviewed evaluation, as are academic publications, or even lectures and presentations (Kew 1997; Daly 2005:9). Every statement, every fact presented, or even the scope and content of social theories presented by experts are potential quarry for Crown counsel, supported by their expert witnesses, if they can draw inferences of instability (therefore imputed unreliability of data or their interpretation), within a discipline, perceived inconsistencies of theory and data, or lack of detachment on the part of the witness. Further, since the anthropologists themselves have to submit themselves to the cross examination process, their behaviour on the stand can impact their own evidence if Crown examiners are

successful at their job, which, according to Hugh Brody, is to “discomfort, to unsettle and to confuse” (in Ridington 1990:286).

In this chapter I will review and discuss the challenges of presenting oral knowledge as evidence in court, as viewed by practitioners in the field, and by those who have studied the use of oral evidence in court.

Anthropologists’ Challenges of Interpreting Oral Knowledge as Evidence

The Canadian court system is based on a hierarchical and adversarial structure, and the courtroom manifests this reality both in immediately obvious ways, and in ways more subtle, but equally impactful.

And there he sat, in the witness stand, tiny, but proud and answered with a very loud voice. And it was then that I realized why we were there in court – when I saw him and the way he was answering. He was very strong yet they were treating him like he was a criminal, sitting in this witness box. The only crime that we committed was being born Aboriginal people, descendants of Aboriginal people of this country. And it hurt. (Dora Wilson-Kenni, describing the oldest witness, at 104 years, in *Delgamuukw v. The Queen, 1991*, in *Time of Trial: The Gitksan and Wet’suwet’en in Court, BC Studies 1992*, No. 95:7)

The physical set-up and etiquette of a courtroom, with its raised judge’s bench and separated quarters for witnesses, the accused, the victim, or plaintiff and defendant, the defence lawyers, prosecutors and court staff, is an alien space for most other people, and particularly for those who must negotiate their way through its indifferent and intimidating environment. It is even more alien for indigenous people whose own past is not rooted in the European based structure and decorum of courts, and who have, additionally, experienced state oppression in its multiple forms in their lives and history. Courts are moreover both symbol and instrument of the state’s socio-political hierarchy, and the processes that maintain its status quo of power, or “vertical force field” (Daly 2005:3). The court system assumes

that a case being heard before it must have a wronged party and an offender, a truth and a deceit; in short, it is an intensely adversarial approach (O'Reagan 1989:5-27). Court procedure and the rules of admissibility of evidence and testimony go well beyond what academia would permit in terms of manipulating data.

In the academic theatre, ethnographic information is collected and largely taken at face value, but its merits and methods of collection are subjected to scientifically rigorous procedures and tests of validity and reliability (Cruikshank 1993; Culhane 1998). The results are added to the general academic body of knowledge and remain refutable and/or are available for further research, which can augment, question, and verify previous data and its analysis. In court, however, this same information is treated as "evidence" that supports the claim of either "side", and is pitted against the other, as the veracity of the material, credibility of the witness giving the evidence, and the otherwise technical validity of the claim in general is debated, however not to enlighten or educate, but to *disprove* and *discredit* the other side (Burns and Elias 1996; Culhane 1998; Daly 2005:9).

The laws and the processes of evidence, as used in the Canadian court system, in turn, were not created for addressing culturally sensitive issues, or for that matter, certain other types of scientific material. This means, as indicated by Michael Kew (1997), that not only Aboriginal cultural knowledge, particularly oral history, but material or expert witnesses, must be prepared to operate under conflicting and previously unexperienced stresses. Of the many challenges to be met in presenting and re-presenting ethnographic material in the legal setting, the most significant is in the reckoning of differences between Aboriginal world view and value-systems, and those of Western society, of which Federal and Provincial court structures are a product and are tools for making rules for the "common" good (Thom 2001: 5). The very concept, for instance, of the combined communal and autonomous individual maintenance of a reciprocal spiritual relationship with a sentient

(living) landscape, central to Aboriginal self- and cultural perception and systems for living, is equally foreign to most, if not all members of the court, whose task it is to process such contextual information in relation to the laws of evidence (Culhane 1998; Thom 2001:8; Ray 2003:257).

As Tipene O'Reagan recounts from the *Ngai Tahu* Maori experience of settling a claim under the Treaty of Waitangi, New Zealand, facts in court can and are manipulated in ways that defy scientific, ethical or moral reasoning, although they may be deemed *legal* (O'Reagan 1992:9). In court, a scientific fact, or cultural truth, irrespective of its value to the resolution of differences, may be omitted from debate, modified or stricken from the record, based on the way it was introduced into the proceedings. Evidence that has been clearly proven in the field, and extensively researched and written about, supported by ethnographic material and that originates from within bodies of ancient knowledge, can be ignored, or in some way discounted, when other pressures, such as finding politically acceptable settlement figures, are exerted on the scales of justice (O'Reagan 1992:11). O'Reagan, a Maori himself, cites numerous bad deals struck by fiscally minded Tribunals, and suggests that the negotiating table is the only safe place for the ultimate settling of accounts between government agencies and claimants. O'Reagan argues that the courts would serve a more effective purpose if they concentrated on deciding legal matters around land claims, rather than also bearing the burden of deciding the financial outcome of the claim. It should be pointed out, however, that here in BC, judges have occasionally helped the cause of Aboriginal litigants by asking the Crown to bear the costs of both parties' trial preparation, thus creating a more level playing field (*see* Reasons for Judgement, Justice Vickers, *R. v. Tsilhqot'in*, 2005)

There are a growing number of legal and anthropological voices (Culhane 1998; O'Reagan 1992; Ray 2003 2006; Reilly 2000; Roth 2002) that warn us that the court is a

dangerous place to hear any case involving legal filtering, or interpretation of the indigenous cultural evidence, under any circumstance, whether it involves claims litigation, or the infraction of federal or provincial hunting, fishing or other resource use legislation. Anthropologist Peter Douglas Elias and lawyer Peter Burns (see *The Man Who Killed the Ram* in PoLAR, 1996, Vol.19, No.2), discuss the issue of a dichotomy of truths that can occur between parties to a legal conflict. Burns and Elias recount how, during a K'tunaxa hunting case they worked on together, cultural evidence of crucial importance to the accused was discounted in favour of popular misconceptions based on wide-spread ethnocentricity and possibly the inexperience of the court, in its interpretation of Aboriginal identity and traditional hunting practices (Burns and Elias 1996:82). Their discussion of the divergent perspectives on "truth" held by respectively, the accused, the legal council, the court, the public, the K'tunaxa band that the accused held membership in, the media, and the anthropologist together inform future researchers of the need to be aware of multiple realities, and their motivating interests.

Burns and Elias thus make the point that "truths" as they are presented and decided in court are culturally and socially constructed. Burns and Elias refer to the work of anthropologist Susan B. Coutin (1995), who fostered the contextual understanding of constructed truths as they occur in legal proceedings, and therefore, a better understanding of legal outcomes in cases involving cultural differences.

...it is important to view legal truth as something that is constructed rather than uncovered. Although in the Anglo-American tradition, prosecution is deemed a means of applying legal rules to facts in order to sort truth out from falsehood, the "facts" that police collect and that judges and juries consider are socially constructed, and the "rules" are defined, at least in part, in their application. The authority of legal rulings derives less from their approximation of some independent reality, than from the proceedings that validate them (Coutin 1995:549 in Burns and Elias, 1996:71)

Similarly, Arthur J. Ray, pioneer in fur trade history research and an expert witness himself, observes the challenges of providing ethnohistorical evidence in the adversarial setting of the Canadian and United States courts. In his 2006 discussion paper (Ray 2006), he explains various legal process elements, and theoretical research positions and dichotomies at work that prolong and make problematic the business of taking culture to court. Ray illuminates the conditions wrought by the sheer volume of ethnographic and historical documentation to be heard, the sluggishness of the court system as a place to hear arguments over culture, conflicting legal mandates and strategies, and the polarization of research and its presenter. Echoing Culhane's observations of the same phenomena as it plays out in *Delgamuukw v. the Queen 1991* (see Culhane 1998), he considers the observable dearth of jurists and prosecutors knowledgeable about the culture in question, which thus shapes its presentation in court.

Ray also explores the status of oral history in the courts. He stresses two primary functions of oral history as evidence thus, "First, it provides crucial indigenous perspectives. Second, when there are substantial breaks in other lines of evidence, this type of history may enable claimants to breach this gap" (Ray 2006:28). On the first count, oral histories that refer to place knowledge and meaning, as these exist in Aboriginal usage, are fundamentally more informative and appropriate for explaining territorial identity, than any form of observed, externally synthesised documentation, as factually accurate as such work may be. This is due largely to the capacity for these oral references to provide context(s) for the location in question. Repeated reference to places, and routes of travel to places, as experienced under a variety of conditions, or events, particularly those that reveal a chronology, have the potential to be useful in explaining land-use over long periods of time (see, for example, Andrews and Zoe 1997; Basso 1996; Brody 1981; Cruikshank 1993; Daly 2005; Ignace 2001; Mills 1994).

Ray cautions us, however, that introducing oral history as evidence has been contentious in the courts; Aboriginal communities do not want to participate in sharing sensitive information with Crown employed researchers where the knowledge they impart may be surreptitiously used elsewhere, used against them in court, or mangled by crafted interpretation. Owing to the difficulties that Crown expert witnesses typically face with respect to conducting fieldwork in Aboriginal communities, not only must they rely on secondary sources for this information, but they are unable to access the claimant's information until it has either been filed as reports, or delivered as testimony by elders, or other members of the Aboriginal litigant group. As the evidence is fair game for prosecutors in cross-examination, so becomes the speaker, or messenger, of the information. Ironically, Ray refers to a statement made by Julian Steward half a century ago "...elders and field ethnologists whom Aboriginal claimants retain as their experts, are, to a considerable extent, the evidence" (Ray 2006:29). The implication of this courtroom inevitability is that the veracity of the oral evidence may be shown to be jeopardized by the *perceived* integrity of the speaker. Crown prosecutors are often motivated to have evidence discounted, or even dismissed by any means legally open to them.

A Word on the History of Anthropology in the Courts

Since 1963, when Wilson Duff was called to present anthropological research as testimony in *R. v. White and Bob*, and in *Calder v. A-G. B.C. 1973*, Aboriginal people seeking to settle land claims and respond to charges leading to rights and resources cases have called upon anthropologists to assist in providing specialized cultural information on their behalf. In so doing it has become an inherent task of the anthropologist in court to also make every attempt to educate judges about the contexts in which much of the cultural information is embedded, and to literally "teach" jurists about theoretical perspectives, shifts

in methodological and field practices, new information and sources, and to bring about a greater understanding of Aboriginal knowledge as it exists and is transmitted, and of Aboriginal history as it actually occurred, especially from the perspective of the Aboriginal people (Thom 2001). This remains a daunting task for anthropologists, given the courts' general dearth of cultural understanding and the inability to comprehend differences in worldview that could otherwise bring about more than one way of looking at things like land, "ownership", relationships, sense of place and cultural history.

One of the primary reasons cited for the court's inability to conceptualise "other" ways of knowing and telling about culture as valid, is that the conservative legal culture in which the courts are situated has at its core a fundamentally colonial, ethnocentric perception of Aboriginal people and culture. Its concepts of "ownership" and "social organization" are based on nineteenth century evolutionism (Waldram et al, 1992:311). As Michael Asch (1997), points out, that it is this archaic

...nineteenth century cultural evolutionism [that] provides the intellectual justification for the existing rationale regarding the legitimate disposition of underlying title in law. In this sense it is 19th century evolutionism that lies behind how the law designates the ultimate authority over cultural property... (Asch 1997:266).

This perspective held by Chief Justice Alan McEachern in *Delgamuukw* (1991), and by other judges prior to that case and subsequently, present challenges to anthropology in that the biases flowing from it tended to blinker and distort or to otherwise incapacitate the court's ability to understand oral history on its own terms (Fortune 1993). Instead, McEachern not only mistrusted the Gitksan and Wet'suwet'en oral histories as mythical constructions tailored for the claim, but he relied on the "common sense" approach of the ethnocentric layman, and saw these bodies of knowledge for what they contained in the way of "brute

facts” he could glean from them, as opposed to their actual function, which was to show how it is that oral culture transmits knowledge (Cruikshank 1992:31, 40).

Even as Chief Justice McEachern permitted oral evidence into the record in *Delgamuukw* (1991), and subsequently ignored most of it, Chief Justice Lamer (*Delgamuukw* 1997) recognized its value as a body of knowledge and a way of corroborating historical accounts, but was not clear how courts should interpret this strange knowledge (Thom 2001:2). The admission of oral history into evidence has brought with it an entire host of new challenges in terms of how it is to be presented, how it is to be interpreted, what of it will be considered admissible and who can present it. In addition, as Brian Thom points out, oral history as evidence must also clear the blockade of the “‘hierarchy of truth’ which judges have exhibited in the past, with scientific knowledge on top and Aboriginal knowledge far down the scale” (Foster and Grove 1993:221; Fortune 1993:116; Thom 2001:5). Thom further cautions that, in the absence of learning to see oral history as a highly contextualized discourse (Ridington 1990; Simpson 1999:77):

...judges may very well continue to act as they have been trained, that is to mine “nuggets” of information from oral histories for their resemblance to “truths” as the judge constructs them. The outcome of this pattern is a continued production of histories poorly reinterpreted and re-written in reasons for judgement (Thom 2001:5).

In late 2007, Justice Vickers of the Supreme Court of British Columbia gave his reasons for judgement in *Tsilhqot'in Nation v. British Columbia*, 2004/2005 BCSC 106, a significant case in which oral history figured prominently as evidence. The case involved the Xeni Gwet'in of the Tsilhqot'in Nation, challenging British Columbia and the Cariboo Forest Region in their plans to permit logging operations in Tsilhqot'in traditional homelands. Based on the legal tests flowing from previous cases (*Calder*, *Delgamuukw*, *Van der Peet*), one of the criteria that had to be met by the plaintiffs (Xeni Gwet'in) was the exclusive occupation of and extent of their territorial boundaries. Another was the length of time they

have inhabited said territory, and still others included their land use and occupation patterns and activities that showed exclusivity of use, and finally their relations with other neighbouring peoples (see Hon. Mr. Justice Vickers, 2005).

Justice Vickers considered the importance of oral history and of the people who appear in court to present it and early on in the case ruled on some guidelines for the legal consideration of oral histories, establishing certain legal tests. Instead of holding a *voire dire* (a trial within a trial typically held to assess the competence and integrity of a witness), to evaluate oral historical evidence in the sense of handed down memories of experience, Vickers chose to:

...lay out a general context for such evidence in relation to the culture and background of the proposed witness. This allows the court to assess particular objections to evidence as the evidence is adduced. In determining whether a particular piece of oral history evidence is reliable, the court must apply a three-part test:

1. It must determine if the evidence is in fact helpful, in the sense of proving (or disproving) a fact related to the issues.
2. It must be satisfied that the evidence meets an acceptable level of necessity (for example, if there are living witnesses to an event the necessity of oral history may be brought in to question); and
3. It must assess the reliability of the evidence. (Robert Janes, January 2001 *CLE Analysis: Aboriginal Law Update*)

More specifically, Justice Vickers outlines the application of the test practically, as it should be used *in situ*, as the trial proceeds:

[18] If a particular event was witnessed by a person or persons and if one or more of these individuals are alive and able to testify at trial, it will be possible to call them as witnesses to testify as to what was seen and heard. If a witness or witnesses cannot be called because of illness, infirmity, distance or death, then a case may be made that hearsay evidence of the particular event, what another person was told by a person who witnessed the event, is necessary. Death of all who saw the event will more likely make the case for necessity.

[19] Then, still grappling with the question of admissibility the court must decide if the evidence being tendered is reliable enough to be admitted. In this regard the court would want to know:

- 1) some personal information concerning the witness's circumstances and ability to recount what others have told him or her;

- 2) who it was that told the witness about the event or story;
- 3) the relationship of the witness to the person from whom he or she learned of the event or story;
- 4) the general reputation of the person from whom the witness learned of the event or story;
- 5) whether that person witnessed the event or was simply told of it; and,
- 6) any other matters that might bear on the question of whether the evidence tendered can be relied upon by the trier of fact to make critical findings of fact.

[20] If the court decides that the hearsay evidence is both necessary and reliable then it is admitted. After it is admitted the court must, in reaching its factual conclusions, decide what weight will be given to the evidence. In that regard, it is open to a court to accept the hearsay evidence in whole, in part or not at all. (Reasons for Judgement, The Honourable Mr Justice Vickers, *Tsilhqot'in Nation v. British Columbia*, 2004 BCSC 106).

One of the most problematic tasks ahead for anthropologists is to meet the Vickers test of *reliability* when presenting knowledge that was intended for use in another language whose transmission is oral and whose context for the substance and styles of discourse are significantly different from English written text. *Tsilhqot'in* was unique in that Justice Vickers heard part of the trial in the Chilcotin, and many speakers travelled to attend court in Williams Lake to give testimony. The outcome of this case was due in part to the existence of ample oral historical material provided by Aboriginal witnesses. Blakes (2007) reports that while the court could

...not make a final declaration of aboriginal title or grant a legal remedy because of the way the case had been pleaded in the Plaintiff's Statement of Claim...the judge stated his opinion on the basis of the evidence that had been put before him that the Tsilhqot'in have aboriginal title to a significant portion of the Claim area...the court also declared that the Tsilhqot'in have aboriginal rights to hunt, trap, and trade furs to sustain a moderate livelihood, through out he Claim area (Blakes 2007:1).

However, it may not be possible in all cases to transport either judges to the community, or conversely all speakers, or performers of oral knowledge to town to give their evidence, which is often the case in BC, where many cases are tried in cities and towns that are remote by several days' travel from the community in question, as it would be cost-

prohibitive. In the event that the alternative of producing written text from spoken word must be conducted, (with respect to place knowledge held in orality for instance, as relevant to the issues at court), fieldwork such as interviews must be held, and recorded verbatim and transcribed all according to scientific anthropological method. *Then* it will have to pass muster as reliable written text according to the rules of court evidence.

The role of the anthropologist-as-interpreter in such cases becomes even more complex and onerous when there is more than one type of oral history being presented. When anthropologists, rather than Aboriginal elders or lay witnesses present knowledge about indigenous place, spiritual beliefs, and practices embedded in cultural knowledge, they must be careful to explain cultural context and meaning or run the risk of their meaning being misconstrued, or having one made to appear less reliable than the other. Much debate as to the future of the anthropologist's role in court has been heard within the academy, as well as from legal practitioners, particularly from Canada and Australia. In the concluding chapter of this thesis, I discuss in greater detail some of the relevant issues that have crystallized and been explored in both continents in the last decade.

Translating and Retelling Aboriginal Knowledge

In the brief section below, I discuss the phenomena that typically impact oral knowledge when it undergoes transformation from its intended spoken form, in an Aboriginal language, to specifically English written text, and which then has new and unintended application for an audience with a limited capacity to understand it.

In her 1999 PhD. thesis, Leanne R. Simpson devotes a section specifically to the effects of translating Aboriginal knowledge, as it exists in a first language, into English:

Paying attention to the structure of language and translation reinforces Indigenous Knowledge as a process rather than a product or an endpoint.

The structure of Aboriginal languages is indicative of Indigenous thought processes...” Here she quotes Little Bear, (1996:621) “*Constant motion is inherent in the Native thought process and consequently many Native languages, such as Blackfoot, are very action-or verb-oriented. We’ve always thought in terms of energy, energy fields and constant motion*” (Little Bear, 1996). “*The translation of knowledge from Aboriginal languages to English is also a process of transformation from a process-oriented system to a product-oriented system. By reducing processes into factual data, much of the power of Indigenous Knowledge is lost* (Simpson 1999:75).

Simpson expands the discussion of this transformation of process-to-product and the loss of dynamic power it manifests in terms of decontextualizing knowledge through attempting to “fit” the information into products. She notes, referring to M.G. Stevenson, 1998, that Aboriginal knowledge systems are considered

...high context communication systems, where in most of the meaning and value of the system is derived from the context, rather than the content...the western scientific system [and indeed the legal system], is of course a literate system that is focused on content, wherein meaning is derived from the information itself, rather than the context. (Stevenson 1998:13, cited in Simpson 1999:78).

This conflict of the Aboriginal processual concepts of knowing by being in, and speaking of a place, or places, being forced to fit with the content-product objectives of site-specificity, for instance, of the Crown in *Jules and Kamloops Indian Band v. Harper Ranch (1995)*, is illustrated when comparing the two ethnographic studies completed by Bouchard and Kennedy for the Crown (*see Bouchard and Kennedy, 1995*), and by Ignace for Kamloops Indian Band (1995). Later in this thesis, I expand on this conflict in the analyses of the Expert Witness evidence provided on behalf of the Crown and its proponents, as provided by linguists and ethnographers Randy Bouchard and Dorothy Kennedy (1995). Bouchard and Kennedy differ from the typical nature of Crown anthropological expert witnesses in that they have conducted significant amounts of field research during their careers, specifically in the 1970s and 1980s.

Studying the Meaning of Place *vis-à-vis* Evidence of Land Occupation in Court

*“Space is a society of named places”
(Claude Levi-Strauss, The Savage Mind, 1966)*

*“The world comes bedecked in places; it is a place-world to begin with”
(Edward Casey, Senses of Place, 1996),*

“Our traditional sites were not made with a cookie cutter and scattered where you find them now...all these places are connected in our memory, language, ritual, and they are connected by a network of trails. How else would we get to them?” Skeetchestn Chief Ron Ignace 1997, on the effects of disconnectedness conveyed by contemporary inventoried approaches to landscape knowledge.

“There is no knowing or sensing a place except by being in that place and to be in a place is to be in a position to perceive it. Local knowledge is at one with lived experience if it is indeed true that this knowledge is of the localities in which the knowing subject lives. To live is to live locally, and to know is first of all to know the places one is in” (Edward S. Casey, 1997)

This section is primarily a textual analysis and review of relevant works that exist in the field of place name research. I have arbitrarily chosen to present those works which focus on finding a way for “good” anthropological place and place name research to be conducted that would be applicable in the Interior of BC, and also useful in the preparation of comprehensible, still current and court-worthy research. I hope to illustrate place name study in the context of a viable form of anthropological inquiry and to show its importance in interpreting oral histories, and in explaining sense of place and identity. In addition, I examine research perspectives that underlie, and methods that have been employed in the production of, research that is presented in court as evidence in Aboriginal litigation, with respect to land-use and territorial knowledge, as well as oral history, and mapping, historiographical and documentary approaches.

Why the Anthropological Study of Place is So Important

Place knowledge and people's connection to land is best studied through an anthropological lens, because of the discipline's "expertise in the holistic study of human social and cultural systems, in particular...systems of kinship, social organisation, beliefs and practices" (Morphy 2006:136). Aboriginal concepts of territory, sense of place, belonging to place and boundary knowledge preserved in memory and transmitted orally, have been and are emerging as issues before the courts in both land claims and in response to criminal charges regarding the exercising of Aboriginal rights. People know and practice these concepts, individually and communally, as they have done long-prior to contact, by acknowledging routes through, between and networks within their local communities and neighbouring territories (Ridington 1990:276). The reasons for maintaining this knowledge of place and places are both pragmatic, and spiritual, and play an integral role in group identity, and in the individual's sense of belonging within a group. (M.Ignace 2001:9). As Andrews and Zoe (1997), Basso (1984), Binford (1980), Cruikshank (1990), Greer (1997), Ignace (2001), Simpson (1999) and others report, most Aboriginal place knowledge is situated within stories and reference to events and phenomena, through which landscape within home territory is remembered, taught about and lived with. It is these contexts that must be preserved along with more site-specific place references or "facts" that may be of particular interest to issues at court (Ray 2003:257).

Space v. Place

Edward Casey, (*in* Basso and Feld 1997) provides a detailed theoretical argument for the notion that people do not automatically conceive of their homelands in terms of *space*, or huge open tracts of land which they share with no-one else. Casey argues that people

interpret their landscape as a collection of places, which may translate into a sense of space, but that these are culturally constructed and will ultimately be expressed in diverse ways. Casey's argument is significant in the expression of indigenous senses of place, where it is illustrated through either orality or through visual manifestation, or in practice. He also takes on an important question for anthropologists who face research challenges imposed by Crown and corporate infringement in Aboriginal territory that specifically reveals the cultural conflicts in the interpretation of the space-place conflict. Casey asks whether or not a sense of *space* is indeed primary to people, in preference to *place*, as early modern positivist thinkers have insisted and acted upon. He challenges such epic philosophers as René Descartes Immanuel Kant and physicist Isaac Newton, each of whom treat a sense of space as not only primary, but as a statically separate entity from *time* and *place*. Casey argues instead that "...space and time come together in place, in that, contrary to Newton's laws of each element operating independently of the other, in reality "place" is essentially where we experience the "matrix" of time and space together" (Casey, 1997:37).

Referring to earlier thinkers such as Aristotle and Archytas, as well as twentieth century structuralist-functionalists like Bronislaw Malinowski and Claude Levi-Strauss, ontologist Edmund Husserl, provides substantial evidence for the notion that a sense of *place* takes priority over that of *space*. However, Casey argues convincingly that not only do people *not* construct a sense of space as primary to place, but that spaces, such as regions or territories are interpreted as being made up of many known "places". Casey further argues that each known place has meaning and depth; there is no "empty" unknown frontier, *tabula rasa*, nor *terra nullius* in the human landscape, which in some way necessitates externally imposed epistemological classification and explanation.

Both A. Irving Hallowell (1997) and Edward Casey (1987; 1996) explain the diverse and complex ways in which humans perceive *place*. Place is interpreted spatially and logistically through one set of criteria by the individual, while place-membership is constructed differently again in social and cultural contexts. Both individual, or sensorial comprehensions of place, and the culturally constructed and socially practiced sense of place are important in understanding people's place knowledge, particularly where territorial identity, expressed through oral narrative and visual traditions, family histories and personal memory contribute to contextualisation of place names. Sense of place is a social and cultural construct across cultures, and is expressed by people variously through the use of metaphor, symbolism, story and action in order to perceive, interpret, remember, position, communicate about, and be *in* and *part of* a place (Casey 1987). Hallowell concurs with Casey in that: certain universals in place knowledge practices exist;

Place naming, star naming, maps, myth and tale, the orientation of buildings, the spatial implications of dances and ceremonies, all facilitate the construction and maintenance of the spatial patterns of the world in which the individual must live and act (Hallowell 1997:133).

Of particular relevance here is Hallowell's discussion of the universal behaviour of people in the naming of places and landscape features as a having a generic function;

When integrated with individual knowledge and experience of the terrain, it affords a schema of reference points for topographical orientation. Such points are not only a guide to action, but can be mentally manipulated and organized in the form of 'mental maps' and the spatial schema inherent in them communicated (Hallowell 1997:134).

This mental mapping of named places is practiced both by individuals and groups, and, is an important function of survival in any environment, be it urban, rural, contemporary or in the past, local or in the abstract. The abstract spatialization of the human world, specifically the conceptualization of places, events, people and things that exist elsewhere in

distant locations is achieved through symbolic representation, such as mapping and picture, but most frequently through the use of words and story (Hallowell 1997:134). Spatialization and concepts of homelands and neighbouring or foreign regions and territories, as human universals, should not be confused, however, with concepts of place as vast uninhabited territories, such as fuelled colonial expansionism, and Cartesian concepts of mapping. It is important to understand something of the development of cartography and its relationship with colonialism and expansionism.

Casey's argument is that there is a discrepancy between concepts of place, and of *space*, which has implications for those studying the impacts of colonial expansionism, and the mapping and dividing up, and eventual usurping of other peoples' places. He argues that people interpret their landscape, as a collection of *places*, which under specific conditions, *may* translate into a sense of space filled with other beings and their places (Casey 1996; Myers 1986). Here, Casey's work is neatly dovetailed by the extensive fieldwork findings of anthropologists Keith Basso (1996), and Hugh Brody (1981), Julie Cruikshank (1981;1990;1993), Eugene Hunn (1990), Fred Meyers (1986), archaeologists Tom Andrews and John Zoe (1997, who contend that it is a "place world", full of places that people *make* through memory of being *in* them, and in the retelling of those memories to acquaint others of the significance of places. This retrospective "place *making*", according to Basso is an everyday occurrence, not requiring special events or skills and that people make places of their own, for their own purposes, as well as in groups, or for groups, as a basic human tool for living. "What is remembered about a particular place – including, prominently, verbal and visual accounts of what has transpired there – guides and constrains how it will be imagined by delimiting a field of workable possibilities" (Basso, 1996:5). He maintains that anyone with the inclination can and does and did make places when they ask, "What happened here? Who was involved? What was it like, and why does it matter?" Basso further asserts that

place making is complex and while it may be the product of remembering, it is also achieved through imagining and conjecturing of what may yet occur.

Not only do people build place, then, but they build *on*, revise and enhance what has been already built of a place, what was known and thought of a place and what a place could yet be, which are all properties of the relationships between people and their places. Basso also encourages us to look at the potential for place names to reveal more than their origin, or significant physical feature. In "*Stalking with Stories*" (1984), he is specifically interested in exploring the notion that: knowing ones' places and having a *living* understanding of the landscape, and where one fits into the circle of life sustained within it, initiates and perpetuates moral discipline. He shows us that places, which have lives of their own, serve to remind Apache people of their need to respect themselves, the land, and other living things, and to be mindful of breaching these laws for living well.

This last notion serves to remind me that when studying people of the Interior, researchers must consider that the potential exists for places to have similar social function to that found in Apache narrative, though they may be expressed differently. Further, that a broader and more integrated research perspective is more likely to capture, and appreciate similarity and diversity, and to offer a clearer understanding of the local sense of place. It is the local discussion of the events, characteristics, contents or history of places in the landscape that necessitates their naming, and it is this discussion between generations, between families, between speakers, that ensures that the names retain meaning, and that the past is preserved.

Basso intersects with Cruikshank (1990) on a number of points about what people do and think about place. While these authors write about two very diverse aboriginal communities, thousands of miles apart, they agree that place-making through remembering aloud is not just a social activity, but a *cultural* one as well, and therein can only be

understood “in relation to the ideas and practices with which it is accomplished” (Basso 1996:7). Although people construct place through a diversity of cultural means and for a variety of immediate reasons, identity *of* and *with* a place seem to be the fundamental motivation and objective, and that this is primarily achieved through retold narrative, even in those cultures that rely upon the written record. Events are tied to places, places make up the landscape, and places that are named can evoke the identifying stories that chronicle those events. Everything is connected.

Not only does this research into Aboriginal senses of place reveal that re-telling history and place knowledge in local language keeps all three concepts alive, but also that written historical recording is not required to achieve this. A lived and verbally or visually remembered history survives generational impacts in ways that are not captured in the written, particularly translated, format. Places are often linked together in the mind and people construct a sense of landscape and territory, and identity within it, through memory “mapping” of places is not the same thing as cartography. A comparative look at these works shows how, across cultures, the concept of “territory” is interpreted as a series of linked places, each with a story, and often a life, of its own. Andrews and Zoe (1997), for example note that “Names and narrative convey knowledge, and in this way Dogrib culture is tied directly to landscape. Travel across Dogrib landscape is easily and clearly described by reference to these names...” (Andrews and Zoe 1997:162), and indeed travel narratives often appear as a series of place names, and serve as an archive of ancient knowledge.

Richard Daly (2005) and Antonia Mills (1994) conducted in depth field research among the Gitksan and Wet’suwet’en of Northern BC, in preparation for *Delgamuukw 1991* attempting to reveal the complexities of territorial knowledge and proprietorship of both Nations, through ethnographic research and the relating of oral histories that depict land ownership through Clans, Crests and Houses. Territorial knowledge, complete with exclusive

and common rights to certain places, within groups and between them, particularly when Nations are linguistically distinct from each other, presents research challenges, but draws attention to the cultural diversity and ways of knowing place that coexist within a geographical area such as the North-Western Plateau of BC. These two ethnographies contributed enormously to the previous dearth of documented knowledge about both the Gitksan and Wet'suwet'en , and their long and remarkable relationship with each other. In addition they provide cautionary tales and first-hand knowledge about courts and court culture, as well as the unique challenges and frustrations of striving to tell the facts to a Chief Justice who could not hear , or understand their evidence.

As evidenced in Daly (2005) and Mills (1994), and other ethnographic works, people are aware of their neighbours or those with whom they share or contest boundaries, landmarks, and resources. Further, people know the qualitative properties of their places and observed peripheral zones, with or without, and often in spite of, arbitrary, or imposed (static) borders. However, the knowledge of local people, held by them about local places and local experience in and of those places, is often appropriated by outside research, and re-interpreted, and often dismissed altogether when called upon as evidence to prove occupation in Aboriginal land litigation. The irony here is that while one of the legal tests for "occupation" of a given claim is the presence of intimate and deeply integrated knowledge of the land(s) in question, the manner in which people remember, and retell such intimate knowledge has become problematic with respect to getting it into, and understood by the courts. Anthropologists are typically called upon to translate and quantify, reduce and simplify vast and complex ancient and personal place knowledge, in ways never intended by its original authors. In addition, anthropological method is critiqued and often made to appear unreliable, and likewise its findings, by Crown's expert witnesses. The role of the

anthropologist in court is complex, and in many cases as expert witnesses, very nearly impossible to do equitably.

Other relevant issues of particular concern to my research include the reality that cartography, map inventories and Western toponomy, have long been held as the dominant methods for the *scientific* determination and recognition of place and space. This fact continues to present discord between government and legal research design (Bordieu 1988, 1991; Gramsci 1978, 1985) on one hand, and of indigenous authorship on the other (Bakhtin 1968, 1981; UBCIC 1998). With respect to this dichotomy, I rely on J. Duncan and D. Ley (1993), and G. Brealey (1995), who investigate topography as a tool of domination and power, through the process of imposition of arbitrary boundaries, or at least those which do not represent the knowledge and interests of the populations being “mapped”.

The effects of colonialism and the imposition of European scientific and historical perspective on “other” cultures are illuminated in *India and the Europeanization of the Earth* (1998), by Wilhelm Halbfass, who articulates the points in the relationship between India and Britain where the allure of perceived mysticism and exoticness of India are replaced by a disdain for a “backward” and non-scientific culture, over the course of colonial history. Halbfass is instructive for exploring similar treatments of the “noble savage” cultural image of the indigenous cultures of North America. What romantic fascination Europeans may have harboured for the mysticism of cultural processes and traditional ways of knowing has been subjugated by a scientific imperative that minimizes such tradition as non-scientific, untestable and un-credible and therefore, construed as un-meaningful and problematic to the objectives of expansionist mapping or court room tolerance and comprehension. This has particular importance in understanding the conceptual frameworks at work in the debate over the “validity” of indigenous ways of knowing about place, landscape, environment and the

meaning of things, and the power of maps to either support the presence, or completely discount the existence of the territories and known places of original inhabitants.

The re-assignment of social information is a significant factor in the perception of territory, land tenure, history and cultural memory of belonging to and in an environment or landscape. The process eventually facilitates the creation of disembodied, arbitrary, moveable and disposable government constructed Reserve lands, bounded more by “legal” colonial and (later) departmental bureaucracy than by the knowledge and custom of the indigenous populations. It follows then, that historiographical research which relies on government mapping documents to dispute Aboriginal knowledge and claims in court should be explored for its accuracy and authorship, so that the agents of change in the histories of Aboriginal communities are more clearly understood. These agents of change have created specific changes in land-use and access to original territories, but as illustrated in the following works, not all place knowledge has been completely erased, and many communities retain significant knowledge of homelands and activities that occurred within them.

An unpublished Master’s thesis by Ron Ignace (1979) about the Kamloops [Indian] Agency and the Indian Reserve Commission of 1912-1916, further illustrates this phenomenon by revealing a chronology of events that are relevant to the study of knowing place and country, and the processes by which such knowledge became lost along with place names that may have been literally legislated out of existence. In this substantial work, based on documentation from the colonial era Commission, Indian Agents and testimonies from the people of Bonaparte and Skeetchestn themselves, Ignace illustrates Reserve conditions prior to and ensuing from changes imposed by Commissioners. Subsequent research into the process of “cut-off” lands, where Federal and British Columbia (BC) provincial governments negotiate the removal of yet more land from designated “Indian Reserves” (dePfyffer 1986; R. Ignace 1979, see also R. Ignace 2008), heighten awareness of the ways in which maps and

other archival documents can be constructed, construed and deployed for agendas of dominance and symbolic violence (Bordieu 1982), beyond providing factual logistical or topographic information.

Hugh Brody (1981:15) contributes to the theoretical and ethical perspective debate by taking issue with the arrogance of Western scientific epistemologies in conducting Aboriginal research. In order to express the experiences of Aboriginal peoples, research can no longer assume an arbitrarily authoritative voice throughout a study, and must facilitate voices from the "subject" group to speak through the research. Brody correctly indicts this Western theoretical arrogance as being responsible for the alienation of communities from their own research outcomes. Anthropologists, and other "outsiders" from worlds away appear to swoop into a community, "lift" valuable information and then disappear, and seen to allow the material to be discounted or in some way minimized, or stigmatized, so as to be less credible as evidence of occupation, and ultimately, title. In this study, Brody is also instructive in developing methods for recording oral histories and establishing effective models for depicting how oral stories are affixed to knowledge of territory.

Similarly, maintaining a critical eye for the academic, social and political context in which more recent Aboriginal land use and occupancy studies have been conducted, assists in understanding research mandate, design and implementation, particularly of those completed during the 1970's and early 1980's, where discounting or reduction of data, and compartmentalist perspectives may have had significant influence in research outcomes. Here Martin Weinstein's 1992 Faro Mining Development report *Just Like People Get Lost*, and his *Aboriginal Land Use and Occupancy Studies in Canada* (1993) provide valuable insight

into the history and development of major research studies conducted in Aboriginal communities and traditional homelands across Canada, since the early 1970's.

In *The Social Life of Stories: Narrative and Knowledge in the Yukon* (1998), Julie Cruikshank, challenges classic Weberian and Levi-Straussian social theory, fraught as it is, she asserts, with traditional compartmentalist thinking and structural-functionalist interpretation. She makes a strong argument for integration and collaboration between theoretical approaches in anthropology, that include an appreciation for the blurring of perceived structural-functional boundaries, focus on local experience, and the appropriate and interdisciplinary use of diverse writers and thinkers (Cruikshank 1998). In agreement with Brealey (1995), Duncan and Ley (1993), Weinstein (1997, 2000) and Wendy Wickwire (1992), Cruikshank reminds us of the tendency of Western ideologies to usurp and diminish the validity of ground-level knowledge. She relies on Mikhail Bakhtin (1981), Walter Benjamin (1969) and Harold Innis (1950; 1951), who discussed progressive ideas about the perils of turning narrative landscape knowledge, and orality in general, into written form, long before these critical ideas became popular. Cruikshank draws attention to revelations about the marginalization of oral narrative, or storytelling, by using "more powerful knowledge systems" (Cruikshank 1998: xiii). Such systems that focus on mining of selected data result in minimized information about the cultural dynamics that produce that data, and the context in which the data is relevant.

Cruikshank (1981; 1990), cautions us to be aware of the notion that writing down orality can literally turn it into stone, petrifying its rich and processual spirit. In short, the dynamic nature of storytelling and its positioning and contextualizing properties, not to mention humour and irony, escape the minimalist or reductionist treatment of data

Cruikshank is however, appreciative of the careful recording of orality through written text, to be useful in providing a secondary method for storing knowledge for the benefit of future community generations, who may have lost a fluent use of mother language. Consequently, Marianne Boelscher's work in *The Curtain Within* (Boelscher 1989) which explores Haida construction of symbolic capital such as hereditary names in the context of negotiating legitimacy, points out that names have emotive, contextual meaning, but that they are "... socially meaningful only as part of a syntagmatic chain of statements, the story that accompanies them. This story of the origin of the name, or an episode in the life of the first bearer usually is recited during the name-giving ceremony", (Boelscher 1989:162). In short, arbitrarily plucking names from narratives for any purpose, including scientific inquiry necessarily disembodies word from meaning. Boelscher illustrates the practice of numerous rhetorical devices such as allusion and ellipsis, a process which also exists in the Interior

In addition, I found Andie Diane Palmer's *Maps of Experience: Shuswap Narratives of Place* (2005) to be specifically helpful in learning about Secwepemptsin sense of place, of names and naming and of equal importance to me, of forming an opinion about best practices in conducting and reporting on such sensitive information. Palmer also illuminates some practice theory and approaches for doing the work effectively and appropriately, but it is her reliance on a wide ranging list of literature by diverse academic writers and practitioners that informs about articulating what it is that place names do. Further, Palmer describes how this information is transmitted, how it should be collected, and why it is important to continue working on place research.

Of central interest to me is her integration and implementation of the information and guiding principles provided by linguists and ethnographers, historians, geographers and

especially by the people of Alkali Lake, BC themselves. Palmer illustrates two important practical issues in designing and conducting otherwise potentially invasive research into sensitive areas of cultural knowledge. Secwepemc culture typically operates from the perspective that all members have the birth-right of personal autonomy, and may have and relate narratives that are significant to their own life experiences, those of their own family members, interpreted through their own voice. At the same time, Secwepemc culture is very much a communal one where perpetuating and thus revalidation of place names and stories depend on retelling in company, involving exchanges between more than one speaker, or as Charlotte Linde (1993), Joel Kuipers (1987), and Dell Hymes (1972) assert, through discourse.

Certainly, stories and lessons are designed to evolve in discursive exchanges, rather than through a single speaker, but Palmer cautions us to remember that even the narrative stories of a single speaker may have context within a larger discursive body when she says “Considering narrative without also taking its situation in discourse into account is to decontextualize it, there by losing some of it’s associated meaning.” (Palmer 1994:5). This line of thought about methodologies for studying oral histories as narrative within discursive, or even multi-vocal form is expanded upon by Dell Hymes (1972) in his discussion of the analysis of myth (his term), but I generalize it to be the analysis of story of any stripe. He argues that a single story, told by one speaker,

...cannot be taken to reveal the entire framework upon which it rests: rather, a single myth [story] is part of a set (genre) which constitutes an area of choice for the narrator; and that the individual myth becomes more fully comprehensible in this context...the cultural framework to which the myth refers is seen as more complex and much less a static cognitive thing...and the flexibility of myth is also shown, because a story is part of a set, and a particular story represents – to the audience as well as the speaker - a choice

among possible statements, it is also active: not merely a passive reflection (or representation) of a cognitive field (Hymes 1972:106).

In terms of reporting on place knowledge, then, the research cannot rely on a single example of oral history (i.e. one interview, one story) to illustrate an entire conceptual framework for the interpretation and explanation of a sense of place. This, Hymes concedes, can present challenges when research is being conducted in a community where few elders remain who are able to illustrate the active nature of story-telling, but offers it as an instructive methodology for this field of research.

Likewise, the function of the indigenous language knowledge in the explaining of any or all properties of other peoples' culture is fundamental, particularly in the study of place, and place name names, where close relationships to landscape form the basis for identity and territorial belonging. In studying communities whose traditions do not readily, or consciously separate "natural" things (environment) from things "cultural" (how people live in and interpret their environment), such as Cibecue (Western) Apache in Keith Basso's essay, "Wisdom Sits in Places" (1996), it should be the aim of the contemporary ethnographer to allow the local voice to present its unique expression of living relationships with landscape or universe, (Hviding 1997) as it may, through metaphor and symbolic icon in local language. By his own account, Basso is influenced by the works of Martin Heidegger (1977), Jean-Paul Sartre (1965) and Edward Casey (1987), who inform his perspective that "...place is a crucial element in many forms of social experience and warrants careful ethnographic study in its own right" (Basso 1996: 88). This "careful ethnographic study" necessarily permits the connections between thought, language and place to be revealed in the research through appropriate story, and not to be minimized, *dis*-connected and separated under disparate subject headings as in traditional ethnographic reporting.

Perspectives on Cultural Research

With specific reference to the ways in which post-contact change, and continuity, in Aboriginal culture is perceived, interpreted and presented by Crown expert witnesses, I considered it useful to look at what informs some research perspectives on Aboriginal knowledge and identity. I was particularly interested to learn about perspectives that underlie the historiographical “reconstructive” approach to this research. Bearing in mind that there exists this divergence in approaches to the uses of anthropological and historical method with respect to taking culture to court, I found that Anthropologist Marc Pinkoski’s research into, and assessment of, the work of Julian Steward, (see Pinkoski 2006) is informative. Julian Steward’s neo-evolutionist cultural ecological approach is frequently relied upon both directly (see S. Robinson’s CV in *R..v. Billy & Johnny*, 2000), and indirectly by Crown witnesses, where it is used to sustain methodological arguments about documenting and explaining cultural change (see von Gernet’s Expert Witness testimony in *Marshall & Bernard*, [Mi’kmaq] 2005:64-65). Pinkoski reminds us that American anthropologist Steward, while heralded as a seminal theorist in cultural ecology, was in fact an evolutionist, whose career was bolstered by his role as a retained expert witness for the US Department of Justice in Indian Land Claims (Pinkoski 2006). In his 1955 work on the relationship between culture and environment, “*Theory of Culture Change; the Methodology of Multilinear Evolution*” Steward defined cultural ecology as the

...study of the adaptive process by which the nature of society, and an unpredictable number of features of culture, are affected by the basic adjustment through which man utilizes a given environment (Steward 1955).

As a result of his reliance on environmental determinism, Steward diminished the role humans play in determining their understanding of their environment, and their perceptions and uses of the landscape. Pinkoski counters that as we have learned more about actual human collective ecological behaviour and about its causal factors, Steward's theories have justifiably drawn criticism from contemporary anthropologists, who have shifted their academic paradigms away from a neo-evolutionist and ecological determinist position towards more holistic explanations about the relationship between humans and land. Such explanations draw on traditional ecological knowledge grounded in history, culture and wisdom that derives from ancient occupation of, and detailed accumulated knowledge of specific places (see for example Turner, Ignace and Ignace 2000).

Art Ray (2003) and Waldram, et al (1992) concur with respect to the shift away from, cultural-ecological and other evolutionist theories that abounded in the 1950's, including Steward's notions of the way we should look at Aboriginal land tenure. As they note, these theories are of little value in explaining the highly complex Aboriginal cultures that exist(ed), in particular, on this continent. Steward "...theorized that 'primitive collectors and hunters, such as the Australian Aborigines and bands of the Great Basin Area of the western United States, had not developed notions of ownership and accompanying tenure systems'" (Ray 2003:257). He based his conclusions on early twentieth century Australian literature, and on claims research regarding the Paiute and Shoshone which he did for the US Federal government as a lead anthropological Expert Witness. Importantly, Steward's outdated theoretical framework is still relied upon today by Crown expert witnesses whose evidence includes such profound arguments as a specific Aboriginal group having no capacity to develop systems of land tenure prior to the arrival of Europeans. As the argument further holds, the seasonally mobile ("nomadic") nature of land-use (non-sedentary), the absence of

horses, the wheel and agriculture at the time of contact all signify “primitiveness” and therefore lack of social organization (see S. Robinson, testimony, in Delgamuukw 1991, and in R..v. Billy and Johnny 1997-2002). The latter, in turn are conceived of as necessary pre-conditions for a European-style commerce or notions of trade for profit (R. v. Van der Peet 1996). This rationale also holds that the acceptance of European technologies and later, patrilineal organization - ironically imposed by the Indian Act - illustrates a disintegration of culture to the extent that traditions ceased to exist and no new ones can be credited to purely Aboriginal origin. Further, particularly in BC, pre-contact Aboriginal groups who traveled on foot *would not* have been able to travel 100 miles from their home communities, prior to the advent of the horse, somewhere around 1760’s (Lovisek, in R .v. Deneault, et al 2005).

As is illustrated particularly in the work of Alexander von Gernet, anthropological expert witness for the Crown in Tsilhqot’in (2006), there exists a distinct contrast between the ways in which highly regarded contemporary anthropologists like Basso, Casey, Cruikshank etc. view sense of place, and the manner in which the issue is tackled in court. In *Tsilhqot’in* there was an adequate volume of high quality anthropological, linguistic, geographic and ethnobotanical research which corroborated elders’ oral histories of place, practices and cultural knowledge. In this instance, the Crown’s approach was to attack the veracity of the data themselves. Von Gernet was particularly memorable in his attacks on the natural discrepancies between individual renditions of oral historical accounts, irrespective of the research that exists that explains such variances. He advanced the view that only archival and written observations of Tsilhqot’in life at given moments in history were able to reconstruct [therefore] accurate accounts of pre-and post-contact life, and that the court should not allow meaningful weight to be placed on the spurious and fleeting nature of

human memory. In the end, however, Justice Vickers in his Reasons for Judgment (cite) agreed with the Tsilhqot'in and their expert witnesses' portrayal of Tsilhqot'in sense of place and occupation of land.

In addition, at one point in this case, it was the Crown's strategy to seek dismissal of the evidence produced by the Tsilhqot'in plaintiffs' experts, including Dr. Nancy Turner, an eminent ethnobotanist. Arguing that much of the ethnobotanical knowledge relied on unverifiable oral history information, von Gernet challenged the methodology and validity of Turner's work. Turner has carried out extensive ethnobotanical research for nearly 40 years, including detailed field research with the Tsilhqot'in and neighbouring groups, and has published a large body of academically peer reviewed journal articles and books. Von Gernet, in turn, without ever having carried out field research or published research anywhere near the Tsilhqot'in, was instrumental in providing what he called his "peer review" of the plaintiffs' expert opinions in order to cast doubt on their qualifications of Dr. Turner and others. Crown held that the area of 'ethnoecology' [the ways in which indigenous people understand and use their ecologies], was such a new area of research that Dr. Turner could not possibly be qualified as an expert in it (see *Tsilhqot'in 2007:transcripts:497*). Whereas peer-reviewing in the academic environment provides a venue for knowing and testing the work of a respected colleague, such attempts at scrutiny and critique by von Gernet in the court room setting serve rather more as calculated strategies for reducing the likelihood of the other side's expert opinions enter into the judge's decision. In this case, however, Justice Vickers accepted Dr. Turner's expertise and her opinion about Tsilhqot'in plant use, and acknowledged its role in their and territorial occupation patterns and place knowledge.

In this Chapter, I have discussed works conducted by practitioners of place research, from diverse disciplinary origins, and attempted to clarify the connection between place

knowledge and concepts, oral histories as evidence in court and the research perspectives that underlie the treatment of such evidence. In addition, I have briefly discussed the contrasting views of contemporary anthropologists who have studied Aboriginal sense of place, with those of Crown's expert witnesses at court. In the following Chapter, I discuss the role of the anthropological expert witness.

CHAPTER 4: THE ROLE AND FUNCTION OF THE ANTHROPOLOGICAL EXPERT WITNESS

*"All the world's a stage,
And all the men and women merely players.
They have their exits and their entrances..."* William Shakespeare from
As You Like It (II, vii, 139-143).

"Woe betide the social scientist who seeks to give evidence on behalf of the aboriginal claimants in aboriginal title litigation. He or she may very well suffer for his or her art" Bill Henderson (1991:202).

The Role and Function of Anthropological Expert Witnesses

Justice Lamer's precedent setting ruling (*Delgamuukw, on Appeal 1997*) on the relaxation of the "hearsay rule", which effectively permits Aboriginal oral history into evidence, paradoxically poses both legal and academic challenges to the objective of getting oral evidence heard in court. As Brian Thom points out, Lamer considers that oral history may represent "... the only credible records of the past, [therefore] the role of anthropologists, archaeologists, linguists and historians are put into serious question for future litigation" (Thom 2001:3). Thom poses the question of the value of anthropology as an interpretive tool, if courts adopt the notion that oral histories can stand alone as primary evidence. In addition, since Lamer did not challenge Chief Justice McEachern's (*Delgamuukw 1991*) evaluation of the plaintiffs' anthropological testimony itself expert witnesses appearing for the Aboriginal claimants in future cases can expect to experience the same kind of challenges to integrity and credibility as were experienced by Richard Daly, Antonia Mills and Hugh Brody. Whereas in the academic theatre, as Michael Kew suggests (*Kew, pers. com. June 20, 1997*), the critique of and comment on research tend to focus on

the validity and reliability of the *work* in question rather than the researcher, court cases since Delgamuukw (see Chapter 3, pp. xx) have shown that the Crown has continued to focus on attacking the integrity anthropological expert witnesses who act for Aboriginal claimants. Thus, to defend against attempts at professional or personal character-bashing, more effective battle-dressing for the Anthropological Expert Witness may be indicated for the future.

This chapter briefly explores the role of anthropological expert witnesses and many of the challenges they face in attempting to report coherently and effectively about Aboriginal culture in court. As trained researchers in the science of studying past and present culture, anthropologists are bound by ethical and procedural rules and conventions that interface, and often are at odds with those of the court system, and in particular with the adversarial nature of examination by legal counsel. To impact the anthropological work and presentation of legitimate cultural research even further, are the effects of “counter-evidence” presented by “anthropological” experts appearing for the Crown, and the manner in which the latter prepare and present their material, and are themselves prepared by the Crown.

I preface the discussion of these roles with the cautionary words of Michael Kew (*ibid*) and Brian Thom (2001) about the conscious political choices anthropologists make when they appear for either the Crown or an Aboriginal claimant. Quite apart from the nature of claims cases to be very public venues, preparing for and presenting research opinions on either side requires intellectual, moral and ethical “...burdens in doing work that will end up in litigation, or in the area of social impact assessments which are inevitably adversarial” (Kew 1993-1994:94-5). In addition to having to make the choice of which politicized side to take, academic anthropologists who work as expert witnesses face the challenge of maintaining academic credibility while presenting anthropological opinion. Noel Dyck (Dyck & Waldram 1993), and others (Foster and Grove 1993:232) advocate for the telling of anthropological information at court, irrespective of ethical standpoint or service position, to

reflect academic credibility, by relying on scientific and cultural facts situated in context, or “telling it like it is” (Dyck & Waldram 1993). Michael Asch (1997) adds here that anthropologists must endeavour to “...build the discipline both theoretically and methodologically” in order to bring opinions to court that rest not only on extensive and thorough fieldwork, but on sound and comprehensive understanding of the discipline’s own epistemology. Bill Henderson (1997), however, points out an irony that exists with respect to expert witness reports and opinions. Expert witnesses are necessary and admissible in cases where the judge does not have sufficient knowledge of the historical or cultural facts of the issues before the court, and must rely on the work of those in the relevant specialized fields of knowledge. An expert’s *opinion*, may well be just that, however;

Archaeological [Anthropological] evidence is expert evidence, and it is always flattering to hear the courts qualify you as an expert. What it means, basically, is that you are entitled to express your opinion in your area of expertise. Most witnesses can only say what they saw or what they know; they can’t tell what they think. An expert can express an *opinion*, and that’s why “expert” is a little misleading (emphasis added). (Henderson 1997:59).

One of the challenges that arises from this irony is that in the presentation of anthropological expert witness evidence, one side may, (usually experts for the claimant), offer reports or opinions based on actual anthropological information (ethnographic fieldwork, linguistics, oral histories, etc.), or what we can consider observed “social facts” (Horowitz 1977:45). The other side, usually the Crown experts, may counter by a) taking the critical approach and investing much of the court’s time challenging the other’s research epistemologies, perspectives and methods; and b) offering opinions instead that are based on historical method and documentary research, and outdated cultural evolutionary models that seek to first deconstruct, then *reconstruct* in its place a perception of Aboriginal culture and histories (Brownlie 2001; Henderson 1992:205; Thom 2001:8).

These reconstructions, usually presented as rebuttals, ultimately serve to support the Crown argument *du jour*, and the attendant opinions are not specifically designed to educate or enlighten the courts, but they do show clever strategizing and great gamesmanship in the attempt to diminish the validity or integrity of the claimant's research. The outcome of this strategy often works to completely baffle the Judge, who may be struggling to follow the unusually convoluted and esoteric arguments typically presented by the Crown (Justice J.P. Gordon, RFJ, *R.v. Billy and Johnny* 2006:6). This is a particularly dangerous situation if the judge is predisposed toward mainstream understanding of Aboriginal culture and identity, replete with notions of outdated evolutionary positivist models expressed in the language of science, fact and objectivism., as has been the case in several Claims litigations in Canada such as *Delgamuukw* 1991, *Van der Peet* 1989, *Bear Island* 1984, *Baker Lake* 1980 (Thom, 2001:9).

A Word on Judicial Notice

As Chief Justice McEachern's 1991 decision in *Delgamuukw* showed, there is danger in presenting too much ethnographic detail reiterated from the Aboriginal subjects' side, in that it left the Judge yearning for information he could identify with, relate to and comprehend based on his own cultural background and predisposition. In the end, in his Reasons for Judgment, he retreated into his familiar concepts of the nature of human social and political organization, the cultural relevance to landscape. In retreating to familiar paradigms which were moreover made palatable by the Crown's expert evidence, he evaluated evidence about Gitksan and Wets'uwet'en culture based on his own incomplete and decontextualized understanding. This was the case when Chief Justice McEachern in *Delgamuukw* 1991, (see also *Ontario AG v. Bear Island Foundation* 1984 and others (Henderson 1992:167), took advantage of the legal option of *Judicial Notice*;

The courts are permitted, for example to take judicial notice of matters of fact said to be notorious; that is they may find them as facts without requiring formal proof. But judicial notice does not extend to disputed facts or facts not widely accepted as true. Almost by definition, social facts are not in the obvious or notorious category. If behavioural patterns were in the category of what everyone knows, they would present no problem to begin with. (Horowitz 1977:280).

Horowitz explains that the exercising of judicial notice to the extent that social facts, which are “objectively contentious” are adjudicated without formal proof, are subject to a judge’s temptation to “fill in gaps in their information with their own generalized normative axioms”, or their potentially ethnocentric rationale (Horowitz 1977:278). Decisions involving social fact should instead be arrived at using evidence, to avoid the development of courtroom anthropologies. Even in the event that a judge chooses to struggle through the opinions and the manipulation thereof, and relies on the evidence in his decision, Horowitz illuminates other evidentiary challenges that are inherent in Aboriginal titles cases in Canada:

1. The system is actually designed to deal with the adjudication of *historical fact* [which is less problematic for the courts to digest and rule on than social fact; emphasis mine].
2. Social fact involves behavioural patterns that are, to use Fuller’s term ‘polycentric’: involving a web of relationships. A different level of adjudication is involved.
3. Cases that turn heavily on social fact do not seek truth as between the parties, but a more generalized societal truth or appropriate social policy.
4. The adversarial system does not always bring forward sufficient or appropriate evidence of social fact.
5. Social fact is usually introduced, interpreted or filtered through experts allied in one way or another to a party.
6. There is a danger of delegation of the judicial function to experts as opinion evidence becomes more technical or extends beyond the training or experience of the judge.
7. The systemic experience of the courts is to grant remedies based on past and present circumstances. There is a serious inability to deal with predictive remedies (i.e. the consequences of social policy decisions). (Horowitz 1977:278-280)

It is the outcome of these elements at work in the judicial system that impacts the reality that Aboriginal titles cases are about the “redistribution of resources at the societal level”

(Henderson 1992:205), and that decisions based on approaches built for sifting through historical fact have long-lasting effects that reach far beyond the two parties present in court. This has implications for the role of the expert witness where the strategies for presenting the claimant's culturally relevant evidence involve not only oral history as presented by Elders, for instance, but where the use of anthropologists to interpret and explain specifically relevant features is also necessary to "combat the ethnocentrism in the judicial consideration of their society" (Rush 1991:168).

The Delgamuukw legal team was aware that "the Judge [McEachern] shared the same cultural perceptions of the governments and therefore the anthropologists had to break through his vision and to introduce him to the native world view" (Rush 1991:168). However, as Henderson points out, even this measure of preparation did not work in the face of McEachern's deeply held perspectives on Aboriginal history, culture and identity, and his perceptions of the anthropologists who presented in that case.

Current Crown strategies may be constructed on the likelihood that judges who try such cases are educated in what may be deemed fact-oriented or "hard-fact" disciplines which typically do not consider the multi-dimensional nature of culture and history, or the myriad of ways that have been employed to explain and understand them. The role of the expert witness therefore, can be easily frustrated by the game rules of the courtroom, unless the judge possesses some measure of understanding of the cultural, epistemological and research issues before him, which is an infrequent occurrence.

What Expert Witnesses Do

The primary function of the expert witness appearing for either the Aboriginal side - usually an Aboriginal group or individual member of that group - or the Crown and its

proponents,¹ is present a written opinion, and then to provide answers to questions posed to them by their own counsel, and in cross examination by Crown lawyers. Furthermore, expert witness opinions are usually supported by a variety of exhibits provided by the expert him/herself, or requested by the opposite side. In addition, they may be required to provide information to the court, should the judge wish to direct questions from the bench. The court must first approve of expert witnesses that both sides have put forward, prior to the commencement of trial, just as it would in any other category of case. At the onset of a trial, each side further seeks to qualify the particular expertise of its witness(es), and typically, these expert witnesses must therefore be prepared to discuss details of their curriculum vitae, and any other aspects of their professional lives, or other history the court determines is germane to establishing credibility and authority over the subject matter in question which gives weight to the expert's opinion before the Judge (Carlson *in* Lorincz-McRae 2001:5). In addition to providing evidence of their professional viability and integrity, the court may inquire about, and take time to hear, discussion of the expert witness's theoretical perspectives and methodological approaches used in the preparation of their opinion report. At this point, particularly if this takes place in a *voire dire* (preliminary examination to establish either a point of law, or to determine the competence of a witness or jury member – see Martin 1998), the actual documents, and other supporting materials used as reference in the expert's report, may be called for and entered as evidence (Carlson, *in* T. Lorincz-McRae 2001:4).

Carlson (2001) points out that the expert witness must therefore remain current with the relevant literature and research pertaining to the specialized knowledge, and be prepared

¹ In criminal trials which result from a criminal charge (e.g. fishing or selling fish in contravention of the fisheries act), the Aboriginal individual(s) as members of an Aboriginal group constitutes the defendant, with the Crown representing the Plaintiff. In civil litigation, such as the Delgamuukw case, typically, the Aboriginal group is the plaintiff, with the Crown being the defendant.

to review existing material, and add to the body of information as new literature and research becomes available. In Anthropology, this is an academic imperative, as research about Aboriginal peoples and culture has opened up new avenues in theoretical as well as methodological approaches, as I discussed above in Chapter 2, particularly in the areas of interpreting history through archaeology, linguistics and oral accounts that take into consideration the perspective and voice of the indigenous subjects. Bill Henderson (1997:4), in addressing a group of archaeologists with respect to the academically acceptable phenomenon of “new facts and new insights generate[ing] new paradigms and new models...” is instructive to all potential expert witnesses bringing social sciences of any stripe into the courtroom:

However, in some of these cases, you will find that if you have written a paper before the [theoretical or methodological] change that was then current and relevant, and then another *after* the change, this is a weakness on which you will be cross-examined. You have to make sure that if you have a lawyer taking you into some of these cases that it is carefully explained to him or her, and to the court, that theories do change as new information comes along, and some inconsistencies do occur as new knowledge comes forward. People do change their minds, and in fact that is quite a responsible thing to do (Henderson 1997: 4).

The evolving nature of theoretical and methodological understandings in academe are normal functions of research and enlightenment, but can and have been questioned in court to appear to indicate either indecisiveness or to be the result of influence from the Aboriginal litigants (see Daly 2005). One of the most graphic examples of this approach to discrediting a witness existed in *Delgamuukw* (1991)., where Dr. Antonia Mills was cross-examined by Crown on her apparent change of view on the origins of cultural borrowings between Gitksan, Tsimshian and Wet’suwet’en and Carrier social organization. In her 1986 research draft on this subject, Mills used a model of generalization derived from work she had conducted in Dunneza-Cree social organization, but later rejected the model when new information about the functions of borrowing between Gitksan and Wet’suwet’en more clearly defined and

explained the degree to which the borrowing took place (see Dyen and Aberle 1974; Mills 1994). Culhane (1998:273-275) recounts the resulting unfortunate assumptions that Chief Justice McEachern arrived at in his Reasons for Judgement (1991), but reveals another cautionary lesson in judicial thinking; the Chief Justice could not see the value or relevance of academic correction, or theoretical maturation in the development of methods for understanding the exchanges of cultural practices; all he could see was that the witness changed her story between her earlier written submission, and her later evidence tendered at court, on behalf of the Delgamuukw plaintiffs (Culhane1998:273). The lesson for future anthropological expert witnesses to be learned here is not to avoid discussion of changes in the interpretation of data, but to educate the courts and counsel, and to be able to illustrate the importance of maintaining academic integrity by remaining open to growth and enlightenment.

Expert witnesses in all cases are subjected to a preparation process, however brief or last minute (M. Ignace, *pers. comm.*,2007) in concert with their legal counsel, in which questions are formulated that will initially and ostensibly establish the content of the expert's reports, but will eventually become material evidence subjected to cross-examination. Herein lies the incubus of the adversarial nature of the courts, and the nemesis of academic anthropologists who are not prepared for the treatment they may undergo as they present, and defend the tenets of their discipline, the work they have conducted and their very own professional and, sometimes personal integrity (Carlson 2001).

Expert Witness Reports

As discussed earlier in this thesis, “good” expert witness reports reflect what exists in the accumulative cultural and documentary record, unfettered by political agenda or legal strategizing (Van Willigen 1993:54). Ostensibly and for the record, expert witness reports for

either side are constructed in answer to a set of instructions from the legal counsel representing the plaintiffs and defendants, respectively, and are written independent of either the legal counsel or the plaintiffs' opinions and advice. Expert Witness reports and their authors must be found to be above reproach in this respect, or face dismissal from the court as inadmissible, not credible and possibly suspect as the product of manufacture (Thom 2001:4).

In Reasons for Judgement, *Tsilhqot'in Nation v. British Columbia*, 2004 BCSC 106, Justice Vickers discusses the accusations of Crown prosecutors that counsel for the Plaintiff Murray W. Browne may have unduly influenced the direction, or outcome of expert witness Dr. Turner's research reports (*Tsilhqot'in* 2004:6:point 13). In response, Browne submits an affidavit wherein he mitigates potential damage to the case that might result in misconceptions of unethical legal influence, and a perception of a position of overt advocacy, and reiterates the role and expectations for expert witnesses; Browne sends these guidelines to Expert Witness, Dr. Nancy Turner during the preparation of one of her reports:

Expert, Not Advocate

*Ordinarily, the evidence of facts is admissible in court proceedings, but evidence of opinions is not. An exception to this rule is made where the opinion tendered is an expert opinion. Expert witnesses who have the court's confidence assist it by drawing inferences from facts, or assumed facts, that the court lacks the expertise to draw itself. Thus the credibility of an expert, and the impact of an expert's opinion, depend on the expert adopting an objective and dispassionate approach to the formation and presentation of that opinion; by contrast, an expert's credibility and impact will be diminished or eliminated altogether by a partisan and biased approach....Argument or advocacy that is presented as expert opinion can be and has been, ruled inadmissible by courts in British Columbia. In order to avoid any appearance of holding opinions that were not independently formed but, rather, have been shaped and moulded to accommodate the aboriginal claim and to advocate for that position, you must at all times bear in mind that your role is not that of an advocate, but rather to express the independently-formed expert opinions that you genuinely hold. (Affidavit of Counsel Murray W. Browne, for the Plaintiff, 19 November, 2002, in Reasons for Judgement, Justice Vickers, *Tsilhqot'in v. British Columbia*, 02 February 2005: 8: point 20 in RFJ).*

Justice Vickers found that Browne was not in ethical violation and dismissed the Crown's accusations of undue influence over Dr. Turner's evidence reports.

Advocacy and Influence - real or perceived

As I noted above, expert witnesses appearing for Aboriginal claimant groups tend to come from backgrounds that involve a lot of field work and years of familiarity with the groups of people they have worked with, and this familiarity can be reinterpreted to be perceived by courts as biased, or reason to advocate for the objectives of the claimant group, and therefore their expert opinions are subject to suspicion, un-academic criticism, and un-democratic treatment in cross-examination (Brody, *in* Ridington 1990:286; Carlson 2001; Culhane 1998; Ray 2003.). Bill Henderson (1997) reminds us that some judges, like Chief Justice McEachern and others (e.g. Justice Steele, *Bear Island 1984*) have taken the perception of advocacy to the extreme, suggesting that the claims put before the courts do not reflect aboriginal interests, but the concoction of "white advisors conspiring with their clients to commit Aboriginal rights...so the thought that traditional lands belonged to them had apparently never occurred to the Aboriginal people themselves...some of these judges have not read much history" (Henderson 1997:3).

The court's *perception* of a position of overt advocacy on the part of an Expert Witness for the Aboriginal claimant is likely where the witness's expert opinion can be seen to be less than the court's vision of "objective", or to show no leanings or propensities toward the claimant group. An absence of this "objectivity" can also render a report, and a witness inadmissible, as was the fate of the expert witnesses, and their evidence of three eminent anthropologists Hugh Brody, Richard Daly, and Antonia Mills whose reports and testimony were largely dismissed out of hand by Chief Justice McEachern in *Delgamuukw* (1991). The basis for his dismissal of their otherwise academically sound research was that he perceived

them to be witnesses who were passionate (read *romantic*) about their subject areas, therefore irrational and not objective, and blatantly advocating for the Gitksan and Wet'suwet'en. In McEachern's view, these three expert witnesses were no less suspect of attempting to present Aboriginal concepts of their own history in a favourable light, than were the Elders and other cultural experts who performed their oral histories in court. McEachern was unable to appreciate the nature of Aboriginal belief systems, and their valid connections to the land, as it was illustrated in the reports and testimony of Brody, Daly and Mills, and found their emphasis on this aspect of Aboriginal culture to equate with mysticism rather than science (Thom 2001:6).

But what of the Crown's expert witness? To what degree is the Crown expert who presents an opinion that serves the legal interests of the State (as embodied by either the provincial Attorney General or the Federal Department of Justice) under suspicion of being "too close to" the Crown? Was the expert witness evidence report of Crown witness Sheila Robinson *less* advocating for the Crown in *Delgamuukw* or in any other subsequent case for which she has appeared on its behalf? Having said that though, the degree to which Crown expert witnesses appear to advocate for the Crown's interests has not often been commented upon in court, at least not in the transcripts I have been able to find. If judges such as McEachern and others still practicing are wary of what they perceive as bias, or advocacy by anthropological expert witnesses on behalf of Aboriginal people, what perception can there be of the position of Crown expert witnesses, who never offer new field research, but do consistently present critiques of the work of others, and confuse the court with extraneous arguments and "technobabble" (Culhane 1997:175)?

As we will see below in Chapter 5, to avert such scrutiny, Crown expert witnesses have tended to emphasize their "professionalism" in both rhetoric and attire, presenting a detached, business-like persona (see Daly 2005:306:6). At the same time, as "hired hands" of

the state, which seeks to maintain its status quo of control over Aboriginal lands and activities (e.g. fishing, selling fish, hunting on Crown lands) Crown expert witnesses are chosen, or offer themselves, to support this effort, and are thus not by definition unbiased and objective. Interestingly, with the exception of Culhane's essay on *Her Majesty's Loyal Anthropologist* [Sheila Robinson] (Culhane 1992; 1998) and passing reference to her work by others (Daly 2005; Miller 1992, Cruikshank 1992), little has been written in the academic literature on expert witnesses about anthropological Crown expert witnesses. While extensive, the Australian literature about anthropological experts is entirely dedicated to experts who appear *for Aboriginal people*, and little is available regarding the roles and realities of those who appear for the Crown.

Given that not all practicing judges who hear Aboriginal rights or titles cases may have an operating knowledge of anthropology or Aboriginal histories (pre- or post-contact), the role of the anthropological expert witness has the potential to become quite complex and onerous. In addition to preparing extensive and often detailed notes on the highly complex nature and substance of the research being presented (relevant to the claimant cultural identity), the anthropologist must also be able to answer questions that may have to do with the science of anthropology itself. There is the potential for courts to require explanations clarifying the origins and functions of the theoretical and methodological approaches used, particularly where these are being attacked by the Crown's experts. The anthropologist at court must be able to articulate for, and inform the courts about, research and its approaches without appearing to be an advocate for the work.

Given the failure of the *Delgamuukw* plaintiff expert witnesses to convince Chief Justice McEachern, Robert Paine (1996) noted, "the task of the anthropological witnesses, chosen by the plaintiffs, became reduced to that of "echoing" the native

voice—rather than interpreting and contextualizing it” and suggests that this “gravely reduced” the significance of anthropological expert testimony (Paine 1996:59). Given that there continue to be three “truths jostling each other in the courtroom, the Aboriginal, the legal and the Anthropological” (Paine 1996:63), along with Elias (1993) thus sees it as anthropologists’ job to interpret and interlocate between the social constructions held by the legal and anthropological disciplines, and Aboriginal peoples themselves, and thus to “take steps to establish ways for thoughts and ideas to flow among them” (Elias 1993:226).

In summary, in the context of court cases that address Aboriginal title and rights, particularly in BC, anthropological expert witnesses appearing for the Aboriginal claimant are usually well established in their field of expertise and can and do provide ample proof of professional fitness for the job (Culhane 1997). They are usually chosen for their specialized knowledge in fields directly relevant to informing the court about the history and culture of the claimant group. Their field research is appropriate to the claimants’ people and culture, and the literature they rely on is current and follows contemporary anthropological theory and practice. Those appearing for the Crown, particularly in BC, however, tend not to be practicing anthropologists possessing a familiarity with the subject group, that derives from field-research, or who are recognized as peer reviewed practitioners of the discipline, according to criteria I have established earlier in this thesis. I will illustrate and explain the nature and repercussions of this divergence further in detail in the following Chapter.

CHAPTER 5: CASE STUDIES OF THREE CROWN EXPERT WITNESSES

*From Turrets and Belfries Came they, to Hover and Chant, but Alas, they were not Gryphons
at all....*

(G.R.S. Banks, *An Oral History of the Adventures of Young Arthur*, 1963)

Preamble

Earlier in this thesis, I have argued that place names, place knowledge and sense of place as known and voiced by Aboriginal people, are cultural and intellectual properties inextricable from each other, and that they function together as elements that contribute to Aboriginal cultural identity. The treatment of such knowledge as “evidence” in court, however, has to various degrees rendered it less significant than ethnohistorical information *about* Aboriginal culture, generated by scholars, settlers and servants of the fur trade, clerks of the colonial government, and clerics of all stripes. This brief chapter looks at the observed performance of Crown’s expert witnesses, and the manner in which they are positioned according to courtroom culture. I attempt to clarify these positions and to illuminate the mechanisms that serve to shape the delivery of “cultural information” at court, and therefore, to shed light on the nature of anthropological research produced by Crown expert witnesses.

Following Asch (1997) Culhane (1998), Fisher (1992), Henderson (1992), Kew (1993/94), Ray (2003;2006), Roth (2002), and others, in the development of criteria for analysis, I draw specific attention to the messengers of anthropological information, their

research orientation and histories, and their mandates and positioning on both “sides” of the legal playing field. While *Delgamuukw 1997* forms the basis for Culhane’s and Thom’s analyses, I apply the critique to the same Crown expert witness and two additional Crown expert witnesses based on their written opinions, curricula vitae and court transcripts of their testimony in various Aboriginal rights and title cases between the mid 1990’s and 2007. In doing so, I show to what degree patterns in the courtroom treatment of culture are evident following the lessons arising from *Delgamuukw*.

The divergence between expert witnesses for the Crown and those for Aboriginal claimants occurs on a number of planes within the context of the court. To begin with, the Crown appears to select its expert witnesses from a narrow pool of professionals, particularly in view of the number of otherwise qualified, knowledgeable and active anthropologists resident in the province of BC. In fact, in the recent *Tsilhqot’in v. BC 2006* case, instead of relying on BC experts who might be somewhat more familiar with the people in question, the Crown imported Dr. Alexander Von Gernet, Dept. of Anthropology, University of Toronto, on retainer to the Federal Government, to essentially deconstruct Northern Plateau cultural history. In *Tsilhqot’in* (2006) and other cases, Dr. Von Gernet’s expert opinions provide a sterling example of the direction the Crown is taking in its evolving strategies to counter Aboriginal claims. I will also examine the testimonies of Dr.s Sheila Robinson – the Crown’s star anthropological expert whose work was previously deconstructed by Dara Culhane (1997) - and Joan Lovisek, both frequently featured in cases in BC as experts for the Crown, and I will address the nature of their anthropological opinions.

Critical Discussion of Crown Expert Witness Testimony

This analysis examines patterns that have emerged in Aboriginal rights and titles cases, with respect to Crown expert witness evidence and what passes for it in comparison

with contemporary anthropological research paradigms as I articulated them in Chapter 2. It also draws attention to the issue of the presence or absence of the court's familiarity and comprehension of Aboriginal culture and anthropological research as a contributing factor to these patterns. My analysis is fashioned from the critique of anthropological expert evidence and the power of the state as presented by Dara Culhane, in *The Pleasure of the Crown* (1998).

I have also gleaned the work of Brian Thom, in his 2001 discussion paper of the *Aboriginal Rights & Title in Canada After Delgamuukw* (Native Studies Review 2001:14(1):1-26) for his brief analysis of the decisions Chief Justice Lamer made with respect to Aboriginal oral histories and anthropological testimony. Thom pointed out that Lamer's decisions allow oral history as evidence, but they also stress that oral histories recounted by claimant members may be the *only* record of an Aboriginal past, which may pose challenges for anthropologists as presenters of such knowledge. Lamer also supports the trial judge's right to assess the credibility of anthropologists and their evidence, and that, barring an error in law, appellate judges should not need to review such assessments (*ibid*:2). Thom also provides confirmation that court cases, post-*Delgamuukw*, continue to produce judgements based on entrenched ethnocentric perspectives and biases, which affect the type of research and expert witness testimony brought to bear. He points out that as long as this is the case, anthropologists must be better prepared to combat the entrenched thinking, and to present cultural material so that strangers can grasp concepts and perspectives new to them...literally teaching judges and prosecutors (*ibid*:6).

In Chapter Two of this thesis I established some criteria for defining "good" contemporary anthropology which are largely concerned with *anthropological integrity*, to

use a term I think can be coined for this purpose. I am interested in determining the presence of good anthropology in the evidence presented by Crown's Experts as follows:

- *Ethical treatment of the people being studied; this would include the conducting of research and the reporting of it in court*
- *Research that involves primary field-research with the subjects based on participant observation; in the very least, if good Anthropological research cannot involve being present in the community of the studied group, then it should rely heavily on the works of reliable researchers who have themselves conducted ethnographic work through participant observation*
- *A multi-disciplined and holistic approach to research design that rely on as many lines of inquiry as necessary, including oral history research and ground-truthing, archaeology, linguistics, geography and environmental studies for corroboration of documentary bodies of knowledge. Such a research design should also respect and reflect the voices of the Aboriginal subjects.*
- *A social constructionist and self-reflexive approach to the study of culture*
- *Professionalism, which I have determined to include such elements as submitting research to peer review, participating in the role of educator, either through publication or formal instruction, fieldwork in Aboriginal communities, research other than government or Crown activities*

Case Studies

What follows are a critical review and analysis of three Crown expert witness performances, and the manner in which anthropological research and Aboriginal knowledge, in particular oral history, are treated by these expert witnesses, based in part on the above principles. The court cases from which the Crown expert witness testimony and/or written opinion reports are sourced are briefly outlined at the beginning of each case study. Criteria applied to the testimony or reports appear in sub-headings throughout each case study. The case studies are limited in their scope by the time and space constraints of this thesis, and by the availability of court transcripts, expert witness reports and relevant statistical information. Not all the cases that I have cited or referred to are of the scope and

magnitude of major Aboriginal rights and title cases, but most of them involve smaller criminal cases in British Columbia Provincial court towards which the Crown solicited these experts' opinions. Within those limitations, however, each of these court cases is abundantly resourceful for a critique of the Crown's treatment of not just oral histories, knowledge and narrative, but on how the Crown deploys anthropology towards its objectives. Patterns in Crown's expert witness treatment of Aboriginal knowledge and self-perception and the anthropological research of it become evident as the cases are examined.

Case Study 1: Dr. Sheila Robinson, PhD.

Case Cited: *R. v. Billy and Johnny* 1997-2002, Transcripts and Reasons for Judgement, with additional professional background references drawn from *R.v. McCaleb & Coutlee*, 2000, Expert Witness Report notes.

History and Facts of this Case: *R.v. Billy & Johnny*: On or about the 4th day of September, 1997, in Little Fort, BC, within the Secwepemc Nation, Fisheries Officer Stuart Cartwright charged Caroline Billy and Robert Johnny, both of the Tsilhqot'in Nation, with 4 counts of selling fish, under Aboriginal Communal Fishing Licence regulations, and under Fisheries (General) regulations. George Coutlee, Counsel for Billy and Johnny, responded with the contention that it is their Aboriginal right to sell, trade or barter fish that they had caught, as it is a tradition of Tsilhqot'in people to do so, particularly with and among other neighbouring Aboriginal people. The case is not sworn before a judge until April 15, 1999, and is eventually heard in 2001, using historical geographer Dr. Sheila Robinson – who had previously been qualified as an anthropological expert for the Crown in *Delgamuukw* - and historian D. A. Stacey as Crown expert witnesses. Defence witnesses were Robert Tyhurst and Dr. Catherine Carlson, along with historian Ken Favrholdt.

Legislation Challenged: In the *R.v. Billy & Johnny* case: **1.** Count *Federal Fisheries Act*, contrary to s. 35(2) of the Fishery (General) Regs. **2.** Counts *Aboriginal Communal Fishing License Regulations* contrary to s.7 - 2 counts.

Legal Test/Issues to be addressed by the Crown’s Expert Witness: In the *R.v Billy & Johnny* case, (Tsilhqot’in): That Tsilhqot’in did not trade in fish with other nations as a culturally distinct practice and therefore that it is not an Aboriginal Right, as claimed.

After 47 days of trial between 1997 and 2006, BC Provincial Court Judge Gordon, in his 2006 Reasons for Judgment, noted,

I am satisfied that the two accused have failed to establish that as members of the Anahem Band and the Tsilhqot’in First Nation they have an aboriginal right to commercially sell salmon to persons or groups who are not members of that First Nation and who do not reside within the territory occupied by the Chilcotin people. Evidence placed before the Court over the first three days of this hearing clearly established that the two accused had committed the offences complained of in this Information. There being no other defenses available to them, I find Ms. Billy and Mr. Johnny guilty of the offences as charged. (Gordon J. RFJ *Billy & Johnny* 2006:436)

Crown Witness Qualifications: Educational and Professional Credits

Based on the court transcripts of the lengthy *voire dire* testimony (in *R.v. Billy & Johnny* 2000) examining her Curriculum Vitae, Crown’s Expert Witness states that Dr. Robinson holds a PhD. (University of London, UK, 1983), in “Cultural Evolution”, and, under Eurasia Archaeologist Dr. David Harris as her graduate supervisor, studied specifically the origins of agriculture,

...and how cultures move from less complicated forms of economic behaviour, where they are hunter-gatherers and how it is they make the transition into a new level of economic behaviour which implies sedentism...that this also implies a move toward civilisation, but in order to be truly that, agriculture must be in practice...Care and concern about domesticating plants and animals, usually is associated with larger and more complex human societies, and ultimately, and in all instances, I believe, has been a precursor for the emergence of civilisation in different parts of the world. In other words, we haven’t had cities, state formations, anywhere in the world unless there’s been an agricultural base. (Robinson, *voire dire*, *Billy & Johnny*, 2001: 50- 51).

In addition Robinson studied “cultural ecology”, which she explains thus:

is saying 'How does that organism fit with its environment?', So cultural ecology is, how do cultures work in the context of their environmental settings or environmental configurations?...not just the geological and biological base, but it also includes the other people, the other human societies with which a small human society interacts...how do societies co-exist? And how do they change over time? (*ibid*).

In defence of her overseas education, Dr. Robinson maintains that, unlike students in North America, the British School does not encourage the adoption of the views of academic supervisors (*ibid:53*), but to become an independent thinker and theorist. This profound declaration is closely followed by a long and arduous recitation to the contrary, of the teachings, influences and theories of her other PhD. mentors. Beginning with geographer Dr. David Lowenthal, (whom she says studies how peoples perceive their past, the way history is written, museums, museology, artifacts collection and prehistoric and pre-contact to colonial period societies in European colonial history); and her external thesis examiner, Dr. Mike Rolands, who was "influential in a kind of adversarial way" (Robinson, *ibid:55*), as he introduced her to the notion that

it's not the economic behaviour that you should be focussing in on necessarily because kinship patterns influence how people are going to use and manipulate resources...do these people have the potential in their kinship matrix to trade regularly with other people, and if so, are there predictable patterns in that economic arrangement that would flow from their kinship organization.(*ibid: 56*)

She then proceeds to declare Rolands as a less important figure of influence, but that he provided a "check" for her when she was preparing for her dissertation. Finally, she cites Geographer Dr. Cole Harris, UBC as the fourth member of her examining panel, in order that she might be able to situate her studies in a more local context, and to familiarize herself with settlement patterns in BC. She also briefly mentions that Harris has in the last 10 or 15 years, been interested in Native groups in BC. Ultimately, the title of her dissertation is "*Men and Resources on the Northern Northwest Coast of North America, 1785 to 1840: A*

Geographical Approach to the Maritime Fur Trade”, which, she says, investigated “Indians having agriculture prior to the arrival of European traders who introduced potatoes, among other things. And potatoes became a very big cash commodity” (*ibid*: 57). She finds this point to be appropriate to introduce her studies in economic anthropology, and uses a quote from Marshall Sahlins’ “*Stone Age Economics*” to elaborate a central theme of this line of inquiry. She paraphrases Sahlins, “...stone- age, pre-literate, or pre-market people have--take the *Zen road to affluence*” (*ibid*: 59), meaning that “...rather than wanting *more*, they want *less* because being mobile is more important to them than being stuck with stuff that makes you stay in one place...so in other words, if you’re nomadic and can move, you’re disinclined to produce surplus” (Robinson *ibid*: lines10-22).

Robinson is given free rein in this *voire dire* to detail seemingly every topic she has ever studied that may have a direct, or even *indirect* bearing on the Crown’s issues at court, including archaeology, environmental studies, historical geography, ethnohistory, myth analysis, historical reconstruction, oral traditions and oral histories, pre- and post-contact change, replete with the standard imperative that tradition ends with contact and that therefore no *Aboriginal* culture remains. She has a Masters’ Degree in archaeology, largely in laboratory process, soil sampling, and readings (Robinson July 20, 2001:34). This may explain why she does not discuss recent research into the Northern Plateau archaeological record, or any of the contemporary approaches to ethnoarchaeology being conducted in relevant *Aboriginal* communities in recent decades, with any degree of proactive competence. Robinson’s extensive claims to effectively, several lifetimes’ worth of education do not reveal a single course in anthropological theory or effective field methods, nor do they indicate an understanding of the work required to produce useful and meaningful study of *Aboriginal* history. Further, there is no indication from her credentials that she has a concept of the complex nature of oral bodies of knowledge, the sensitive information they carry and

the importance of careful translation and interpretation for use in contexts outside their intended settings.

Does the Crown's Expert Witness Report (or testimony) cite or quote contemporary or accepted methods and theories of the discipline of Anthropology?

A review of her testimony and CV recital in the *R .v. Billy & Johnny* [1999] case, and in Expert Witness reports she has submitted for *R .v. McCaleb & Coutlee* [2000], shows Robinson's pantheon of theorists and methodologists is a veritable who's who of practitioners of Cultural Evolutionary theory (Marshall Sahlins), Ethnohistorians (early Trigger) and Eurasia Archaeologists (David Harris,) textual analysts (Ong), Geographers (Cole Harris), venerable ethnologist McIlwraith and early 20th century archaeologist Harlan I. Smith. She does not put much stock in the works of ethnographers Franz Boas or James Teit with respect to any Interior group, as she suspects they are practicing and preserving an 'ethnographic present' in their studies (Robinson, *ibid*:38; Robinson *R. v. McCaleb Notes* 2000:1). In addition, she says, Teit was involved in advancing the political objectives of Interior peoples of BC through the promotion of their grievances to the Federal government in Ottawa - ergo, he cannot be trusted to report objectively. Instead she prefers the work of Livingston Farrand, based in New England at Cornell, who worked with Boas on the Jesup Expedition studying the Tsilhqot'in (Farrand 1900), but practiced a subfield of anthropology, popular at the turn of the last century, known as *ethnopsychology*. His main contribution to anthropology was in the relations between peoples, however, as Robinson states, he did "produce records of oral traditions, as well as a recapitulation of characteristics known about the Chilcotin [sic] at the time" [circa 1890-1900] (Robinson, *ibid*:42). Unlike Teit, Farrand did not invest much of his research time in the company of locals here, and Dr. Robinson was at a loss to be able to explain his sources and exactly why he would qualify as a more reliable

source than Teit, who had spent much of his adult life in the company of locals from most of the nations in the Interior Plateau at one time or another.

Robinson's Expert Witness Report for *R. v. McCaleb & Coutlee* 2000, in which she is required to pull out all the stops in a fish selling case, she appears to include for discussion, six binders of documents, seemingly the entire existing anthropological, ethnohistorical and archival bodies of literature available on Nlaka'pamux and Secwepemc. However, on closer inspection, she does not include the seminal work of Nancy Turner, et al, *Thompson Ethnobotany* 1990, and only two actual immediately relevant ethnography entries (one "Shuswap" by Ignace, 1998, and one "Thompson", Wyatt, 1998) that post-date the 1960's, both published in the Smithsonian's *Handbook of North American Indians, Vol. 12, 1998*. The balance of her six volumes of documents, among many archival or primary historical sources, are either carefully chose excerpts from early ethnographies (Boas - 5 entries, and Teit - 7 entries) and the quasi-anthropologist Hill-Tout, (1899), fur post journal-entries, private papers of traders, provincial and federal Department of Indian Affairs documents, and a plethora of venerable but decidedly positivist and evolutionist past social scientists such as Sahlins (1965, 1968, 1972), Service (1966), Evans-Pritchard (1951), Polyani (1968), Mauss (1969 [1925]), Firth (1967), Du Bois (1936) and Dalton (1961). There is not one contemporary anthropological theorist of note in the collection that would indicate that Robinson has updated her knowledge. There is no indication that she has knowledge of the concept of "complex hunters and gatherers" (see e.g. Hayden 1992) nowadays usually used to characterize Plateau societies.

From an anthropological perspective, Robinson, at best, represents a practitioner of out-dated, long-ago shelved evolutionist thinking which puts Plateau societies distinctly into the camp of pre-capitalist, non-commercial primitive societies. However, the fact that she is not practicing, but *critiquing* anthropology is more closely in line with her job description in

the role as Crown expert witness, which is essentially to support the Crown's positions, and to take advantage of the likelihood that the judge in this case is ignorant of the maturation of the discipline into contemporary anthropology. It is still a fairly safe wager that most judges will still buy into what they find familiar, even if they don't know how it all fits, or doesn't fit, as the case may be, depending on how the chips fall. This means that very likely, we will see the Crown continue to deploy evolutionist-based experts, compartmentalist thinkers who support their theoretical perspectives by heaping on large amounts of historical documents in an attempt to convince the judge with written "facts" that "prove" theories of civilization likely familiar to the judge's own cultural disposition, at least until such time as judges begin to obtain at least a rudimentary education in the discipline.

What are the stated or implicit theoretical assumptions in the Report (or testimony) about the nature of society, culture and human social organization?

It is Robinson's objective to rationalize evolutionist thinking as the foundation for her later arguments that the Tsilhqot'in (*R .v. Billy & Johnny 1999*) did not cultivate plant species beyond what she has coined "incipient agriculture", which she says is comprised of such non-European approaches to horticulture as transplantation of seedlings, seeds and fibres for specific uses, but not the development of worked fields, ditching, etc. This argument is tendered along with the standard template of concepts for this paradigm which include theories of social organization and evolutionary stages advanced by Elman Service, whose work was specific to Meso-American horticultural peoples, but erroneously applied to such highly complex mobile cultures as the Tsilhqot'in. Further, the template has as another imperative the notion that because the Tsilhqot'in have been what she terms "acephalous" (without a head), they lack an "overarching political or economic organization" within the pyramidal structure associated with more "advanced" cultures in evolutionist theory. As the

argument goes, they therefore are unable to establish or maintain rigid territorial boundaries between themselves and other peoples, thus they are not likely to have historically exclusive use and occupation of the lands they claim to be sovereign in. Nor, goes the template, are they able to conceptualize the generation of product for surplus and commercial trade, as their system of sharing equally the resources available to them negates the possibility of such an economic strategy. Finally, the study of the ways in which cultures adapt and make change, ostensibly after Bruce Trigger, is trotted out to prepare us for the inevitability of the sudden and fundamental changes which Tsilhqot'in would have experienced once they came into contact with European goods, never to look back. Robinson also expounds the unreliability of oral histories and traditions where they can be countered by archival accounts, and the strength of ethnohistorical, archaeological records over a more contemporary anthropological approach which seeks to include an Aboriginal voices in the work, which therefore do not reflect objectivity (ibid; see also Robinson 2000).

With respect to Robinson's use of terms for Aboriginal people and newcomers, it is notable that she consistently refers to the first peoples of this place as "Indians", while at the same time addressing explorers and fur traders and staffers as "Eurocanadians", (Robinson, *McCaleb & Coutlee* 2000:1). The fact that both of her choices of address are incorrect, ethnocentric and grossly misleading, indicate an unfamiliarity with either cultural accuracy or relativism ["Indians" come from India, and the first peoples of this country have perfectly good names for identifying and distinguishing themselves], or with the ethnogenesis of a first generation immigrant population in this country. Most early post-contact explorers in what became BC, were born overseas, and traders and staffers were largely Scots and Brits by nationality, *not* yet Canadians. Rhetorically, thus, Robinson pits the culture and actions of homogenized Aboriginal people as "Indians" against those of [Euro] Canadians or immigrants, whose interests are represented by the Crown in opposition to Aboriginal people.

Robinson does not work from a place of obvious appreciation for Tsilhqot'in culture, let alone nationhood, as particularly distinct from other Plateau peoples, and leans toward the use of almost *any* other linguistic (Athapaskan) or geographically proximal group (Tahltan, Bella Coola, Shuswap, etc.) to build an argument of sameness (*Billy & Johnny 2000:67*). The fact that the Tsilhqot'in consider themselves a distinctly unique nation does not fit into Robinson's one-size-fits-all assessment does not deter her.

Does the method address the legal questions?

In *Billy & Johnny 2000*, Robinson appears to focus on the four targets she was hired to give an opinion on. To wit: Tsilhqot'in did not have individual aboriginal rights (with regards to the catching and trading/selling of fish for profit); that it is unlikely that they had commerce; that the Tsilhqot'in are not a nation but are comprised of widely dispersed geographically distinct groups which had stronger trading relationship with outside groups proximally closest to them (i.e. Ulkatcho & Bella Coola to the West, Farwell Canyon people with Northern Shuswap, etc.), so the likelihood of Tsilhqot'in trading at Little Fort, beyond immediately adjacent groups (not nations) was pretty slim. The fourth sortie is in regards to the dearth of early documented material on Tsilhqot'in, which, she says, should not be taken as an excuse to

...collapse the timeline and to make generalizations from Teit, whose writing in the 1900's about Indians in the 1860's and 70's...to say that those records pertained to Chilcotin speaking peoples around the time of contact... just because he's the first anthropologist [on the scene at Farwell] doesn't mean that his data necessarily holds for a century earlier (Robinson, *ibid:18*).²

² In Aboriginal rights and title cases, following legal tests set out in earlier cases, Aboriginal practices must be proven to have been in existence as integral to the societies in question in and before 1846, the time the Crown asserted its sovereignty to the territory of BC, based on the Treaty of Oregon. What Robinson is saying here is that Teit's information on the Chilcotin and other Plateau societies gathered around 1900 from then-adults and elders do not pertain to the early 1800s. See M. Ignace 2006 for a different opinion. In this case, Judge Gordon agreed that Teit's ethnographic work was valid and accurate.

With respect to the question of her methods addressing the legal question, Robinson's responses on the stand are long-winded and provide little in the way of concise information and are inconclusive at best. Much of her language consists of ambiguous *non*-conclusions, leaving the listener to sew bits and pieces together and hopefully conclude what she wants from it. Throughout her testimony in *Billy & Johnny 1999*, she uses "probably", "possibly", "perhaps", "likely", "unlikely" and "I'm not sure" to the extent that whatever authoritative properties her initial statements may have carried, her expertise under cross-examination does not inspire confidence, at least with respect to her grasp of contemporary anthropology and the ethnography of the Tsilhqot'in people. In the process of reading her exhaustive court transcripts, it is difficult to affirm, as Culhane previously observed (1997:163), that Robinson clearly or consistently provides indisputable evidence to support Crown's legal questions.

In the Billy case, Judge Gordon expressed some irritation over the irrelevance of Robinson's rambling theorizing:

Quite frankly much of the testimony offered by the different expert witnesses called by the Crown bore little relevance to the question before the Court – namely, whether or not the export of salmon on what might now be considered a commercial (as opposed to a private) basis, was such an integral part of the pre-contact Chilcotin nation or its sub-communities that it must now be considered as an aboriginal right protected by s. 35 of the Constitution? Some fifty-five exhibits were received in this case but of those, Exhibit 47 consists of some six different binders containing ninety different documents comprising thousands of pages. A few of these documents bear on the question in issue. Many more I found to be of great general interest, but at least as many provided little if any help in determining the answer to that question (Hon. Judge Gordon, 2006, para.6)

To what degree has fieldwork been conducted that provides recent or relevant information in the Report (or testimony)?

Nothing in Robinson's evidence reports, court testimony or CV in *Billy & Johnny*, or *McCaleb & Coutlee* indicates that she carried out even a brief amount of field research among the Tsilhqot'in or any other Plateau society, or professionally corresponded with any

anthropologists who had recently conducted field research among them. In fact, in *Billy & Johnny* (1999:17)

To what degree does the research address the culture group specifically?

Again, Robinson relies primarily on documentation that pre-dates the land-claims research era of the 1970s, which in turn use limited ethnographic data, and rely on archival material for much of its substance. However, she does dispute the claims of the defendant by using inferred parallels with nations that border on Tsilhqot'in territory, and that may be understood to share some of the same resources and harvest techniques, but little else. In retrospect, Robinson invests the lion's share of her testimony in attempting to explain what Tsilhqot'in is NOT, as opposed to discussing the culture and the people with any level of authoritative competence. She relies on the rather scant historical record, DIA and Fisheries documents, as well as some fur trade journal records, and as mentioned earlier, all but dismisses the ethnographic work done by Teit in the early 1900's as not pertaining to the period in question (see above, footnote 1).

To what degree does the CV reflect Professionalism?

By her own admission, she does not consider other academics to be her peers and does not recognize them as such; in response to the criticism that she does not teach, she replies that she does teach judges and lawyers (*Billy and Johnny*, 2001:17 July: line 47). As she adds, she does not publish her material for peer review because, she claims outsiders would not view her work in the right light, and therefore would not understand it (*ibid*: 50). She appears to be content to operate outside of these otherwise acceptable criteria for the profession, and to continue to write reports for a variety of government departments, including INAC and National Parks, without quitting her day job as a retained Crown Expert

Witness. However, these criteria did not prevent the presiding Provincial Court Judge Gordon, from considering “beyond dispute” Dr. Robinson’s “credentials and qualifications ...to testify as an expert witness in cases of this kind,” along with her “understanding of the theoretical framework to the study of anthropology” and her grasp of factual material as “beyond dispute,” although he commented on her being “obstinate” in defending her erroneous opinion about a map (*R. v. Billy and Johnny*, Reasons for Judgment, fn 1).

Summary

Dr. Sheila Robinson holds the distinction of having blazed trail for other Expert Witnesses who follow her in the quest to serve the Crown’s interests through the presentation of “anthropological opinions”. Beginning with her performance in *Delgamuukw 1991*, she has been consistent in bringing forward work which is clearly not anthropological in nature, but instead is founded on social and historiographical theory that is outdated, and irrelevant for the study of Aboriginal culture and identity. She has not conducted field work either in preparation for her opinions or in her pre-expert witness career. She has not published her work for peer review, nor has she taught in any forum where her methods and theories can be properly critiqued by peer anthropologists. In spite of this, she has been relied upon by various Crown prosecution offices for nearly twenty years in several significant Aboriginal rights and titles cases. Since many of her expert witness appearances were in smaller, unpublished provincial court cases, she carried out much of her work since *Delgamuukw* below the radar of academic anthropologists, and as I showed above, her expert evidence did not have a negative impact on the outcome of the case.

Case Study 2: Expert Witness Report of Joan Lovisek, PhD. M.E.S. for the Crown, August 29, 2005

Case cited: *R. v. Deneault* - also known variously as “*R. v. Florence Emily Deneault et al.*; *R v. Barrett Autry Deneault*”, and “*HMTQ v. Florence Emily Deneault, Kristopher Dawn Young, Dorothy May Joanna Grant and Adeline Willard 68104; Barrett Deneault 73370, Kamloops Registry*”, 2001-2007.

History and Facts of this case: On or about the 13th of August 2001, Florence Deneault, Kristopher Young, Dorothy Grant and Adeline Willard, all of *Neskonlith Band*), were charged with unlawfully possessing fish and fishing contrary to regulations.(See Legislation Challenged). These infractions were alleged to have taken place at a fishing site on the Fraser River, Clinton/High Bar First Nations Territory. These individuals were arrested and charged at the same site as two members of Whispering Pines/Clinton Band along with one member of Alkali Lake Band four days prior. Subsequent to this, on the 20th day of August 2003, Barrett Autry Deneault was arrested and charged with similar infractions of Sect. 33, Fisheries Act Regulations. Both parties filed notice under the Constitutional Question Act with regard to the constitutionality of Sects 33 and 78 of the Federal Fisheries Act, Sect. 26 of the Pacific Fisheries Act, and Sects. 2, 4, 5, 7, & 8 of the Aboriginal Communal Fishing Licence Regulations.

The Crown maintained that the Department of Fisheries and Oceans notified Clinton/High Bar, Whispering Pines/Clinton Bands, and possibly Neskonlith as well, of a fishery closure on the Fraser at this site, by facsimile transmission (fax). However, it is unclear from the available documents whether or not these communications were received and or distributed within the communities in question. *Deneault, et al.*, claim that it is their Aboriginal right to fish on the Fraser, and that they had been given express permission to do so by Clinton/High Bar Hereditary Chief Rose Haller.

Legislation Challenged:

1. *Federal Fisheries Act*, R.S.C., 1985, c.F-14, s.33 and 78
2. *Pacific Fishery Regulations*, SOR/93-54, s.26
3. *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332, s.2, 4,5,7 and 8.

Legal Test/ Issues to be addressed by the Crown's Expert Witness In this case, Lovisek is required to support the Crown's position that persons from the Neskonlith Band, one of several Secwepemc communities, would not have fished for salmon on the Fraser at High Bar prior to contact, with, or without express permission to do so. Her rationale and opinions are discussed in greater detail later in this chapter.

Crown Expert Witness Qualifications: Joan A, Lovisek holds a PhD. In Anthropology, from McMaster University (1991), a Masters of Environmental Studies, York/UofT (1976-79); and a BA, archaeology, York (1974). Her 2005 curriculum vitae claims that she has had over twenty years' contract consulting experience in First Nations issues, specifically aboriginal rights and land-claims, and has expertise in

ethnohistorical and anthropological research...original historical consultation, anthropological witness opinions, community consultation, oral history collection and assessment; analysis and consultation of claims for Special Claims negotiation, pre-litigation reports (historical); preparation of Statements of Claim, and management of historical documents (Lovisek, CV 2005:1).

She also includes therein a number of archives she has accessed. She includes entries of scholarly papers she has published in journals and presented at conferences. Her work prior to 2001 was primarily about or in reference to the northern Ontario/Quebec Cree, Huron and Ojibwa communities, and exists almost exclusively of contemporary official records and archival documentary research of the post-contact periods therein. Of the 36 contract employment entries she records, 32 are engagements for governments, or as a Crown Expert Witness. In the four remaining entries, the use of ambiguous language in the text of

her entries does not clarify a) if she actually worked at the behest of an Aboriginal community, or was sub-contracted by an intermediary, (i.e. legal counsel), or b) the extent to which Anthropological perspective was employed in her research. In her CV, under “Related Experience”, Lovisek lists six entries, all of which are inventory and data recording projects, museum research or litigation reports. To her credit, Lovisek shows that on occasion she has collected interview data that was obtained by interviewing First Nations Elders or community members., however, it is not clear if she herself conducted the interviews, what type of interviews were held to obtain the data in these oral histories, nor the extent to which the context in which the data originates was also considered.

Outside of her obvious skills as historiographic researcher, and a brief mention of a cultural ecology project while at McMaster, in which the focus is “on the establishment of pre-contact importance of fishing as a central feature of Algonquian social and political organization” (Lovisek CV, 2005:08), nowhere in her lengthy CV does Lovisek clearly articulate the extent to which she is able to speak authoritatively to the particular cultural or anthropological issues before the court in *R. v. Deneault, et al.* Based on her inferential use of the PhD. in anthropology and extensive use of terms such as “anthropological”, “ethnohistorical”, and to a lesser extent the terms “community consultation”, “oral history collection [and ‘assessment’]”, in the text of this CV, the reader is led to the assumption that Lovisek has the requisite field experience and comprehension of culture and that provides a background for authoritative and informed anthropological research in this BC Interior fishing case.

Does the Crown’s Expert Witness Report cite or quote contemporary or accepted methods and theories of the discipline of Anthropology?

Lovisek tells the court that her report considers “the anthropological literature, ethnographic studies and the historical record regarding the location of Neskonlith fisheries pre-contact”

and this included "...potential evidence considering 'historical nomenclature, ecological factors, intergroup relations, particularly as it related to access rights by the Neskonlith Band... which can be traced to an identifiable pre-contact group". (Lovisek 2005:1). The methods she employs appear to be limited to a historiographical approach, and minimalist textual analysis [mining of selected "facts"] of archival documentation. Obviously, she conducts no fieldwork toward her opinion, or interviews, or oral history analyses or even "assessment", and does not herself visit the areas in question. Like Robinson, her ethnographic authority derives from her detailed use of archival and written ethnographic sources, from her impressive on paper credentials (PhD, numerous research reports, even some field research as part of government projects and a small number of refereed publications).

What are the stated or implicit theoretical assumptions in the Report about the nature of society, culture and human social organization?

Outside of quoting the findings of earlier research, and the archival record, including North West Company, and Hudson's Bay Post journal entries, Lovisek's theoretical and conceptual assumptions about the nature of Plateau social and political organization, unlike Robinson's, are tacit. However, they are evident in some of the problematic research statements she concludes with. She takes a clearly evolutionist-cum-cultural ecological research position, and proposes some erroneous but convenient arguments. As a result, she is unable to discuss with any authority the pre-contact histories and relationships of Neskonlith and more westerly situated Secwepemc communities. In addition, she avoids to even briefly visit Aboriginal concepts of land, landscape, sense of place and territorial knowledge and identity, especially those concerning the concept of a nation, the extent of mobility, and a system or laws of land tenure. She merely quotes from and applies those excerpts from archival documents that support, or in some way do not directly discount the Crown's position.

Finally, like Robinson, she relies heavily in her text on ambiguous terms such as “likely”, “probably”, “possible” as she pronounces her opinions on a variety of apparent phenomena.

Lovisek takes a faulty ethnological comparative approach, informed mainly by documentary and archival sources, and makes problematic assumptions and generalizations based on this highly external, compartmentalised and de-contextualized material. On one hand, she attempts to make a pass at describing pre-contact lifeways by using generalizations deriving from research into other groups (Lovisek Report, 2005:6). On the other hand she wants the court to accept that because there is some variation in fishing technologies, and in the archaeological record evident between Fraser Riverine culture of the period and that of Neskonlith/West Shuswap, that members from either of these groups could not have fished in each other’s country (Lovisek Report, 2005:6). Using this approach, it is an impossibility to arrive at a culturally integrated assessment of the facts, since so many of them are absent from the archival record. In addition, while she draws attention to the differences in the archaeological record between the two communities’ two fishing technologies, Lovisek wants the court to partake in the notion that this necessarily means that the two communities (High Bar and Neskonlith) shared no other cultural commonalities, and were therefore mutually exclusive and incompatible.

In addition, like many evolutionists, Lovisek wants the court to believe that in the several millennia prior to contact, Interior peoples did not experience travel of distances of sixty to one hundred miles or better (the distance between the communities is 226 km [140 miles] by road, considerably less by overland trail), let alone transport dried salmon, as she deems it was too difficult, until, of course, horses were introduced indirectly by Europeans (i.e. a more *advanced* culture). Further, she decides, dugout canoes were not used as frequently by pre-contact people as post-contact people, because European metals then became available to make better dugouts, which would immediately enable them to travel

greater distances, and carry more goods. Her anthropological non-sequiturs beg these questions: if travel between villages was historically limited to less than 100 miles, how did the horses and canoes know where to take the geographically and socially limited Secwepemc (whose name, incidentally, means the “spread out people”)? Did the horses make their own trails through the bush to get to these foreign places? Lovisek’s arguments are perilously weak because they ask the court to believe that locals did not have intimate knowledge of their own and neighbouring homelands, the travel routes between their communities, relations with other communities en route, or that they could have specific and meaningful reasons for travelling more than 100 miles, frequently, between communities *without the assistance of European technologies*. This starkly Eurocentric thinking also asks the court to forget, or to over-look the most central of all principles in the mass production and transport of food, materials, equipment, etc.: the collaborative and combined efforts of highly organized, extensively trained, strong, motivated, resourceful and clever people, and the dynamic networks they exist within, which over long periods of settlement in their home lands have produced ways to access one another’s resources in times of scarcity, cyclical salmon runs and other events (see Ignace 2008, Anastasio 1972 for well researched arguments about Plateau resources and mobility; Simon Fraser’s journal itself shows evidence of individuals being significant distances from their communities). Yet, the calculated knowledge by the Aboriginal people themselves about places, resources, sharing and travel is down-played in Lovisek’s report in favour of probabilities and conclusions that state the Secwepemc “would not” and “could not” have travelled 140 miles between communities to harvest resources.³

³ In the 2006 R. v. Deneault case, the Hon. Judge Blair sided with the Crown’s lack of mobility argument and found the defendants guilty, notwithstanding anthropological expert opinion, lay and elder evidence in support of Secwepemc pre-and early contact mobility. Again, one cannot help but conclude that the Crown in a calculated way played into the Judge’s preconceived notions about the nature of pre-contact Plateau

Does the method address the anthropological issues behind the legal question?

In her introduction to her report, Lovisek narrowly addresses her methodology. She uses what Robin Fisher, in referring to Chief Justice McEachern's historiography, called a "xerox-scissors-and-paste" approach (Fisher 1992:45), which amounts to the selective use of literature, fact and conjecture to craft an ostensibly believable hypothesis; or in the very least one that *sounds* good and supports Crown's position. Starkly avoiding any reference to the Secwepemc as a Nation, or larger socio-political unit, or to the notion of cultural and historical continuity, she is quick to state early in the report that she assumes there is a "cultural affiliation" between the current Neskonlith band (First Nation) and a known pre-contact band and established fishery at Neskonlith. Indeed, whether through typographical error or lack of words, she refuses to even call the Secwepemc a "group":

Shuswap is the common anglicized spelling of a term of self-identification for an *aboriginal* known as *Sexw'épemx*, which is also spelled Secwepemc.²
Shuswap is a language and Shuswap speaking people ['Shuswap'] belonged to the Interior Salish linguistic family (Lovisek 2005:2)

This serves to establish in the reader's mind a notion that where Neskonlith now sits, there existed always a sedentary, self-sufficient village, always and only associated with the ancestors from that place who were eventually restricted to and registered by the Indian Act as its band members and contained on its reserve. Further, that this made the necessity or likelihood of inter-relations with Fraser River Secwepemc communities implausible. This is an interesting departure from typical Crown reports, which more frequently work to establish a fractured or non-existent historical relationship of the claimant group with its resident ancestral people.

societies and that the witnesses for the defence were not able to change, despite detailed anthropological, ethnohistorical and elder evidence that supported mobility. In this particular case, the problem can also be located in the quality of the defence counsel's legal arguments and ability to effectively present anthropological and Aboriginal evidence to the judge.

In the negative, even though she credits the “cultural affiliation” model as her mentoring principle, and claims that it can be supported by numerous scientific methods, she avoids the body of historical and ethnographic information that speaks to the existence of the Secwepemc with a distinct sense of common identity, boundaries and culture (Ignace 1995; 2006, R. Ignace 2008; Teit 1909). In addition, her excerpts from ethnographic documentation (Teit 1909; Dawson 1891), explorers’ reports and HBC documents leave out sections where details of travel, mobility, resource sharing, or social and political unity are presented. Like the other two Crown’s expert witnesses studied here, she also circumnavigates the entire social and historical phenomenon of the development of Reserves, and the attendant dispersal and displacement of people by bureaucracy and misfortune. A closer examination of some of her assertions indicates the ease with which un-checked use of a single tool of inquiry can create a gap between what behaviour is merely observed out of context, or heard about and recorded by untrained, “drive-thru” foreign witnesses (Culhane, 1997), and that which is intimately known and understood by its people.

Glaring among the erroneous assumptions arising from her reliance on an historiographical model, is the example of her misleading banter about the Neskonlith Band having a single “ancestral progenitor” (Lovisek, Report, 2005:footnote, p.1), to whom she is, remarkably, able to connect all subsequent Neskonlith members. According to her argument, this autonomous “progenitor” is evidence of a continuous genealogical link with the “geographically discrete area” of present-day Neskonlith, originating from the pre-contact period (*ibid*, 4). She then manages to incorrectly identify this pre-potent individual, as the Great Lakes Wendat/French HBC hunter, named *Antoine Gregoire*, who travelled to the Shuswap country sometime following the establishment of the first fur post at Kamloops in 1811, or perhaps before, since he was initially posted in the Okanagan. This assumption requires the court to accept that not only was the French-speaking Gregoire permitted by

Secwepemc residents to start his own colony (band), but also that he represented the pre-contact period, and travelled alone (without others of his crew), divested himself of all his previous cultural influences and thus became completely assimilated into Shuswap culture, without, in terms of cultural influence, leaving so much as the wake of a paddle. In other words, her culturally affiliated “link” to the pre-contact Neskonlith people, turns out to be of French and probably Wendat or Iroquoian descent, 3500 miles from home, who doesn’t actually get here until *after* first contact in this region. It seems unfathomable that this conjecture went unchallenged in cross-examination by the defence counsel.

Oddly, Lovisek has determined as part of the myth, that this founding individual was a recognized “Shuswap” Chief, owing largely to such a reference made to him as such by surveyor Walter Moberly in a communication brief to the Chief Commissioner of Lands, Victoria, 1865 (Lovisek, Report, 2005:4). Outside of this historical “fact”, there exists little if any evidence that Antoine Gregoire himself was recognized as a bona fide chief, as endorsed by Secwepemc people. It is more likely that, as a fluent speaker of French, he was probably called upon to act as a go-between and translator, for European fur trade staffers and post clerks. This would have gained him some stature within Secwepemc communities, but it is much more likely that his son, whose mother was Secwepemc, may have been endorsed and functioned as a chief at Neskonlith in later decades (see *Hudson’s Bay Company Thompson’s River Post Journals*). Lovisek continues in error as she informs the court that Neskonlith Band is comprised of Little Shuswap Lake Indian Band, Adams Lake IB, and Neskonlith IB (Lovisek, Report, 2005) These are “facts” that are surprising to the members of these communities, and in direct contradiction to the findings of persons who have conducted research into this place and its people in great depth (see Teit, 1909; Ignace, 1998; 2006); but then, a judge might not know any better. In sum, Lovisek does not satisfy the legal question

as to whether or not Neskonlith people would have fished at High Bar/Clinton, as she does not provide material that is free of inconsistencies and errors.

Has Fieldwork been conducted that provides recent or relevant information in the Report?

Lovisek does not report that she has conducted any fieldwork to support her “anthropological” Expert Opinion Report. She did not attend either of the communities in question, has never conducted field research in or near Plateau communities, and it is not clear if she is familiar with the country, or still-existing main and secondary trails and networks between the communities therein, or the nature of Secwepemc resource use practices. Instead, her report represents a detached, point-by-point chronological citation of instances when outsiders encountered Secwepemc in the locations in question (Neskonlith and High Bar on the Fraser River). The report is accompanied by a neatly assembled “Document Set” in PDF format which includes photocopies of all of the documents she has used, (and some she has not). The methodology of relying on “hard evidence”, that is, the written witness reports of credible explorers and traders who encountered the Secwepemc and observed their actions and practices, aims at persuading the court that the data she uses are scientific “facts.” However, there is a methodological problem here: Throughout the early part of the nineteenth century, the “proto-contact” period, recorded visits by explorers and traders were infrequent, and whether cultural practices or events made the written record was highly coincidental.

To what degree does the research conducted address the culture group specifically?

What Lovisek’s report lacks in anthropological comprehension and understanding, of each group and inter-relations, it makes up for in detached inventoried fact delivery. The peoples of Neskonlith and Clinton/High Bar are described as though objects of data, in a litany of

numbered paragraphs filled with report findings and decontextualized bits of vital statistics, outsiders' recorded glimpses, and conclusions or conjectures drawn from meagrely reported facts. Owing to her reliance on select literature and archival materials, Lovisek portrays the Neskonlith people as relative sedentary isolates (even citing an inadequate secondary source, a school text reporting the Shuswap Lakes division being "one of the most isolated bands",⁴ Having the large Adams River salmon run at their door step – its severe cyclicity omitted - they are portrayed as uncharacteristically immobile and ignores the evidence that indicates cultural practices to the contrary. In short, she anthropologically and historically constructs a group with a Secwepemc "cultural affiliation", but her material does not effectively describe the Neskonlith people.

To What degree does the CV reflect Professionalism?

Lovisek's CV records some papers and lists several published articles, in which she critiques oral history as evidence in Aboriginal claims litigation in four efforts and is critical of the work of anthropologist Ruth Landes in two others. She contributed to an anthology on the evidence of Aboriginal conflict and bloodshed in "Aboriginal Warfare on the Northwest Coast: Did the Potlatch Replace Warfare?" in *North American Warfare and Violence* "(in press), in which *"fourteen leading scholars dispassionately describe sources and consequences of Amerindian warfare and violence, including ritual violence. Originally presented at a landmark symposium, their findings construct a convincing case that bloodshed and killing have been woven into the fabric of indigenous life in North America for many centuries."* (University of Arizona Press, Book Review, 2007). In addition, she contributes an article, "Northwest Coast Human Trophy Taking" to *The Taking and*

⁴ This confounds the Secwepemc of the Chase area (Neskonlith, Little Shuswap, Adams Lake and their villages near Salmon Arm) with the [Arrow] Lakes people, whom Teit, somewhat erroneously, called the Shuswap Lakes Division, but who are in good part Okanagan/Colville in origin.

Displaying of Human Trophies by Amerindians (2007). She reviewed fifteen books and articles written by others. She does not appear to teach, nor does she lecture. Of the 38 contract consulting engagements she lists, 20 are as Crown expert witness, or in the preparation of similar reports for Crown prosecutors, with the balance of engagements in the employment of government agencies. Her list of reports is largely comprised of those produced for litigation and government agencies, and many consist of what she calls “Document Sets”. She is a member of the American Society for Ethnohistory, American Anthropological Association, and of the Champlain Society.

Short Summary

Lovisek’s CV is impressive in its volume of published papers and court cases, and upon first blush might be considered to qualify her as an expert in the area of Aboriginal fishing practices. However, when the CV is examined more closely, it reveals a startling lack of education in the diversity of Aboriginal cultural contexts and relevant comparative studies, and further, information regarding her research mileage in the field is inconclusive at best. It is not evident anywhere in the transcripts of this case that Lovisek actually conducted relevant field research, but that she did rely almost exclusively on archival and some academic literature, selected for the purpose. What she did not do in the *Deneault* fishing case was to conduct an integrated study of the peoples, histories and dynamic relationships between the communities involved. As in other dispassionate Crown anthropological expert reports, no attempt is made to describe the people in question, the Secwepemc of a certain community, from an emic perspective, taking into account their own voices about their past and cultural practices. As a result of this practice, some of her material provides the court with inaccurate and misleading information. Although the evidence Lovisek provides in this

case was flawed, defence counsel did not seek and provide the existing evidence required, and, as I noted above, the case was lost.

Case Study 3: Expert Witness Report of Alexander von Gernet, PhD., July 2006

Case Title, Docket Number, Date: *Roger William (Xeni Gwet'in First Nation and Tsilhqot'in First Nation) v. BC*; (SCBC 90 0913, and 98 4847, Victoria Registry) also known as *Tsilhqot'in Nation v. British Columbia (BCSC 1700)*: with case references from *SCC Marshall; Bernard 2005*, and von Gernet's Expert Witness Testimony, Trial Transcripts from *Marshall and Bernard 2000*, also referred to here as *Mi'kmaq 2000*.

1. History and Facts of the Case: In 1990 and 1998, Chief Roger William, on behalf of Xeni Gwet'in First Nation (the Nemiah Valley Band) and Tsilhqot'in National Government launched a claim that asserted their Aboriginal Right to trap, hunt and to gather on resource-producing land in their territory, in which they hold a registered trap line, and Aboriginal Title (on behalf of the Tsilhqot'in Nation) to those lands. The Province of BC considers the timber-cutting rights on these lands to be within its jurisdiction, however. The area in question is set out in the claim of rights and title at approximately 450,000 hectares of land in the Cariboo-Chilcotin region of BC. In addition, *Tsilhqot'in* claimed that Forest Development Plans and cutting permits issued on these lands to date unjustifiably infringe upon the Tsilhqot'in Nation's title and rights. The purpose of launching this case was to seek a declaration of Rights and Title to their ancestral lands and resources (*Braker and Company, 2005: chart #10*). In November 2000, and October 2000, Crown (BC) enjoined Canada in SCBC90 0913 and SCBC98 4847, respectively, set the trial date for September 2001, and allowed 120 days to hear evidence; upon being added as a party to each case, Canada immediately requested between 10 and 12 months to prepare for the trial(s); Justice Vickers gave Canada until March 2002 to prepare, However, this case lasted over five years and consumed 339 court days (Lawson Lundell 2007).

Following the addition of Canada as a party, and the adjournment declared, the Tsilhqot'in requested an injunction that the issuance of logging permits cease until trial concluded. Judge Vickers decided that since there was no immediate threat to log in the disputed area, non-invasive forestry activities, such as timber cruising and marking blocks, could continue, provided the prescribed system of prior notice was adhered to by the logging permit holders. In addition, when permit applicants apply, BC must advise them of the Court proceedings and that they must be made aware that Tsilhqot'in may apply for an injunction in response to each application for a permit.

Legislation Challenged

Tsilhqot'in challenged the BC provincial forestry legislation (*Forest Act*) by claiming that the Province did not have constitutional jurisdiction in lands subject to aboriginal title.

Legal/Test Issues to be addressed by the Crown's Expert Witness

With respect to aboriginal title the test issues to be addressed in this case were:

- Was the presence of the Tsilhqot'in in the claim area uninterrupted and continuous before Britain asserted its authority over British Columbia in 1846?
- Did the Tsilhqot'in exercise control over the portions of land inside and outside of the Claim Area in or around 1846, or could they have excluded other aboriginal nations from that land had they so desired; and
- Did other aboriginal nations generally recognize that portions of the Claim Area were Tsilhqot'in territory, as did early Europeans in the area? (Lawson Lundell 2007).

Crown Witness Qualifications: Education and Professional Credits

The anthropological expert witness for the Federal Crown was Alexander von Gernet. By his own account, Dr. Alexander von Gernet holds “three degrees in Anthropology”, however the record shows that he concentrated his studies rather more on the periphery than at the centre of the discipline, with an emphasis on *comparative* Anthropology courses taken where compulsory to satisfy concentration requirements (see von Gernet CV, *Mi’kmaq* 2000). His CV reads impressively, and includes a PhD. from McGill University in ethnohistory, an MA (McGill) in Archaeology, and a BA in “symbolic anthropology” from Western. However, von Gernet’s actual academic posting and employment activities reveal his appropriateness as an instrument of the Crown, and his *incompatibility* in the service of real life anthropological situations on the ground... where people live.

Dr. von Gernet currently occupies an associate instructor position at University of Toronto’s outpost Mississauga campus, where he teaches courses in Archaeology and Cultural Anthropology, *relating* to Aboriginal studies (Fraser Institute www.fraserinstitute.ca). The university of Toronto’s Mississauga campus itself lists him as Adjunct Professor, which is a different position than a tenured or tenure track assistant, associate or full professor position. He maintains that he has not accepted tenure due to the increased administrative responsibilities it would bring to bear on his already heavy workload. While it is unclear from the text whether or not he teaches courses of an Anthropological nature from an *anthropological perspective*, which might inform and enlighten students about the theoretical and methodological approaches of the discipline, the Fraser Institute’s website does elaborate thus:

His main interest is in reconstructing Aboriginal pasts by using various sources of evidence in methodological conjunction. He is in considerable demand as a consultant for both government and First Nations clients and has served as an academic advisor and expert witness in numerous Aboriginal litigations in Newfoundland, Québec, Ontario, Alberta, British Columbia and New York State. He was one of the contributing authors of the Report of the Royal Commission of Aboriginal Peoples and was the Editor-in-Chief of

Ontario Archaeology. Professor von Gernet is currently writing a book on oral traditions as evidence in Aboriginal litigation. (Fraser Institute Biography website www.fraserinstitute.ca).

It is duly noted however, that in his 2000 expert witness testimony, during the recital of his curriculum vitae (in *Marshall v. the Queen; Bernard v. the Queen*, collectively hereafter known as “*Mi’kmaq*” 2000:65), he has launched three readings/research courses, in which one student at a time conducts segments of what he calls “ethnohistorical” research, into fields which, oddly enough, bare striking resemblance to the highly specific nature of his work for the Crown. He also admits to taking anthropology courses himself, when he has time, though it is not specified at which institution he is attending, nor in what area he is studying. By his own admission, however, his primary areas of interest and employed activity are in Archaeology and his highly specialized approach to “ethnohistorical methodology” (*Mi’kmaq*, von Gernet CV, 2000:176). I attempt to explain this methodology further in the sections below, in order that it might be more clearly understood.

A review of his scholarly works show that von Gernet’s primary area of interest has been the archaeology and historiographic study of First Peoples in the Great Lakes and Woodlands regions of Ontario and western Quebec. In addition he was called upon to testify about ethnohistorical research he had conducted in Nova Scotia and Newfoundland in preparation for the *Mi’kmaq* case. He edited the *Ontario Archaeology* periodical for several years, in which capacity he “peer reviewed” the works of archaeological and ethnohistorical contributors, assessing their “scholarly merits”, and set the standards by which submissions would be accepted. By his own account (*Mi’kmaq*) he also also contributed to the 1996 Report of the Royal Commission on Aboriginal

Peoples (RCAP) , claiming to have been asked to write the sections about first contact between Wyandot, (it is not clear if this is Wendat from Canada, or Wyandot from the US), Innu and Europeans in the Eastern and Woodlands phase. He also stated that he was engaged to “peer review” portions of the RCAP Report, casting himself in the exalted position of both contributor and quasi-academic peer reviewer (von Gernet CV *Mi'kmaq* 2000). It is not lost on the observer that by the time he wrote for the RCAP, and “peer reviewed” the work of other contributors to it, he had been in the steady employ of the Federal government for four years. The questions arise, where do the “peer reviews” appear and, how are they used? Typically, scholarly peer reviews are published for the rest of the academy to critique and validate research that and analysis as conducted according to the standards of the discipline. A search of the Department of Indian and Northern Affairs website not only does not list such information, but von Gernet’s research for the Federal Government is not available on-line, although a phone number to order some of the material is posted on INAC’s website. At this writing, I have made four attempts to obtain, for instance, Chapter 6, of his *Oral Narratives and Aboriginal Pasts* (INAC <http://www.ainc-inac.gc.ca:o2> 2007) which contain over 900 opinions, yet have been unsuccessful to date.

In 1992 von Gernet began his long association with the Federal government as a contract researcher, working largely “in the background” (von Gernet, CV *Mi'kmaq* 2000:82) conducting analyses of oral histories, written versions of and about these, and collecting all forms of subsequent relevant literature, including archaeological reports conducted by field practitioners, for use in subsequent Crown interests (*Mi'kmaq* 2000). He claims to have worked directly for Aboriginal communities, but outside of coordinating a “native festival” in downtown Mississauga, Ontario in 1995, at the behest of an external funding organization, it

is not clear for whom von Gernet has conducted meaningful Aboriginal research. Indeed, as he says, since 1996, he has been, and remains in demand and very busy as a Crown expert witness for his now patented critique of anthropologists and orality as evidence in Aboriginal litigation. Of interest here, however, is a discrepancy pointed out by an investigative reporter for the Ontario Coalition Against Poverty (2007), who notes that while von Gernet's U of T faculty write-up describes him as "... Advisor to the Departments of Justice and Indian and Northern Affairs,...[however], when questioned in court, von Gernet denied that he acted as an advisor to the Government, but acknowledged that it was an understandable assumption for the University to make" (Retrieved from Ontario Coalition Against Poverty website 2007; <http://ocap.ca/node/112>).

As it turns out, the journal *Windspeaker* (v.20 (6):6), investigated von Gernet's activities as a Crown Expert Witness through the Freedom of Information Act, and discovered that, previous to his response under oath, he was retained by the Department of Indian and Northern Affairs (DIAND) to conduct research and compile documentary evidence for litigation purposes, over a period of 40 months, (July 10, 1999 through October 31, 2002). For this contract, he was paid

...\$321,000.00, or \$8,025.00 a month ...in addition to his salary as Adjunct Professorship at U of T, Not surprisingly, the sections [of the FIA records] that would have shown exactly how many days/hours (?) the Professor worked to earn his lofty salary were blacked out by DIAND's access to information and privacy officials (<http://ocap.ca/node/112>)

Further, a fact that some may find troubling is the source from which von Gernet was issued his recompense; to wit, the Residential Schools Unit and the Research Unit of DIAND's litigation and management activities branch has retained von Gernet on a "standing offer" arrangement, where he is called into service as needed. Finally, at the time of the OCAP article, von Gernet had provided expert witness testimony on behalf of the Crown in eleven Aboriginal Title and Rights cases, throughout which he has amassed a considerable

collection of material in his professional library (see von Gernet <http://www.ainc-inac.gc.ca:1999-2006>), mounted a mind-boggling theoretical conflict defence template. He perfected his arguments in an article for the Department of Indian Affairs and Northern Development (INAC), called *Oral Narratives and Aboriginal Pasts*, and in subsequent publications (see *What My Elders Taught Me: Oral Traditions as Evidence in Aboriginal Litigation*, in *Beyond The Nass Valley*, 2000; expert Witness Reports for *Samson Cree*, 2002).

Again, by his own admission in *Mi'kmaq* 2000, von Gernet is popular as a Crown expert witness, for both his “peer reviews” of the work of Expert Witnesses for Aboriginal claimants, and his external “assessment” for the Crown of the validity and reliability of oral evidence presented by elders and locals, and this strategy is used in a growing number of cases, particularly in the rebuttal phase of these cases (see *Mi'kmaq* 2000, *Samson Cree*, 2002 and *Tsilhqot'in* 2006, for example). What von Gernet does NOT contribute as a Crown expert witness, are ethnographic research and anthropological perspectives based on contemporary approaches in the disciplines. His primary focus is to de-construct oral histories and decontextualize oral tradition in such a way that their veracity as evidence is brought into question before the judge. However, as discussed below, his textual analysis method is questionable, and does not, in fact render oral historical narrative unreliable. But, cast in the rhetoric of ethnographic authority, scientific enquiry, theoretical sophistication, “peer review” and credentials, it sounds good.

During his undergraduate studies, von Gernet briefly visited symbolic anthropology, or a “subfield of anthropology... [which is]...the study of human symbolic systems and the way in which humans use systems in all cultures to symbolize their material worlds...you do a cross-cultural study of the human use of symbols and it is, I suppose, a part of cultural anthropology rather than archaeology” (*Mi'kmaq*, 2000:34). He then moved immediately on

to his archaeological projects. Later, on page 40 in these transcripts, he discusses his move to historical studies, and uses this as a point of entry to prioritize ethnohistorical method as having the imperative analytical “rigor” for examining pasts, whereas he reduces cultural anthropology to a discipline that not only singularly focuses on “non-western, aboriginal peoples”, but, since it lacks “rigor”, it needs to be propped up by ethnohistorical method singularly based on written records. Thus [for him] “Ethnohistory was a chance to bring these two together and ensure that the history of aboriginal peoples in this country was treated the same way as any other history” (von Gernet CV, *Mi'kmaq*, 2000:40). The significance of mentioning his comparative treatment of anthropology and ethnohistorical method here speaks to his clever use of reference to that which he wants down-played, and that which he wants emphasized. It is of some concern here that von Gernet’s penchant for making cleverly crafted, yet sweeping statements also reveals his denial of the larger corpus of anthropological applications in real world conditions; anthropologists study a wide range of cultures, western and non-western. As Rosaldo (1989) articulated nearly two decades ago, what cultural anthropologists excel at is “good ethnography,” deconstructing socially and politically constructed phenomena as we hold the mirror to ourselves.

However, there is a method to von Gernet’s procedure as expert witness and Crown charged “peer reviewer” of experts appearing for the Aboriginal side; throughout his testimony, he literally conditions the listener to weigh ethnohistorical method as a more sure-fire tool for seeing aboriginal history. He begins by diminishing the importance of cultural understanding and the associated existence of diversity in the human use of symbols, which prepares us for his later argument that ethnohistorical method based on written documentation alone, and its generalizations, can offer authoritative explanation and verification of human behaviour more effectively than can actually understanding it. For example, on page 53 of *Mi'kmaq* 2000, he says that he teaches that forager/hunter-gatherer

societies are similar all over the world “no matter where you find them on the globe, so the same principles [of understanding their histories and social organization] apply”. From the perspective of the Aboriginal/indigenous subjects of such explanations, his teachings – uninformed by the subjects’ knowledge or voices – must be indeed unnerving, particularly where the criterion he uses for choosing students for a certain class he teaches is based on the dearth of their knowledge of aboriginal history (*ibid*:59); he then gives them his version of the comparative overview of aboriginal peoples in North America, which is likely short in its duration, since according to his template, “if you know one, you know them all.” Moreover, the template aims at maintaining segments of hegemony and political and social inferiority of indigenous hunter-gatherer peoples.

Does the Crown’s Expert Witness Report Cite or quote contemporary or accepted methods and theories of the discipline of Anthropology?

Dr. Von Gernet may have been qualified by the courts to speak to anthropological issues, based on his inferred expertise in matters Aboriginal, but upon closer inspection, his primary function is *not* anthropological. Insofar as he critiques what he calls “postmodernism”, and “relativism” as problematic and ineffective in the telling of Aboriginal history, his discussion *infers* that he is familiar with the works of anthropological thinkers, and people who have invested lifetimes in the field, seeking to understand other people. Throughout *Analyzing Tsilhqot’in Oral Traditions* (2006), now known as *Tsilhqot’in Report # 2*, and other von Gernet articles and expert witness opinions that I have studied (*Samson Cree, Mi’kmaq, Oral Histories and Aboriginal Pasts*) he rarely refers to field anthropologists, ethnographers such as Hugh Brody, Julie Cruikshank, or ethnobotanist Nancy Turner, all of whom have considerable first-hand familiarity with cultures that are unique to certain areas of British Columbia, upon which von Gernet makes critique in this case. He does, however,

rely almost entirely on some “heavy” academic names such as the late ethnohistorian Bruce Trigger, historian Jan Vansina and archaeologist Ian Hodder, to support a perception of his renown as a scholar and a prominent figure in ethnohistory and archaeology. He relies largely on inferences to other ethnohistorians, and in some cases he relies on the site and inventory forms from the archaeological record to wage his war on orality, (see *Mi'kmaq* 2000), inferring that the physical nature of artefacts is more credible than remembered fact.

Citing Vansina (1985), von Gernet has long held that an imperative of analyzing oral narrative is to distinguish those stories which are, to him, obviously recent memories of individuals as “oral histories”, from “oral tradition”, or those stories which are of more venerable origin and shared intergenerationally (von Gernet, *Analyzing Tsilhqot'in Oral Traditions*, Report #2, *Tsilhqot'in* 2006:5). He has founded his template for his rebuttal of claimant evidence on the notion that this can be arbitrarily and effectively achieved, by him, to the extent that no Aboriginal oral tradition on its own can be considered a valid source of evidence for court, fraught as it is with, he says, impurities, contextual changes and personal slants. However, doing the actual math indicates a different picture. It is important to note that the reality of Tsilhqot'in oral narrative is that it will legitimately contain both perspectives, (ancient and personal) depending on the speaker and motivation to tell the story, among other impacting factors, one of which is that time in narrative is not necessarily linear, and may enter into cyclical reference and back into linear or vice versa (Dr. Nancy Turner, *Tsilhqot'in Expert Witness Report draft notes* 2006:1-9). Here she refers to Julie Cruikshank (*Do Glaciers Listen? Local Knowledge, Colonial Encounters, and Social Imagination*, 2005:34-35) who clearly reminds us that “Trying to find [linear] chronology within oral tradition is probably fruitless, since that was seldom the teller's purpose”, and as an example, with respect to a Tlingit elder's journeying “that the number of years varies from version to version”.

Knowing these characteristics of oral narrative, as it exists in this country, helps to understand the nature of humans to pass information along with slight variation in some instances, whereas in others information is told and retold verbatim, often learned in a teller's apprenticeship (Turner, 2006:2). However, both Turner and Cruikshank are clear on the point that the legitimacy of the substance and of the perspectives is valid, particularly in the realms of place knowledge and plant life. Von Gernet, however, does not rely on the work of such scholars, but chooses, on one hand to discount oral tradition as unable to provide a reliable chronology upon which to base claims, and on the other makes generalizations about Tsilhqot'in stories being "borrowed" from other cultures at a "recent" point in time.

In his *Analyzing Tsilhqot'in Oral Traditions*, he states that "My only concern is whether the type of oral evidence mustered to prove the claim is historically reliable for the period prior to 1846" (von Gernet, *Analyzing Tsilhqot'in Oral Traditions* Report #2, *Tsilhqot'in* 2006:4). In this report, von Gernet is required to challenge the veracity of stories told by Tsilhqot'in people largely by applying western rules of evidentiary validity to them, and then rationalizing that this is how *all* Aboriginal oral accounts should be adjudicated by and for the courts, so that they will not be lead astray by false memory, and *emic* interpretation of history; or, lest they fall prey to the general willingness of listeners to be lulled in to the notion that Aboriginal people know their history better than he can "reconstruct" it. On the contrary, von Gernet is of the opinion that when it comes to a contest between Aboriginal accounts of Aboriginal historical experience, (replete with momentary lapses in detail or order, correction, and validation by others), on the one hand, and the externally observed, recorded and interpreted written textual accounts of the same experience, on the other (which would never omit, or in any way distort what may be fact), that "...*the most retentive memory is paler than the weakest ink*" (von Gernet, 2nd Report, *Tsilhqot'in* 2006:10).

Nancy Turner (2006:3) takes issue with this sweeping statement While von Gernet's sweeping statement is profound and aimed at establishing quasi-scientific authority of the written historical narrative (documents) produced by outsiders, it is it is not accurate, as for example, Nancy Turner has shown (2006:3). Written documents are equally fallible and when they are the product of early colonial effort, and are notorious for their weaknesses in providing educated and informed observations of Aboriginal life, understanding or explanations (*see* J. Borrows 2001) In von Gernet's polished Crown-led recital of his CV, he does, however, rely on cleverly crafted inferences of scholarly devotion to the work of one truly seminal figure in the development of ethnohistorical method, designed to lend credibility to *his* masterpiece methodology. Where strategically useful, von Gernet makes reference to his "mentor", Bruce Trigger, (*Mi'kmaq* 2000) who is often considered by scholars of anthropology and historical research to be a pioneer of the methodology of ethnohistorical reconstruction of, specifically, past Wendat lifeways. While indeed the exhaustive research that Trigger conducted for *Children of Aataentsic* (1987), remains unrivalled, his work there set out to remedy a research situation quite different from *Tsilhqot'in*. Whereas Trigger formulated a methodology for collection of information about a group of people, the Wendat, whose culture, population and language had been witnessed and recorded in written texts for over a period of two centuries or more, but has since all but vanished in the last 100 years, Xeni Gwet'in and other Tsilhqot'in people have maintained strong cultural identity and continuity long after European contact in their lands. Ergo, they retain much of their ancient history, cultural memory, landscape and territorial knowledge, and continue to transmit these through their language, without help from ethnohistorians.

In addition, as seminal a work as *Aataentsic* was, by his own account, Trigger found it frustrating that for all the extant documented history of the post-contact period, "...how much easier it was to secure information about the motives and understandings of Europeans

than about those of the Hurons [Wendat] with whom they interacted” (Bruce Trigger 1982). Trigger learned that disparate accounts of the past that are the results of mining archaeological data and historical documents for “facts” do not produce adequate accounts that throw light on the perspectives, agency and voices of the Aboriginal actors (Trigger 2985)

Further, in *Children of Aataentsic*, Trigger ...”argues convincingly that the European impact upon native cultures cannot be correctly assessed unless the nature and extent of pre-contact change is understood (Queens-McGill University Press Review 2006). Trigger was interested in finding out how cultures change and was able to illustrate that Wendat experienced change as well as continuity on a continuum, long before the advent of European contact. However, Wendat experiences were in large part peculiar to their conditions and contexts and Trigger is careful not to encourage generalizations or leaps to conclusion based solely on his approaches and findings. While the integrated use of ethnological studies about Aboriginal peoples is useful, without the explanatory properties of ethnographic inquiry, however, or the ability of ethnography to explain contact relations between Aboriginal and European cultures, much in the way of understanding people and accurately explaining cultural behaviour is also lost on the wind. He supports an integrated, or “eclectic” approach to understanding Aboriginal histories which incorporates the methods of archaeology, oral traditions and histories, linguistics and ethnographic field work, ethnological study and ethnohistoric method, and does not credit any one of these as capable of telling the whole story or revealing all that there is to know when used as the single form of inquiry.

The caveat here, however is, whereas Trigger’s application for his methodological approach to reconstruction was an exercise in a dignified and accurate portrayal of a people experiencing change from a multitude of factors over a prolonged period of time in the woods of the Great Lakes, von Gernet, the devoted Trigger student, re-arranges the Trigger

model and uses it to *deconstruct* Aboriginal history and cultural memory, wherever the Crown sends him (*Mi'kmaq* 2000; *Samson Cree, Tsilhqot'in* 2006). He appears to use his ethnohistoric methodology as a template, and his perceived position as an accomplished scholar, for decontextualizing the oral histories and oral traditions of whichever claimant group his masters are opposing in litigation, as though where it either exists or can be made to fit, the written word is actually the *final* word on a claimant's history.

His perception of cultural relevance is rather more focused on what can be glossed over in clever language, than what he can discuss with any degree of familiarity. However, he does elaborate, wherever useful, on the politically motivated trend of Aboriginal people to conduct what he calls "revitalization movements". According to this imperative, certain groups will emphasize diversity and traits peculiar to their culture, but essentially, they're all actually just practicing *re-invention* and retro-fitting history to suit their cause (*Mi'kmaq* 2000:59-60). He elaborates on this in his Tsilhqot'in opinion (von Gernet 2006:44-45; 2006:49-50), in an attempt to re-enforce the notion that Aboriginal motives for bringing culture into court may not be altruistic.

What are the stated or implicit theoretical assumptions in the Report about the nature of society, culture and human organization?

While Dr. von Gernet claims to have ample training in Cultural Anthropology (University of Western Ontario, BA), his approaches to the work that he conducts in the capacity of Crown expert witness, do not reveal an evident appreciation for any recognizable contemporary anthropological theoretical perspective. The bulk of discussion, in this case, of his theoretical positioning exists, he says, in the *Tsilhqot'in* Report #1, [which I was unable to obtain] and he does not repeat himself in Report #2 *Analyzing Tsilhqot'in Oral Traditions* (2006). However, a reading of the CV he is led through by Crown in *Mi'kmaq* 2000, and of

Report #2, reveals that he is clearly conducting textual analyses and critique, as opposed to providing new or relevant anthropological research. Indeed, he makes hay out of the fact that he was a student of Bruce Trigger, but does not discuss the theoretical influences that even Trigger relies on in the development of reconstructive historical method, and manages to launch his own methodological template without so much as a bye or leave for an anthropological epistemology or paradigm. However, implicit in his rebuttal remarks and opinions on the testimony of both Tsilhqot'in and their academic witnesses, is a positivist "objectivist" perspective that seeks to actually *deconstruct* the ability of people to remember and to report these memories with the diversity of results that occurs naturally within a group - much like people actually do.

In his critique of the Expert Opinions of Dr. John Dewhirst, appearing for the Plaintiff in *Tsilhqot'in*, and of the testimony of local Tsilhqot'in witnesses themselves, von Gernet attempts to create a conceptual connection between the absence of institutionally appointed and recognized Tsilhqot'in cultural story-keepers [as they are observed in Eastern Woodland/Iroquois cultures], and a necessarily primitive social ordering. Since Tsilhqot'in oral histories are shared by all Tsilhqot'in, without specialized ownership or a storyteller profession, von Gernet invites the court to accept that a knowledge system characterized by being shared equally among its members and without institutionalized and specialized roles indicates that their level of social organization is not sufficient to meet the test of an "organized society" in the eyes of the law, and therefore are unlikely to possess a concept of cultural identity, or manage exclusively a territory to the extent that their claim should be recognized. He also sweeps away Dewhirst's discussion of checks and balances in Tsilhqot'in narrative systems as a device for maintaining accuracy, as an "anthropological invention", rather than a "Tsilhqot'in reality", and then says, "In any event, even if this list of "cultural checks" is in evidence today this in no fashion should be taken as evidence it

existed in the past” (von Gernet, 2006:15). Like Robinson and to some degree Lovisek, von Gernet thus subtly invokes evolutionist concepts of primitiveness that cast the Aboriginal litigant group in opposition to the culturally sophisticated complex division of labour of Western society, which, since the *Baker Lake* case (1972) imposed the test of organized society on Aboriginal title and rights cases. Thus, the less specialization of function in Eurocentric terms, the less “organized” the Aboriginal society (the latter indeed an oxymoron within social science!) and the less likely to have a system for exclusivity of territorial occupation. Moreover, the absence of such social specialization implies the notion that previous to contact, these people aimlessly “foraged” in the countryside, reacting to their ecologies and driven largely by instinct, much like the creatures whose migratory patterns determined the peopling of the territory to be claimed, a familiar argument we saw presented consistently in the evidence tendered by Sheila Robinson, the Cultural Ecologist, during her career as a Crown Witness.

To what degree has fieldwork been conducted that provides recent or relevant information in the Report?

Not surprisingly, von Gernet does not report that he has conducted field work to support his “anthropological Expert Opinion Report” for *Tsilhqot’in*. At best, he has conducted his standard review of literature *about* the *Tsilhqot’in* people, attempted a textual analysis and critique of translated oral testimony given by some very shy, confused and non-English speaking *Tsilhqot’in* witnesses, and examined the court transcripts of evidence given by other expert witnesses in this case. Irrespective of his unlimited access to the corpus of available relevant literature on the recent history of the *Tsilhqot’in*, it speaks for his intentions that he deploys an unpublished 1972 Masters Thesis (Hewlett 1972), which argues that the *Tsilhqot’in* War was not a war, but an “uprising”, and therefore did not constitute an

illustration of a people trying to defend their homeland. He discounts the Tsilhqot'in perception of the motives for the conflict, which they locate in a concerted attempt to defend their homeland and people against ruthless invasion by outsiders, and similarly dismisses Dinwoodie's well-researched and extensive interview-based accounting of this (see Dinwoodie 2002), in favour of the Hewlett assessment. This move indicated to me that von Gernet had a hard time finding anything with which to rebut this issue. On the whole, however, since his primary task is to provide rebuttal of the evidence presented by the Tsilhqot'in, he eschews any opportunity to present data, regardless of quality, that diminish Tsilhqot'in oral histories and construction of the past in light of their claim.

To what degree does the Research conducted address the culture group?

It is not clear if von Gernet actually did conduct his thorough pre-engagement literature research study for *Tsilhqot'in* as he claims in court. Again, in this case, he does not discuss Tsilhqot'in culture in a way that suggests any level of ethnographic familiarity with it, outside of the examination of archival records, and the arms length textual analysis of elder testimony. In his unique attempt to paint the Tsilhqot'in as a violent, bloodthirsty and, most importantly *primitive* society, and while unable to discuss Tsilhqot'in history competently, he relies on drawing analogies that are based on stories about other peoples, quoted from archival newspapers (e.g., *Klondike Nugget*, 1898) about the violent nature of Tutchone and Tagish people (who live *somewhere* near Tsilhqot'in). Further, he refers to the 1853 California Tolowa "Burnt Ranch Massacre", and how each of these conflicts featured sensational deaths of whites at the hands of Aboriginal people. Without doubt, his use of such graphic examples reported by the representatives of settlers who usurped indigenous lands invokes generalized impressions of "savage" actions against innocent settlers, and aims to persuade the court that the Tsilhqot'in' claim to land and rights on the land is illegitimate and

harmful. This assertion leads logically to his next, which is that Tsilhqot'in are so primitive (despite the reasons they offer for their part in the Tsilhqot'in conflict), that they could not have conceptualized the notion that white people were about to take their land and they needed to defend it... they just wanted to shed some blood; a point von Gernet alludes to by coming up with an array of contradicting reasons why Tsilhqot'in engaged in this skirmish (see von Gernet, 2006:37-40). In sum, in *Tsilhqot'in*, the material he strategically presents is largely concerned with critiquing other researchers' anthropological theory, methods and data, especially the invalid nature of Aboriginal oral history, and any research based on it. Nowhere in his 2006 report does von Gernet provide a comprehensive ethnographic understanding of Plateau culture or of the Tsilhqot'in specifically.

Does the method address the anthropology behind the legal question(s)?

In *Tsilhqot'in Report #2*, what von Gernet provides is primarily a rebuttal in response to the anthropological reports submitted on behalf of the Xenigwet'in and Tsilhqot'in claims to Aboriginal Rights and Title. This rebutting is an effective court-room tactic which serves Crown's purposes by confusing the trier of fact (and indeed other scholars) with its convoluted critique of anthropological epistemologies and opinions, and its methods for "assessing" orality presented at court, while at the same time, serves as a concentrated sales pitch for a replacement research model, that turns out to be, oddly enough, an historiographical template for discrediting orality as evidence in court, as patented by von Gernet (see Evidence Report *Tsilhqot'in 2006*; von Gernet CV's *Samson 2002, Mi'kmaq2000*).

Much of the evidence tendered on behalf of Tsilhqot'in and Xenigwet'in is in the form of oral histories, told from the recollections of experiences of individuals, and from the larger, community and culturally-held bodies of cultural knowledge, or oral traditions. These

contain ancient knowledge of landscape, place name, travel through the land, genealogy, taboos, celebrations, prayer and lessons for life, relationships with the world and other people, explanations of origin and phenomena, as well as the incorporation of proto-and post-contact events and explanations – all of which attest to an emic perspective of Tsilhqot'in and Xeni Gwet'in sense of cultural history and identity. As in earlier court cases that have relied on oral accounts of events and knowledge (*Delgamuukw, Samson, Baker Lake*) oral histories and traditions for *Tsilhqot'in* had the potential to provide powerful evidence for Aboriginal rights and title, and towards rebutting the Crown's denial of rights and title. In this case, as referred to above there are three essential tests which *Tsilhqot'in* must prove, and the Crown must dis-prove:

- uninterrupted Tsilhqot'in presence in the Claim are before 1846;
- Tsilhqot'in control of lands inside and outside of the Claim area to the exclusion of other First Nations in or around 1846; and,
- Did other First Nations generally recognize that portions of the Claim Area where Tsilhqot'in territory, as did early Europeans in the area

All of these tests are based on European, or western constructs of their substance, and in order to be recognized as evidence in court, responses to the tests require meeting specific and established ingredient and theoretical content, in western language and in accordance with western epistemological and scientific paradigms. Meeting the tests in court (a western marketplace of words and thoughts and rules), with some appearance of credibility as per the courts' concept of this, and in accordance with these rules, requires Aboriginal orality to be accompanied by, and then filtered and reinterpreted through another set of western eyes and thoughts and rules that it trusts - a science. Once there, in order to eliminate orality as a threat to its position, Crown applies a methodology which appears to be scientifically responsible, or, if nothing else able to reinforce Eurocentric notions of the

safety of believing in tangible written records, over the unwritten memories of non-literate [read uncivilized] people who are trying to change history to their benefit.

As discussed earlier in this thesis, a social science such as anthropology or any one of its sub-disciplines, typically seeks wisdoms from theorists and philosophers, as well as developers of methodologies and practices. Most practicing anthropologists are able to discuss with some authority and competence, those thinkers and doers who contribute to their epistemological perspectives and field methods on the work that they do in the scientific pursuit of understanding human cultural behaviour, perception and knowledge. However, von Gernet circumnavigates this line of academic information, in favour of a more pragmatic explanation of ethnohistorical *method*, which he claims is scientific, (even though it is a methodology, not a true discipline), as he considers it as the tool most able to separate fact from non-fact.

Von Gernet's work, in my analysis, is predicated on the notion that Aboriginal pasts, as they are presented in court, need to be reconstructed by the researcher, who, speaking with Said (1978) can know the subject better than the subject can know itself. His rhetoric of "peer review," "forensic ethnohistory" and professional qualification aims at casting him in an authoritative position of the detached scientist who relies on the "hard" facts of written texts and objects, rather than being distracted by extraneous elements such as context, meaning, speaker perspective and intention, all of which in his analysis, divulge Aboriginal political intentions and motivations. In his analysis, even the evidence of Aboriginal witnesses who have read up on their history and oral history is contaminated by outsider influences and thus invalid.

To what degree does the CV reflect Professionalism?

The Crown may have hired the expensive von Gernet based on the well-intentioned notion that his credentials would guarantee them someone who could use anthropology to refute other anthropologists' opinion, or perhaps the Crown has continued, since Sheila Robinson, to bet heavily that judges are disinterested in extensive discourses on anthropological theory, or don't understand any of it, but will typically go for the familiar "documents=truth" argument that they are most familiar with. In any event, upon close inspection, von Gernet does NOT present an inspiring picture of professionalism in anthropology. As I noted, his curriculum vitae does not reflect the ethical and professional attributes of someone who is considered even a minor figure in contemporary academic anthropology. His published materials are not based on contemporary anthropological perspectives or even anthropological in nature, and his writings on oral history have largely been produced for the Federal Crown, government agency, and the Fraser Institute, a politically conservative think-tank. While he is presented at court as an anthropology professor, it is apparent from his descriptions of his courses (*Mi'kmaq 2000:51-54*) that he is not actually teaching a contemporary and enlightened understanding of anthropological perspective, but perpetuating a cloistered, comparative and compartmentalized view of humanity. It is similarly apparent that through this "mentoring" (*ibid*), he is also attempting to indoctrinate new students with his brand of anthropology, a notion that gives cause for concern.

Short Summary

Von Gernet provides industrious support for the Crown's position in Aboriginal rights and title cases, much as Robinson did in her day, but with clever professional attributes

missing from Robinson's and even Lovisek's CV's, such as "peer review" - to which he does not succumb but subjects others - and status as *professor*. He specializes in ethnohistorical and historiographic method, and has an office in the Anthropology department at University of Toronto, Mississauga Campus, where he at times teaches anthropological courses. He has been a loyal servant of the Crown in the capacity of researcher and expert witness for many years, and over time has developed an ostensibly scientific approach to undermining not only anthropological opinions, but evidence produced by Aboriginal litigants. More specifically, he has dismissed Aboriginal oral tradition, memory, and sense of cultural identity as unreliable and invalid. Through what he calls "peer review" in quasi-scholarly jargon, he has been deployed on the witness stand, but also behind the scenes to, deconstruct the evidence and opinion of experts for and witnesses on the Aboriginal side. As with the type of anthropology carried out by Sheila Robinson and Joan Lovisek, von Gernet's self-proclaimed "forensic" dissection of indigenous oral history and oral narrative, which moreover privileges the historic validity of the non-indigenous written word over the indigenous subject's own narrative, runs counter to contemporary anthropological narrative that deals with particular situated peoples' sense of place and conscious knowledge of history (see R. Ignace 2008).

In the end, von Gernet was unsuccessful in refuting the evidence offered by *Tsilhqot'in* for the tests set out in this case, as Justice Vickers found that the *Tsilhqot'in* had indeed proven title to large portions of land inside their Nation. In his Reasons for Judgment, Justice Vickers considered the evidence provided by *Tsilhqot'in* oral testimony, and anthropological and ecological research to be valid and crucial to rule in

favour of the Tsilhqot'in (Lawson Lundell 2007:2; see also Reasons For Judgement, Vickers, J. *Tsilhqot'in* 2007).

Chapter Six: Conclusions

Rethinking the Anthropological Role

Throughout the history of *Delgamuukw v. The Queen*, and other landmark Aboriginal rights and titles cases in Canada and Australia, the role of anthropology and its practitioners as expert witnesses has been revisited and critiqued by academic anthropologists, who have questioned why anthropological expertise did not deliver the goods, or was questioned or dismissed by the judge. Various academic anthropologists, historians and members of the legal profession have offered suggestions on what to do better, contributing considerable and valid opinions to the current discourse on the future of everything from anthropology's conceptual approaches, to the nature of field research, the presentation and interpretation of oral histories, the preparation of research reports for presentation as evidence, and finally, the very role anthropology and anthropologists might have in court (see Asch 1992, 2007; Borrows 2001; Cove 1996; Culhane 1998; Elias 1993; Glaskin 2004; Kew 1996; Morphy 2006; Paine 1996). Equally valid are the specific caveats from those who participated as witnesses in the courtroom, and whose experiences early on in the game are legendary and have served as important lessons (see Brody in Thom 2001; Daly 2005; Mills 1994,1996, Ray 2003;2006). I found the reflections by Art Ray, who served as historical expert witness on several occasions, particularly instructive in his understanding of the challenges inherent in doing the job effectively, while retaining a modicum of respect from the court. In true collaborative form, the genesis has been furthered greatly by the entry of informed, resourceful legal minds into the fray. The circumspect and grounded guidance being offered by legal practitioners Browne (*Tsilhqot'in* 2005), Burns (1996), Jackson and Grant (in Daly 2005; Mills 1994, and elsewhere), Henderson (1992; 1997), Borrows (2003) and Rush (2003) to name but a few, will assist in this re-shaping of

the role of the anthropologist as expert witness with respect to the court's perceptions of the discipline and its presentation of its evidence. I hope that my contribution in this thesis has been furthermore, to ground such constructive criticism in the lessons that can be learned from a deconstruction of the strategies used by Crown expert witnesses. Such strategies, as I have shown, are not grounded in contemporary anthropological theories and approaches, ethnographic field research method. Instead, they are based on a research model that for the most part defies academic anthropology's practices and standards of peer critique and review, and likewise defies established standards of collaboration in research with the indigenous subject, and listening to, and reflecting the indigenous voice.

What goes into this re-shaping?

As Glaskin (2004:4) aptly points out, anthropologists need to have a "sound comprehension" of Aboriginal rights and titles law. Moreover, the involvement of legal practitioners in this effort may also go a long way to facilitating a two-way exchange of information and education, so that jurists and lawyers become more familiar with the nature of the research coming in from the field, as it were. Here, Daly (2005:21) specifies the concern that it should not be anthropology alone that concedes and makes change to become palatable to the courts, but that there should be equal effort on the behalf of the courts to attain a measure of comprehension of cultural relativism, and a healthy regard for the tools and methods that anthropology employs to understand people and past lifeways. Glaskin (2004), Paine (1996), Rush (2003) and others suggest in reflecting on Chief Justice McEachern's *Delgamuukw* (1991) decision, that the anthropologist's role in future litigation should in part be to continue striving to meet the rigorous standards of scientific inquiry, without diminishing Aboriginal concepts of meaning, and at the same time clarifying and contextualizing culturally specific knowledge so that courts are not alienated by "otherness".

In effect, as this position holds, anthropologists in court must become interlocutors⁵ speaking *to* the courts, *from* the field, and disambiguating human behaviour and knowledge, ancient and contemporary, through the use of an anthropological narrative. Beyond acting as interlocutor for the indigenous subject, Paine (1996:61) suggests that legal counsel undertake anthropological interlocation in the “demonstration of the universality of social construction”, particularly where it helps to explain the nature of peoples everywhere to create cultural distinction and legitimization through narratives about themselves (*ibid*:62). In other words, anthropologists need to give their voice to deconstructing western social constructs. Rush (2003) poses the idea, with specific respect to oral historical research and testimony, that while elders, chiefs or other designated members are the experts of oral history, “another way of advancing the reliability of oral history evidence is to call an expert on how oral history is to be understood, what it proves, and why it ought to be accepted as reliable” (*ibid*:24). Where such an expert is not available from within the community, to translate and contextualize for the court, the anthropologist will inevitably have to be prepared to provide this as material evidence. Preparation is everything when taking culture to court.

With that in mind, Glaskin advises that expert witnesses need to consider that the Federal courts [in Australia] require anthropological reports to “address issues arising out of developing case law, where this affects how native title law is understood and applied by the courts” (Glaskin 2004:4). This is where the contribution of legal counsel is particularly useful, as seen in the example of on-line case analyses posted by Robert Janes (*CLE* 2005),

⁵ The term “interlocutor” coined here is specifically in reference to the role of anthropologists as mediators of knowledge, as opposed to spokespersons, between the field and the court; as the interlocutor here does not represent the official view of anyone, but can explain it, along with symbolism, epistemologies, cosmologies and oral narrative, Ignace, and Paine suggest that as expert witnesses, anthropologists can avoid the pitfalls experienced in *Delgamuukw* 1991, to wit: “As far as the court was concerned, the exotic...was left interpreted, the philosophically complex rendered bizarre (Paine 1996:62).

through out the *Tsilhqot'in* trial. Canadian anthropologists need to understand and stay current with the changes in research emphasis resulting from findings and decisions *as they unfold*.

Morphy (2006:146) suggests that anthropological work that is relevant to a rights or titles case should be sorted through, or categorized so that material specific to the issues before the courts takes a primary place in the anthropological report, and that the contextual material remain on hand, should it be required. He suggests that material be divided to three categories: *fact; the systematic compilation of fact and; anthropological models or synthesis* (Morphy 2006:*ibid*). The problem is that some issues that are before the courts in Canada necessarily require contextualization so that the courts can understand them in the first place. With respect, for instance, to worldview in Australia, the greatest diversity between Aboriginal peoples falls outside the central and unifying belief system known as the Dreaming, which in turn instructs the systems of ownership and occupation of lands across all Aboriginal cultures there. In Canada, on the other hand, Aboriginal belief systems, cosmologies and land tenure practices, occupation patterns, human behaviours and histories are so highly diverse that no one set of guidelines or research models can bring about reliable results in all cases. In addition, and of central interest to rights and titles cases, in Canada we have proto-and post-contact histories that vary widely and cover 500 years or better, whereas Australia's contact and colonial history spans considerably less. Dates of contact, real or imagined surrender, tradition, population and territorial use and occupation patterns, genealogy, and other issues occur at different times over millennia and all have impact in gathering evidence to address legal issues here. Further, as the case with the Gitksan and Wet'suwet'en, some Nations will want to control the manner in which their culture is portrayed to foreigners, and this may impact attempts at applying guidelines intended to result in tidy reports. It may seem like an onerous task to create guidelines or categorize data

in strange ways, and the notion gives rise to more questions; who should undertake this? Should we consider the Australian model? Should we follow von Gernet's model of preparing Aboriginal research as evidence? Should the Feds be the ones to develop guidelines and dictate what we research as evidence? These are questions we will have to wrestle with, and, not too soon, as Kew (1997), Morphy (1996), Rush (2003) and others remind us, as we're taking culture into court; we're not giving a lecture in the classroom

Morphy (1996:147-8) also provides a recommendation that anthropological expert evidence [ergo that from other social sciences], be subjected to review by other experts prior to submission in court, as a more expedient alternative to the current process of presenting the material un-reviewed and having the courts decide what is viable anthropological research and what is not. This measure may have considerable value in determining the applicability of some of the more venerable existing ethnographic, archival or historical works, and problematic social theory that have been relied upon particularly by Crown expert witnesses in the past; further, it may give a chance for newer works and more recent fieldwork to be reviewed before entry into court as evidence.

Resulting from my research for this thesis and in related areas, I have concluded that we need a think-tank, educational conferences, and/or series thereof, in which these very issues are discussed between anthropologists, historians, legal counsels and others who have much to teach the rest of us from their experiences in court, their reflections and their ideas for this re-shaping process. These sessions should produce written and video documents for publication (from lectures and discussion panels), and should in turn be used to inform and enlighten jurists, and to educate other students of Aboriginal rights and titles law. For my own contribution to this process, I intend to compile the literature and sources that I have gathered and create a resource bibliography, housed here in the SFU Kamloops resource library, but accessible to all, to be updated and expanded as new information comes to light.

Finally, with the exception of the work of Culhane, Thom, Burrows, but few others, not much in the way of analysis, discussion and critique of the type of anthropological research used by Crown expert witnesses has been tendered to date. Such information needs to be more widely known and must become part of the discourse of applied anthropology that addresses rights and titles law, as it shapes what takes place in the court room and within the discipline itself. My thesis hopes to make a contribution to such a discourse.

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