American Indian Law Journal

Volume 10 | Issue 2 Article 2

6-13-2022

# The Rule Against Hearsay, Indigenous Claims and Story-Telling as Testimony in Canadian Courts

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Table of Contents



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**Abstract**

The claims for the restitution of legal estate by the First Nations in Canada are often without the benefit of a written agreement, and they have to prove a spatial and temporal connection with ancestral lands in their narratives. The witness is a storyteller who, in the absence of documentary evidence, has to convince the court of the probative value of his evidence before the oral testimony is admissible as an exception to the rule against hearsay. This paper argues that there is a need for a framework that contextualises the terminologies of Native witnesses and submissions by understanding the epistemology of storytelling that is inherent in Indigenous cultures and the authenticity of expression where there is no written evidence to substantiate a claim.

## I. INTRODUCTION

The appropriation of land from Indigenous peoples in the "discovered" world was launched by the European nations based on the fiction that the land was *terra nullius*. This was a concept that regarded the real estate of the native inhabitants as "vacant," leaving Natives with no rights in the land since time immemorial.[2] In the North American continent, the land was deemed for settlement as a colonial domain upon the Royal Proclamation,[3] which resulted in the forfeiture of the indigenous lands by treaty.[4] Their claim to its restoration has to overcome the lack of documentary title. The oral testimony of tribes is often the only evidence available, but is based on hearsay evidence. Canadian courts have adopted different approaches to this conundrum, and the success of litigation can be measured against the principles that the courts have developed..: The probative value of oral narratives based on epistemology of indigenous culture and the analogy with landscape gardening can override the presumption that stories are hearsay.

The indigenous peoples who were conquered in the period of "discovery" were not literate in discourse, and as such did not enter documentary transaction when negotiating the

[2] The concept that land had no title when colonised was based on the Papal Bulls of the 15th Century. The Romanus Pontifex, 1452 proclaimed by Pope Alexander gave permission to King Alfonso of Portugal "to capture, vanquish and subdue all Saracens, Pagans, and other enemies of Christ, to take all their possessions and property, and to put them into perpetual slavery". Gardiner, Frances, 19l7, European Treaties bearing on the History of the United States and its Dependencies to 1648, Vol. 1, Washington, D.C.: Carnegie Institution of Washington. at 20-2.

[3] The Royal Proclamation 1763 established the basis for treaties between the British Crown and later Canada and the indigenous peoples. It states "We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our especial Leave and Licence for that Purpose first obtained." Royal Proclamation of 1763: Rights, Responsibilities and Treaties, indigenous and Northern Affairs, Canada, *www.aadnc-aandc.gc.ca/eng/1379594359150/1379594420080*.

[4] For its continuing impact upon the indigenous peoples, *see* JOHN STECKLEY & BRYAN D. CUMMINS, FULL CIRCLE, CANADA'S FIRST NATIONS 122 (Pearson Prentice Hall, 2008). *See also*, JOHN BORROWS, WAMPUM AT NIAGARA: THE ROYAL PROCLAMATION, CANADIAN LEGAL HISTORY, AND SELF-GOVERNMENT 155-172 (Univ. of British Columbia Press, 1997).

conveyance of their estates. Their lack of understanding of unfamiliar legal terms and conditions of sale with the European Sovereign was the principal reason for the transfer without retaining deeds of title as proof of previous ownership.[5]

The *Cambridge History of the Native Peoples of the Americas* provides an explanation of how the concept of literal communication was alien to indigenous tribes:

> *The greatest problem confronting scholars in researching the history of Native Americans is that the written sources for that history derive largely from the non-Native side and are subject to the distortions, misconceptions, biases, and ignorance that are generally associated with history seen from an external cultural perspective. Moreover, the nature of those biases and distortions has varied over the centuries, so that the data from which the historian must draw need to be interpreted with an understanding of those changes* [6]

The anthropology of the period must consider the indigenous concept of communal ownership rather than as a commodity where there is a vendor and a purchaser. The tribal context of right to and enjoyment of land depends on oral narratives, and the indigenous litigants can only produce oral testimony whose content is based on stories conveyed inter-generationally that establish the spatial and time connection to land. This form of evidence asserts the truth of the facts stated by a non-witness which is precluded in the common law courts by the rule against hearsay.[7]

The form of property law practised in Canada is inherited under common law where the title is recognised in fee simple, meaning that it was conveyed to the Crown in absolute ownership. The indigenous peoples held only a possessory title to land, and this was a qualified right recognised by the courts.[8] The colonial authorities and then their successors denied the right of alienation except to the Crown or the federal government and its true market value could

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[5] The Oxford Handbook of the History of International law states "the Aboriginal leadership had limited knowledge of the national system that lay behind the colonial apparatus. What they did know was that their allies needed their support and relied heavily upon their contributions." (Bardo Fasbender and Anne Peters, eds., 2013).

[6] Bruce G. Trigger & Wilcomb E. Washburn, *The Cambridge History of the Native Peoples of the Americas*, NORTH AMERICA VOLUME 1 PART 1, NATIVE PEOPLE IN EURO- AMERICAN HISTORIOGRAPHY 7 (1996).

[7] A witness can only give evidence of a fact of which the witness has personal knowledge because "any other source of knowledge, whether it be what someone else has told the witness or something the witness has read, is hearsay and is generally inadmissible". RODERICK MUNDAY, CROSS AND TAPPER ON EVIDENCE 54 (10th ed. 2010).

[8] In *Tee Hit Ton v. United States,* the Supreme Court held that it was "well settled" that Native Americans held claim to lands in North America "under what is sometimes termed Indian title or permission" and that this description means "mere possession not specifically recognized as ownership by Congress." 348 U.S. 272, 279 (1955). This was affirmed in *City of Sherrill v Oneida Indian Nation,* where Justice Ginsberg wrote for the majority: "[u]nder the doctrine of discovery, fee title to the lands occupied by the Indians when the colonists arrived became vested in the sovereign, first the discovering European nation and later the original States and the United States." 544 U.S. 197 (2005).

not be obtained.[9] However, the assertion of claims in court have to satisfy the scientific framework that derives from the archaeological and geological findings and can be quantified into an epistemology by the court.

This article examines the courts' acceptance of oral histories that support the claims of the indigenous peoples in Canada as an exception to hearsay evidence to proving the historical title to land. Claimants may thereby establish their claims with the circumstantial evidence that their land was appropriated by force or treaty negotiated under duress. The courts' development of principles in adjudging the admissibility of storytelling has to be viewed within the legal framework that exists in Canada under the Constitution Act 1982, sections 25 and 35, which has been termed the Indian *Magna Carta*. This paper asserts that the courts should adopt a receptive theory of evidence based on the epistemology of tribal culture and draw an analogy with landscape gardening based on accuracy of visual details retained in the narration of oral storytellers.

A parallel can be drawn to the and the admissibility of Native storytelling as an exception to the rule against hearsay in United States courts. The preeminent argument is as follows: the courts must adopt a receptive theory of oral evidence because doing so will facilitate the pre-trial hearings, directional stage, and the disclosures with more informed knowledge of the evidential value of oral stories. The current narrow conception of the Anglo-American courts should be rejected; instead, the concept of epistome should be applied in order to more closely define the admissibility of hearsay oral evidence and to corroborate our conception of hearsay with anthropological evidence.

## II. CONSTITUTIONAL PROTECTION AND *SUI GENERIS* RIGHTS

The Canadian Constitution Act of 1982 [10]has been defined as a Charter of Fundamental Rights for the First Nations of Canada. Its two most important provisions for affirmation of indigenous rights are section 25 and section 35.[11] The international recognition of the validity of

[9] The US the Indian Non Intercourse Act of 1791 forbade sale or purchase from a non-government source; the Royal Proclamation Act of 1763 had the same effect in Canada.

[10] An Act to give effect to a request by the Senate and House of Commons of Canada. UK Public General Acts. 1982 c. 11, SCHEDULE B

[11] Canadian Constitution Act, 1982, Sec. 25, 35. ("The guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired."); Section 35(1) ("The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired").

oral testimony by indigenous peoples is generally acknowledged in Canada.[12] It is necessary to assess to what extent these rights have been accepted in Canadian jurisprudence, where the rules of evidence are framed on common law basis which abides by the reliability and the best evidence rule. The application of this rule with regard to the admissibility to storytelling as an exception to the hearsay rule needs to be examined to determine the jurisdictional approaches and the possible basis for reform in the legal system.

The Canadian courts have two main avenues to admit oral history as evidence. First is a judicially created "principled approach" to the hearsay rule, which reflects the constitutional devise that indigenous rights and interests be recognised and affirmed.[13] The admissibility of evidence under the hearsay rule must be "necessary and reliable." The trial judge determines issue of reliability, and the determination is premised upon the basis that the events must have occurred before living memory.[14] The requirement of necessity may be met if the originator of the story or the witness to its rendition are deceased and cannot be produced before the court.[15]

In *R v Van der Peet*,[16] a member of the Stó:lō Nation, was charged for selling fish which under their tribal food fishing license they were forbidden from selling as catch. The trial judge held that the right to fish for food did not extend to the right to sell fish commercially. The conviction was restored at the Court of Appeal, and the issue when the matter reached the Supreme Court was the test for determining an "aboriginal right" under section 35 of the 1982 Act.[17]

Justice Lamer, writing for the majority, stated that:

> [T]he basis for the aboriginal rights doctrine exists, and is recognized and affirmed by s 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal

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[12] Canadian Community Economic Development Network (CED) 4th (online), Aboriginal Law, "The Canadian Legal Framework: Constitutional Protection for Aboriginal Peoples: Section 35 of the Constitution Act, 1982: Aboriginal Rights: Proof of Aboriginal Rights: Evidentiary Issues" (II.5.(a).(ii).B.4) at § 317.

[13] BRUCE GLANVILLE MILLER, ORAL HISTORY ON TRIAL: RECOGNISING ABORIGINAL NARRATIVES IN THE COURTS, 8-9, 157 (UBC Press, 2012) ("In the Canadian context these questions take on significance because the Crown has argued that oral materials are transformed into documents and hence are amenable to standard historiographic methods").

[14] Val Napoleon, *Delgamuukw: A Legal Straight-Jacket for Oral Histories?*, 20 CANADIAN J. OF L. AND SOC'Y 131 (2005).

[15] Lori Ann Roness & Kent McNeil, *Legalising Oral History, Proving Aboriginal Claims in Canadian Courts* 39 J. OF THE WEST 66, 68 (2000).

[16] R v. Van der Peet, 2 S.C.R. 507 (1996).

[17] *Id. See also, The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self Government*, GOVERNMENT OF CANADA, https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136 (last visited May 16, 2022) ("The provision does not define the term 'aboriginal rights' or provide a closed list of rights but has recognised the inherent right of self-government under Section 35"). S*ee also The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self Government* (with the information you have in the footnote in a parenthetical with the appropriate citation). ,

> peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.[18]

His Honor wrote that in "determining whether an aboriginal claimant has produced evidence sufficient to demonstrate" that "a practice, custom or tradition integral to a distinctive aboriginal culture" the court must:

> [A]pproach rules of evidence, and interpretation of the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in common law courts. The claims to aboriginal rights must be adjudicated on a specific rather than general basis.[19]

The principles established in this case came up for appraisal in *Delgamuukw v British Columbia*[20] where the Gitksan and Wet'suwet'sen litigants submitted the evidence of the location of their houses as establishing a spiritual link with the land. The Supreme Court held that the most "significant evidence of the spiritual connection between houses and their territory was the feast hall" where the "people tell and retell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands."[21] The indigenous title claim can be differentiated by ordinary usage rights, because communal land ownership is protected by s 35(1) of the Constitution Act 82. It was deemed to connect them to indigenous culture, and therefore was "sui generis." The meaning of this term is broadly defined to include not only the physical possession of the land, but also the "languages, laws, and customs that the tribe follows". [22]

Chief Justice Lamer wrote that oral histories were "tangential to the ultimate purpose of the fact-finding process at trial in the determination of the historical truth." [23] He allowed the appeal, in part, because the trial judge had not afforded the oral history evidence called at the trial appropriate weight which did not conform to evidentiary principles established in *R v Van der Peet*. The implication of the trial judge's reasoning is that oral histories should never be given any independent weight and are only useful as confirmatory evidence in aboriginal rights

[18] *Id.* at 30.
[19] *Id.* at 68.
[20] 3 S.C.R. 1010 (1997).
[21] *Id.* at Para 13.
[22] *Id.* at Para 83.
[23] *Id.* at Para 87.

litigation. His honor stated, "*I fear that if this reasoning were followed, the oral histories of aboriginal peoples would be consistently and systematically undervalued by the Canadian legal system....*" [24](emphasis added,)

The oral evidence was an important determinant in that case because the assertion of indigenous title had an important non-economic component. The land had an intrinsic value which was enjoyed by the community and they could not utilise it in a manner that would "destroy its aesthetic value".[25] In order to assert a claim for title, the First Nation had the "*burden of proof that must satisfy (i) the land must have been occupied prior to European sovereignty (in British Columbia, 1846); (ii) if present occupation is relied on as proof of occupation pre-sovereignty, then there must be a continuity between present and pre-sovereignty occupation; and (iii) at sovereignty, that occupation must have been exclusive*". [26]

Chief Justice Lamer wrote further that

> "If the group has maintained a substantial connection with the land since sovereignty, this establishes the required central significance."[27] This implies that the oral history need not provide definitive and precise evidence of pre-sovereignty aboriginal occupation on the territory claimed, but it may demonstrate that current occupation has its origins prior to sovereignty. It also means that the interpretation of the evidence must give due weight to the tribal people's perspective regarding practices, customs, traditions and their relationship with the land. In order to relax the proof of continuity requirement between existing and pre-sovereignty occupation the claim does not need "an unbroken chain of continuity".[28]

The Court refused to draw a rigid link in terms of spatial and time connection in proving title from oral testimony by acknowledging that

> occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title. To impose the requirement of continuity too strictly would risk undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect aboriginal rights to land. ).[29]

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[24] *Id.* at Para 98.
[25] *Id.* at Para 130.
[26] *Id.* at Para 143.
[27] *Id. at* Para 151.
[28] *Id.* at Para 153.
[29] *Id* Para . at 54, (quoting *R v. Cote*, 3 SCR 139 (1996)).

These guidelines for the maintenance of the nexus between people and the land to establish continuity were based on the requirement of exclusive occupation. The Court reasoned that "[t]he proof of title must, in this respect, mirror the content of the right".[30] This is an indication that there is no requirement of an exclusive possession of the land and that it could be demonstrated by the "intention and capacity to retain exclusive control."[31] This principle addressed a number of substantive issues and enunciated important principles relating to the significance of oral history, indigenous title, and the test for proving title to land, resting upon the scope of constitutional protection to be afforded to tribal land, and limitations on the provincial power where the First Nation Reserve was located to extinguish title.[32]

Matthew Sparke writes that the evidential burden of proof in *Delgamuukw* for the Gitxsan and Wet'suwet'en required the indigenous tribes to translate "their oral knowledge into a series of maps against the spatial knowledge of the Canadian state and its territorial boundaries".[33] They communicated their history that consisted of "effectively cartographing their lands as First Nations within the abstract state-space of Cartesian cartography" by supplementing the provincial and federal mapping of the land with maps based on tribal nation's oral knowledge.[34] The land claims before an uninformed or "merely skeptical Western-centric court is a challenge to Native communities" whose wide range of cosmologies and "notions of time and space defy the norms" and representation mechanisms conflict with established colonising existence.[35] The main difficulty for communities lies in the fact that it is "no simple matter to distinguish what really is past or present in a particular colonizing paradigm" according to the theory on memory induction and history formation.[36]

David Milward observes that there are obstacles in the manner in which the oral testimony is heard in the courts in terms of the judges understanding of the epistemology of indigenous cultures. This is based on the following observation:

> The Supreme Court of Canada has articulated several legal principles that mandate the flexible and generous treatment of Aboriginal oral history evidence in support of Aboriginal rights claims. Lower courts, however, continue to devalue such evidence, often displaying explicit disregard for the legal principles, in order to defeat rights claims and subordinate Aboriginal interests to state sovereignty. This has no rational basis, since

[30] *Id.* at 155.
[31] *Id.* at 156, (quoting KENT MCNEIL, COMMON LAW ABORIGINAL TITLE 204 (Oxford Clarenden Press, 1989).
[32] Cheryl Suzack, *The Transposition of Law and Literature in Delgamuukw and Monkey Beach*, 110 S. ATLANTIC QUARTERLY 447, 454 (2011).
[33] Matthew Sparke, *Map That Roared and an Original Atlas: Canada, Cartography, and the Narration of Nation*, 88 Annals of the Ass'n of Am. Geographers, 463-95 (1998).
[34] *See also* Napoleon, *supra* note 12.
[35] *Id.*
[36] *Id.*

> it is now clearly established that documentary historical evidence does not have any innate superiority over oral history evidence when it comes to ascertaining what happened in the past.[37]

Milward proposes that there should be training of judges in order for them to appreciate "the potential value and accuracy of oral history evidence", and they should be able to magnify the use of oral history evidence. This can be done by means of the more elastic use of the doctrines of "inference and judicial notice, and using court-appointed experts" to assure greater impartiality.[38] There are clear limits placed in case law of the extent of the evidence that will be admissible and the dividing line that exists before it may achieve probative value. This can be achieved because "the law of evidence and substantive law are in constant dialogue with each other". In this context the rules of evidence "must be developed dynamically and flexibly in order to realise fair and substantive justice for Aboriginal rights claims".[39]

The court's primary concern with indigenous oral history is its reliability; many features of tribal oral history undermine its reliability and its probative value in courts. For example, story tellers are replaced over time and so the keepers of the stories and courts cannot depend on the compiler's affirmation of the truth of the facts stated in the story.[40] This fact must be balanced by the threats to indigenous peoples' access to their ancestral lands, which are of immense cultural significance.[41]

The Courts have developed basic principles of when oral evidence will be accepted that asserts the truth of the facts stated therein as a general rule. This is within the framework of the best evidence rule – a cornerstone of the Canadian legal system. In *Mitchell v Minister of National Revenue*[42] a member of the Mohawk First Nation attempted to bring tangible goods back across the border from the United States but refused to pay tariffs, claiming that he had an indigenous right to trade that exempted him from having to pay customs duty on the merchandise. The parcels brought across the border were intended as a gift to another First Nation as a goodwill act. The Crown argued that there was no tribal right that excluded Mitchell from having to pay duties at the border, and that even such a right were consistent with national sovereignty, that it was necessarily invalid. In ruling, the Supreme Court operated as if

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[37] David Milward, *In Doubting What The Elders Have To Say: A Critical Examination Of Canadian Judicial Treatment Of Aboriginal Oral History Evidence,* 14 INT'L JOURNAL OF EVIDENCE & PROOF, 287 (2010).
[38] *See also Mathias v Canada,* 207 F.T.R. 1 (2000) (holding that "stories may be reworked by different story tellers").
[39] Milward, *supra,* note 35 at 301-02
[40] *Id.* at 296; *See also* Jane McMillan, *Colonial Traditions, Co-optations, and Mi'kmaq Legal Consciousness,* 36 L. AND SOC'Y INQUIRY 171, 194 (2011).
[41] *See also* Larry Nesper, *Indian Traditional Cultural Property in the Organized Resistance to the Canadian Mine in Wisconsin,* 36 L. AND SOC'Y INQUIRY 162 (2011) ("Not unlike the Black Hills for the Lakota…the local geography has been growing more sacred over the decades as it is threatened by external forces").
[42] 1 S.C.R. 911 (2001).

traditional Canadian sovereignty and tribal rights were not in accord. Instead, it should have determined how the evidence would be dealt with when determining if an indigenous right exists.

Chief Justice McLachlin ruled that the relevant law on the admission of oral history was premised upon "where it was both useful and reasonably reliable, subject always to the discretionary nature of the trial judge".[43] The admission of evidence was based on three factors, namely, whether it was useful, reliable, and probative. [44]

This implies that for the court to process the admissibility of indigenous oral history as evidence it had to satisfy the hearsay rule and the best evidence rule. The inference is that oral histories may be admitted for two reasons: firstly, they may offer evidence of ancestral practices that would not otherwise be available, and secondly, they may provide the tribal perspective on the right claimed. The best evidence rule means that the court will prefer written evidence over all other evidence in most circumstances. [45]

*A. Procedural rules for Indigenous Litigants*

The Federal Court of Canada has, in recent years, attempted to formulate evidentiary rules for oral history evidence in an effort to be more respectful of indigenous processes. The Federal Court Aboriginal Law Bar Liaison Committee has issued Aboriginal Litigation Practice Guidelines which state in their preamble that in "litigation practice issues involving oral testimony and the role of Elders, the committee continues its work with a focus on litigation practice issues involving applications for judicial review."[46]

Part IV of this article, which deals with Oral Testimony and History, sets out the Guiding Principles of the Federal Rules which state in relevant part:

> "Principle 1: The Federal Courts Rules must be applied flexibly to take into account the Aboriginal perspective; Principle 2: Rules of procedure should be adapted so that the Aboriginal perspective, along with the academic historical perspective, is given its due weight; Principle 3: Elders who testify should be treated with respect; Principle 4: Elder testimony and oral history should be approached with dignity, respect, creativity and

[43] *Id.* at 27.
[44] *Id.* at 30.
[45] The rule can significantly reduce the evidentiary weight given to oral history when there is a written alternative, and the latter may contradict oral history but not vice versa.
[46] Aboriginal Litigation Practice Guidelines, Federal Court, ABORIGINAL LAW BAR LIAISON COMMITTEE, (Oct. 16, 2012), *http://cas-cdc-www02.cas-satj.gc.ca/fct-cf/pdf/PracticeGuidelines%20Phase%20I%20and%20II%2016-10-2012%20ENG%20final.pdf*.

sensitivity in a fair process responsive to the norms and practices of the Aboriginal group and the needs of the individual Elder testifying."[47]

The courts are rigorous in applying the reliability of the hearsay testimony and will make a more detailed inquiry into the facts surrounding the claim. The reputation of the narrator is the crucial point, and the judge will assess whether the statement may have been made by the deceased person who had "an interest in the matter" which may cast doubts on its veracity.[48] The courts will consider reliability before the witness takes the stand which allows filtering at the earliest possible opportunity. This preliminary investigation allows the "witnesses to contradict or confirm the accuracy of the recitation" in order to ascertain if the evidence is reliable.[49]

The other alternative for permitting hearsay evidence is to utilise the general hearsay exception for statements uttered by deceased individuals if the statement concerns reputation. As "Oral History is communal these declarations come "within the categories of public or general rights that can be proven by declarations of reputation".[50] It includes the rights to land which are "communal in nature" and come within the "public or general rights" that can be proven by "declarations of reputation".[51] The courts accept oral history about the position of boundaries on tribal land under this reputation exception, for example, but excludes evidence about the way "tribes use the land".[52]

Judges also adopt judicial notice in addition to best evidence rule and the hearsay rule to admit oral history. Functionally, judicial notice allows the courts elasticity in approaching aboriginal oral history by allowing a judge "to make a finding of fact without evidentiary proof provided by the parties".[53] The courts can, by referring to this principle, "take notice of the facts that are common knowledge in the particular area in which the court is located".[54] They can determine by the application of judicial notice the "local geography and historical facts".[55] However, there is a flaw in this process of adjudging tribal land law claims – knowledge about customary ties with the land may not be within the general knowledge in the area where the court is convened and "historical and geographical facts are often vigorously disputed in indigenous land claim cases".[56]

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[47] *Id*. at 10-11.
[48] *Id.*
[49] Mitchell *supra* note 40.
[50] Kent McNeil and Lori Ann Roness. *Legalizing Oral History: Proving Aboriginal Claims in Canadian Courts*, 39 J. OF THE WEST 66, 69 (2000).
[51] *Id.* at 68-69.
[52] *Id.*
[53] Milward, *supra* note 35 at 289.
[54] *Id.* at 317.
[55] *Id.* at 289, 318-19.
[56] *Id.* at 316.

To remedy the apparent lack of knowledge, judges have discretion under the Practice Guidelines of Aboriginal Litigation to transfer the venue of the trial to a location on a First Nation Reserve to facilitate the narration of evidence by elders.[57] The Canadian courts have a wide discretion in how they apply judicial notice and they can "contextualise the application of judicial notice" to fill the lacuna in written records.[58] The courts observe the evidential rules that substantiate the evidence by the presence of corroboration, repetition and consistency. This can be satisfied by the presence of "other oral history testimony" or the supporting evidence that is rendered in the form of story-telling.[59] The court has to evaluate the originality of the oral testimony even when the story is admissible in order to decide what weight to assign to the statement of the indigenous claimant who has the burden of proof in the litigation concerning land.[60] The common law courts have lowered the burden of proof in cases involving a treaty and land claims in an effort to respect claims within their modern judicial systems. This is premised on section 35 of the Constitution Act 1982, case law, and the Practice Guidance in Aboriginal Litigation. The courts have formulated the doctrine that allows the adducing of evidence that will be deemed admissible if it satisfies the principle of reliability and usefulness.[61]

### *B. Conflict With Common Law Rules of Admissibility*

In dealing with the Western notions of evidential value and those of indigenous cultures, one needs to decipher the contrasts in the rules of application where the fact evidence is concerned. Their nexus with the land provides the tribes with affiliations that are central to their existence as communal entities, investing in them their cultural identity and security, and the centrality of land sustains their existence and determines their relationship to the environment.[62] The spiritual relationship governs the accepted practices on lands and translates it into a

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[57] From the Aboriginal Litigation Practice Guidelines: "trial management that in the course of selecting a (b) trial venue the judge must consider having parts of the trial in the aboriginal community; assess the advantages/disadvantages arising from the choice of venue, including: the effect that the venue may have on the ability/ease of witnesses to testify in open court, and in particular where Elders are being called to testify.", *supra* note 44, at 8.

[58] Milward, *supra* note 35, at 318.

[59] Glen Stohr, *The Repercussions of Orality in Federal Indian Law*, 31 ARIZ. L. J., 679, 692 (1999).

[60] *Id*.

[61] In *R v Marshall*; *R v Bernard*, 2 S.C.R 220 (2005), Chief Justice McLaughlin wrote that "the need for a sensitive and generous approach to the evidence tendered to establish aboriginal rights, be they be right to title or lesser rights to fish, hunt or gather. Aboriginal people did not write down events in their pre-sovereignty histories. Therefore, orally transmitted history must be accepted, provided the conditions of usefulness and reasonable reliability set out in *Mitchell v MNR*, are respected."

[62] The importance to indigenous peoples is driven by an intention "to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems." *See e.g.* Eric Dannenmaier, *Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine,* 86 WASH. UNIV. L. R. 53, 58 (2008): "The indexical value of land in establishing identity is completely different then the legal value of land inscribed in deeds…[i]n this way, the law can undermine the foundational significance of land for a popular culture."; Gerald Torres & Kathryn Milun, *Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case*, 39 DUKE L. J. 659 (1990).

compelling duty to protect their land.[63] The customs, traditions and the folklore are all part of the affinity and "belonging" with the land. [64]

In deriving a link with land for indigenous peoples, the ownership of deeds is the main obstacle to its restoration of ownership. Robert A Hershey, Jennifer McCormack, Jennifer Newell, and EE Gillian – lawyer, law professor, geographer and archaeologist, respectively – have proposed an interdisciplinary perspective by focusing on mapping and the potential challenges of using navigational aids to support indigenous land-rights claims. They elucidate the "shortcomings of colonial legal systems in justly addressing indigenous claims to revealing the limitations of the law itself as a mechanism of justice." [65]

They provide an example by showing that there are no separate words for space and time in the Maori language, whereas, for the Tohono O'odham, "the past exists alongside the present, and people interact with spaces acknowledging the "wi'ikam ("those things that are left behind"), the living objects left by the Huhugkam ("those that are gone") and Wu:skam ("those that emerged"): This illustrates the point that the linear notions of space and time that regulate conduct in the dominant cultures "are not neutral and objective but , like the oral histories thatcourts distinguish them from, have a particular perspective and history in mind.[66]

Obstructions to the admission of oral history via usually an exception to the hearsay rule leads to judges potentially rejecting or undervaluing the evidence if it is not accompanied by other corroborating evidence. This presents a disadvantage for indigenous peoples, who, given their historical reliance on oral history, tend to lack such corroborating proof. The land claims before an uninformed or "merely skeptical Western-centric court is a challenge to Native communities" whose wide range of cosmologies and "notions of time and space defy the norms" and representation mechanisms conflict with established colonising existence.[67] The main difficulty for communities lies in the fact that it is "no simple matter to distinguish what really is past or present in a particular colonizing paradigm" according to the theory on memory induction

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[63] "Tlingit property and jurisprudence…are inextricably intertwined with the metaphysical." Caskey Russell, *Cultures in Collision: Cosmology, Jurisprudence, and Religion in Tlingit Territory*, 33 Am. Indian Q. 230, 240 (2009), quoting ROSITA F. WORL, TLINGIT, TANGIBLE AND INTANGIBLE PROPERTY (Harv. Univ. Press) (1998); VINE DELORIA JR. & CLIFFORD M. LYTLE, THE NATIONS WITHIN THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY (Univ. of Tex. Press) (1984) ("With respect to the lands they lived on, many Indians felt a strong religious duty to protect their territory").

[64] John C. Hoelle, *Re-evaluating Tribal Customs of Land Use Rights*, 82 U. COLO. L. REV. 551, 585 (2011), quoting Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self Determination: The Role of Ethics , Economies, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 284-85 (1996).

[65] Robert Hershey et al., *Mapping Intergenerational Memories (Part I): Proving the Contemporary Truth of the Indigenous Past*, ARIZ. U. (Jan. 2014), https://www.academia.edu/6968061/Mapping_Intergenerational_Memories_Part_I_Proving_the_Contemporary_Truth_of_the_indigenous_Past

[66] *Id.*

[67] *Id.*

and history formation. The consensus exists that the different angles presented by western scholars and tribal oral histories are complimentary.[68] The conveyance of land through oral transactions by indigenous peoples would have left records thereof that could be utilised to support oral testimony and substantiate the facts argued in the narrated accounts.

The landmark decision in *Tsilhqot'in Nation v British Columbia*,[69] by the Supreme Court indicates that archaeological evidence may substantiate indigenous land claims in the future. This ruling was the first time in Canadian history that a court has declared native title to lands outside of a reserve and the ruling also rejected the "postage stamp" view of tribe's land permanently. The title is not restricted to small, intensively used sites and extends to all the territory that a First Nation, regularly and exclusively, used when the Crown asserted sovereignty. This means ownership is of areas that were utilized only by the Tsilhqot'in at the time the Canadian government staked its claim. [70]

*Tsilhqot'in Nation v British Columbia* overrides the Western discourse which prioritizes the written word as the dominant form of record keeping and, until recently, the tendency of academics to consider oral societies to be peoples without history. Hulan and Eigenbrod argue in *Oral Histories and Oral Traditions* that oral traditions are "the means by which knowledge is reproduced, preserved and conveyed from generation to generation and oral traditions form the foundation of Aboriginal societies, connecting speaker and listener in communal experience and uniting past and present in memory."[71] They argue against the presumption that that written evidence is the best evidence available based on the following facts:

> The discussions of oral history have occasionally been framed in over simplistic oppositional binaries: oral/writing, uncivilized/civilized, subjective/objective. Critics wary of oral history tend to frame oral history as subjective and biased, in comparison to

[68] As Stó:lō historian Naxaxahtls'i (Albert "Sonny" McHalsie) observes: "The academic world and the oral history process both share an important common principle: they contribute to knowledge by building upon what is known and remembering that learning is a life-long quest. Together oral and written methods of recalling and recounting the past have the potential to contribute greatly to the historical record." Albert "Sonny" McHalsie (Naxaxalht'i), *We Have to Take Care of Everything That Belongs to Us, in Be of Good Mind: Essays on the Coast Salish*, 82 (Bruce Granville Miller, ed., Vancouver: UBC Press, 2007).

[69] 2 S.C.R. 257 (2014).

[70] *Id.,* Justice Vickers stating that he would use "anthropological, archaeological and historical records to corroborate oral history evidence." In his trial decision, Vickers relied extensively on expert opinion evidence from historians and a comprehensive record of historical documents. In deciding to accept the large body of oral accounts given at trial, he accepted the distinction between oral history and oral tradition evidence. Oral tradition evidence, he found, consists of verbal communication, messages, from the past beyond the present generation. Oral history evidence is "recollections of aboriginal life" and consists of a present-day "witness" account of what he or she learned from deceased individuals within the community concerning genealogy or traditional activities and practices, including land use" (*See id.)* Both oral tradition and oral history evidence was called to prove title.

71 Renée Hulan & Renate Eigenbrod, Oral Histories and Oral Traditions, in *Aboriginal Oral Traditions: Theory, Practice, Ethics*, ed. (Halifax: Fernwood Publishing, 2008), 2–3.

> writing's presumed rationality and objectivity. In Western contexts, authors of written documents tend to be received automatically as authorities on their subjects and what is written down is taken as fact. Such assumptions ignore the fact that authors of written documents bring their own experiences, agendas and biases to their work—that is, they are subjective.[72]

The anthropologists argue that the divide between oral and written history is a misconception and writing and orality do not exclude each other; rather they are complementary. This is corroborated by the Stó:lō historian Naxaxahtls'i Albert "Sonny" McHalsie who writes: "The academic world and the oral history process both share an important common principle: they contribute to knowledge by building upon what is known and remembering that learning is a life-long quest."[73] Together, the oral and written methods of evoking and remembering the past have the potential to contribute immensely to the historical record.

The veracity of oral history according to this reasoning is a legitimate and valuable addition to the historical record. The oral-based knowledge systems are predominant among indigenous peoples as an extra-curricular "discourse and form part of ceremonies to validate a person's or family's authority, responsibilities, or prestige".[74] There are some stories that are narrated at particular times or places or by people that often inform important wisdom about a given tribe's culture, the land, and the manner of interaction with each other and their environment. The conveying of these stories inter generationally maintains the social order intact and the oral histories must be conveyed diligently and accurately and it is often the repository of wisdom in the designated person of the tribe. This person is responsible for keeping the knowledge and eventually transferring it in order to preserve the historical record.

John Borrows writes that the format of storytelling places the "importance on accuracy, oral narratives often present variations, either subtly, or otherwise whenever they are told". The narrators may locate an incident "in context, to emphasize particular aspects of the story or to present a lesson in a new manner among other reasons". Then by force of repetition, a story becomes elaborate and creates a broader and more comprehensive narrative. If the listeners ever invoke the narrative elsewhere, "they would be expected to a certain extent to reflect their interpretation of events and to better apply the story to its existing context. In some instances, precision and the contextualizing have their objectivity ascertained by the storytellers."[75]

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72 *Id*.
73 McHalsie, *supra* note 65.
74 ROYAL COMMISSION ON ABORIGINAL PEOPLES, REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES, VOL. 1, LOOKING FORWARD, LOOKING BACK, 33 (1996).
75 John Borrows, *Listening for a Change: The Courts and Oral Tradition,* 39 OSGOODE HALL L. J. 1, 9 (2001).

This may be differentiated with written history that represents a discourse but a static record of an authority's singular recounting of a series of events. The readers of the manuscript may interpret these writings, but the documentary record remains in perpetuity. The same oral narratives, on the other hand, do not have to be identical - what is fundamental is whether or not they carry the same message.

## III. U.S. COURTS

In comparison with Canada, the courts in the U.S. have been less accommodating "to accept indigenous oral history as proof of Indian land claims based on the hearsay rules of evidence, because the original story teller cannot be summoned and there is no written record to confirm the recounted events."[76] This is despite the fact this is the "'best' evidence of such claims" or could be the only available proof in the matter. [77]

The U.S. has inherited the common law from its English origins, and success in litigation can be measured as such against the principles adopted by the Federal Rules of Evidence, the United States Constitution, and the relevant case law. This portion of the article is examines oral storytelling as testimony in claims to prove title on land and its reception in the U.S. courts. As it applies to the United States, courts should attempt to adopt a receptive theory of oral evidence, as doing so will facilitate pre-trial hearings, directional stages, and required disclosures with informed knowledge of the historical and anthropological evidential value of oral stories. Episteme can be applied to define the admissibility of hearsay oral evidence and to corroborate that with anthropological evidence.

### A. *Federal Evidence Rules and Exception To Hearsay*

In dealing with Native American claimants, there are two branches of courts in the U.S. that consider oral hearsay evidence, the Court of Federal Claims (CFC), and the Federal Circuit Courts. The manner in which evidence is presented is an important factor in terms of admissibility; the Federal Rules of Evidence (FRE) apply the best evidence rule and prioritize the submission of original evidence which is written unless otherwise stated. [78]

The case law of the CFC lends few clues or leads as to how oral evidence may be admitted regardless of its hearsay status. The acceptance for an expert's opinion testimony is one such example, as it is based upon personal knowledge, facts already in the record, and facts not

[76] Hope M. Babcock, *[This] I Know from My Grandfather: The Battle for Admissibility of Indigenous Oral History as Proof of Tribal Land Claims*' 37 AM. INDIAN L. R. 19 (2012).
[77] The Federal Rules of Evidence apply the best evidence rule and prioritise the submission of original evidence which is written unless otherwise stated. FED. R. EVID. 1002.
[78] *Id.*

in the record. Those facts not in the record must be "of a type reasonably relied upon by experts in the particular field in forming opinions and inferences upon the subject."[79] This provides some flexibility because the expert can base an opinion on facts not in the record and could rely on that opinion on "facts [that] may be inadmissible hearsay." [80] There has also been speculation that the litigants tendering evidence based on stories that establish a connection with land may be acting from personal gain and that makes their evidence unreliable.[81]

The Courts have had to weigh the admissibility of oral evidence and its probative value against the documentary evidence offered by the other party. In *Pueblo de Zia v. United States,*[82] the claimants offered evidence from various tribal council members, which consisted of "oral accounts handed down from father to son . . . from time immemorial".[83] The Court stated that because the opposing party did not proffer any evidence of its own, the court would give the oral tradition "some weight."[84] However, the court qualified the use of the oral traditional evidence by stating that "corroboration of "historical and archaeological evidence and testimony" may be necessary. [85]

In *Confederated Tribes of the Warm Springs Reservation of Oregon v. United States*[86] the FCC affirmed that Indian title does not apply to those areas where the tribes had "permanent villages" but included those areas where it had "intermittent control" and that over period that it "used and occupied to acquire title" could not be fixed "precisely but had to be long enough to become domestic territory." [87] The ruling strongly emphasized the importance of cross-checking oral evidence "since informants can mislead researchers by describing some period . . . besides the aboriginal, pre- treaty period". [88]

While these two cases established that tribal claimants could adduce oral traditional evidence in courts, the requirement for corroboration by outside sources has severely limited its application. The most significant case decided in the CFC in which oral narratives came up for their conformity with the established rules of evidence was *Zuni Tribe of N.M. v. United States.*[89] Plaintiffs, members of the Zuni tribe of New Mexico, brought a claim based upon oral narratives

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[79] PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE 317 (4th ed., 2013).
[80] *Id.*
[81] In *Coos Bay Indian Tribe v United States* 87 Ct. Cl. 143, 152 (1938), where the oral evidence was ruled inadmissible because there was no probative value and the Court dismissed the testimony of Native people who gave oral history of their Tribe's land claim because the testimony of some of the witnesses had "a direct interest in the outcome of the case."
[82] 165 Ct. Cl. 501 (1964).
[83] *Id.* at 504
[84] *Id.*
[85] *Id.*
[86] 177 Ct. Cl. 184 (1966).
[87] *Id.* at 8
[88] *Id.* at 204
[89] 12 Cl. Ct. 607 (1987).

that had been conveyed to them by their parents and grandparents. They sought compensation for the alleged taking of lands and the court had to decide whether the Zuni had aboriginal title to the land in question.[90] The claimants had to prove "actual, exclusive, and continuous use and occupancy for a long time (or from time immemorial)."[91]

The Zuni's expert witness utilized specialized techniques to present the evidence to the court in the form of anecdotal testimony. The court considered the matter and without any specific discourse about the manner in which it was compiled admitted the testimony and the claimants succeeded. [92] However, the court acknowledged that much of the evidence offered consisted of oral histories and held as follows:

> Defendant conjectures but offers no evidence to contradict or impeach the Zuni recounting of their history. And, given the import attached to the oral transmission of history and religious observation by the Zuni, there is no reason to suspect gross or deliberate distortion. Accordingly, the court is persuaded that, notwithstanding some insufficiency, this recounted history is of evidentiary probity.[93]

The ruling did not provide any binding authority for other courts to follow, nor explained as to why exactly it was persuaded that the histories were "of evidentiary probity."[94] The expert witness, Andrew Wiget, was an anthropologist who assisted the Zuni in this case and provided information as to the tribe's oral histories, consisting of 1,300 pages of deposition testimony. This evidence was anecdotal rather than formalized oral tradition, but Widget presented it in a framework that met the court's requirements.[95] The large amount of oral traditional evidence was admissible specifically because of the expert witness's innovative presentation.

To return to the subject of expert testimony: courts may allow external basis for admitting opinion evidence if "the expert is fully capable of judging for himself what is, or is not, a reliable basis for his opinion." [96] Whiteley argues that the expert opinion testimony about a tribe's oral traditions and history would come under this category and while the evidence about oral histories cannot be expected to "conform exactly to scientific models of falsifiability." Oral traditions may be interpreted to prove the facts of the case, but they primarily exist as cultural

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[90] *Id.* at 607.
[91] *Id.* at 608-09.
[92] *Id.* at 609.Z
[93] *Id.* at 616.
[94] *Id.* at 127.
[95] Andrew Wiget, *Recovering the Remembered Past: Folklore and Oral History in the Zuni Trust Lands Damages Case*, *in* ZUNI AND THE COURTS: A STRUGGLE FOR SOVEREIGN LAND RIGHTS 173 (Richard Hart ed., 1995), detailing Wiget's methods while working with the Zuni; he had over 1,000 pages of depositions, worked with numerous informants, and did not have access to outside evidence while he was with the Zuni. This detailed the efforts of the anthropologist who worked with the Zuni to present their large amount of oral traditional evidence to the court. This evidence was anecdotal, rather than formalized oral tradition.
[96] *Id.*

"canons for evaluating truth-claims and appraising the plausibility of particular accounts of the past." [97]

Whiteley gives an example related to stories about the migration of a particular Hopi clan to their contemporary location. These accounts "are entrenched features of a corpus of Hopi narratives," thus an individual who tells the stories incorrectly "would be dismissed as a know-nothing…." [98] This is a process which he describes as subjecting the account to "critical standards of historical judgment," and as the expert's own evaluation of a reliable basis.[99] The judgment therefore reflects the view that a court's focus should be on the reliability of the opinion and its foundation rather than the fact that it is technically hearsay.[100] The other option for admitting testimony from Native litigants in the form of oral traditions is to use one of multiple existing hearsay exception under the FREs. Rule 803(20) allows the admission of hearsay testimony to prove "reputation concerning boundaries or general history.[101] The text of this hearsay exception allows testimony that implicates the "[r]eputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community".[102]

In *Sokaogon Chippewa Cmty. v. Exxon Corp*[103] the Sokaogon tribe sought a declaration that the tribe had the right to occupy a particular tract of land rich in mineral deposits. They primarily used oral traditional evidence detailing a promise of a reservation. The issue before the court was whether the Sokaogon had ceded their right after negotiating a treaty during the 1800s. It ruled that "there is no documentation of this tradition, which is at best embroidered (too many ransoms, shipwrecks, lost and stolen maps, and deathbed revelations to be plausible) and at worst fictitious." [104] The Circuit Court held that the Sokaogon had failed to state a claim in the framework that could circumvent the documentary evidence. It explained that oral traditional evidence was not admissible because "no effort was made by the Sokaogon's counsel to cast it into a form in which it would be admissible in a court of law."[105] This appeared to be taking a more stringent approach compared to the rationale developed in the preceding cases decided

[97] Peter M. Whiteley, *Archaeology and Oral Tradition: The Scientific Importance of Dialogue*, 67 AMERICAN ANTIQUITY 405 (2002).
[98] *Id*. at 407
[99] GIANNELLI *supra* note 76, at 411, quoting *United States v. Sims*, 514 F.2d 147 (9th Cir. 1975).
[100] *Id.* at 355, referencing *Soden v. Freightliner Corp*., 714 F.2d 498 (5th Cir. 1983).
[101] FED. R. EVID. 803.
[102] *Id.*
[103] 2 F.3d 219 (7th Cir. 1993).
[104] *Id*. at 222.
[105] *Id*. at 224–25

before the change of approach that came in the 1960s when hearsay evidence tendered by the Native tribes began to receive some credibility in the courts.[106]

Litigation over land claims are still governed by the FCC decision in *Zuni Tribe* where the Court accepted that the ancient ties of the Zuni to the land were manifest in the tribal oral tradition about Zuni origin and migration and in the physical artefacts representing the archaeological history of Zuni culture.[107] There was evidence that had probative value in the oral tradition because it attached the community to accurate transmission of oral history, "and the presentation of oral history in a deposition form made it "more persuasive to the court." [108] The validity of the evidence was established "through corroboration between different pieces of the oral history testimony"[109] reliability or repeatability, tested through the ability of witnesses to render the story on various occasions; and 'consistency' meaning the conformity of testimony with other testimony".[110]

However, after the *Sokaogon* ruling, tribes in the future will be forced to speculate as to whether circuit courts will reject oral testimony when there is more recent documentary evidence available that conflicts with the type of evidence in *Zuni*. If courts were to set out guidelines, any future tribal claimants would be able to ascertain when to submit their evidence, and whether that evidence would be found admissible, thereby reducing the number appeals in the federal courts.[111] The only statutory exception that exists in legislation in terms of specifically admitting Native oral history hearsay evidence is the Native Graves Protection and Repatriation Act (NAGPRA), which permits the testimony of oral evidence in support of claims for ancestral remains. The statute has achieved what the courts have been unwilling to set out in rulings in

[106] *See* Pueblo de Zia v. United States, 165 Ct. Cl. 501, 505 (1964) (declaring that oral traditional evidence entitled to "some weight").
[107] Dwight G. Newman, *Tsilqot 'in Nation v British Columbia and Civil Justice: Analysing the Procedural Interaction of Evidentiary Principles and Aboriginal Oral History*, 43 ALBERTA L. REV. 433, 448 (2005).
[108] *Id.*
[109] Stohr, *supra* note 56, at 692 .
[110] *Id.*
[111] The Advisory Committee on Hearsay Evidence that stated that the hearsay exception "is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries." However, the rule is not sufficiently developed, and the courts have had to view the Indigenous claims in the Circuit courts on the facts of each case. This leaves the rule open to interpretation of the judges, and as such standard rules of application have not been formulated. *See also* McCormick on Evidence § 299. (Kenneth S. Broun ed., 6th ed. 2006) (explaining that "the Circuits appear divided as to whether in typical grand jury situations exculpatory testimony meets this ['similar motive'] requirement of the Rule"); Michael M. Martin, *The Former-Testimony Exception in the Proposed Federal Rules of Evidence*, 57 IOWA L. REV. 547, 557 (1972) (the common law formulation of the exception was easier to apply than the Federal Rule, in part because the Rules' drafters provided no criteria to guide judges in its application).

placing oral evidence parallel to documentary evidence. [112] There needs to be cultural significance to land as there is to the ancestral remains of the Native tribes. [113]

In Canada, the approach is based upon the written rules and codes that have been formulated for the determination of storytelling as evidence. The evidence that is collated from archaeological proofing can be supportive of such oral testimony. The Canadian courts have rejected the concept of *terra nullius*, removing an impediment on indigenous claims establishing title or interest in land. The Supreme Court has given the new constitutional framework an interpretation that provides equal treatment of oral history and documentary evidence.[114] Oral history evidence has to be treated in accordance with the spirit of the constitution, and "it has to be given real and fair chance to prove an aboriginal rights claim…if the oral history evidence is subjected to a critical inquiry as to its ultimate reliability, then the documentary and historical evidence should be subjected to that enquiry as well."[115]

This provides an incentive to the submission of evidence in the form of oral testimony that has the potential to be admitted as the truth of the facts stated therein. It can be supportive and can corroborate the evidence that is presented by the anthropological findings. Roger Anyon, et al state that the oral narratives and archaeological evidence are complimentary and can be reach similar findings because of the geographical facts surrounding the land:

> It is important to recognize that oral traditions and archaeology represent two separate, but overlapping, ways of knowing the past. Because they are qualitatively distinct, different standards apply in the way that information is collected, evaluated, and used to understand the past. These sources of knowledge converge in a broad sense on certain issues and themes, however, such as migrations, warfare, residential mobility, land use, and ethnic co residence. Both sources can therefore be used productively to investigate these issues, among others.[116]

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[112] The implementation of NAGPRA makes story telling part of the adjudicative process and expressly treats hearsay evidence as admissible by requiring that the "decision maker must consider oral tradition " in evaluating the "strength of a claim of cultural affiliation" to repatriate sacred or funerary objects or human remains through the Act's provisions. They can prove cultural affiliation by a balance of probabilities based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion. 25 U.S.C. § 3005(a)(4) (emphasis added).

[113] "Not unlike the Black Hills for the Lakota .... the local geography has been growing more sacred over the decades as it is threatened by external forces." Larry Nesper, L, *Ojibwe Indian "Traditional Cultural Property" in the Organized Resistance to the Canadian Mine in Wisconsin*, 36 L. AND SOCIETY INQUIRY 162 (2011).

[114] Kirsten Matoy Carlson, *Does Constitutional Change Matter? Canada's Recognition of Aboriginal Title*, 22 ARIZ. J. OF INT'L AND COMPAR. L. 449, 485 (2005).

[115] *Id.* at 467.

[116] Roger Anyon et al., *Native American Oral Traditions and Archaeology: Stepping Stones to Common Ground* 77-88 (Alta Mira Press, 1997).

Consensus exists among certain circles that the perspectives of western scholars and indigenous oral histories are complimentary.[117] This leads to a more receptive theory of evidence and allows the admission of evidence as truth of the facts stated when the common law courts evaluate its admissibility and probative value. Evidence can, and should be, admitted done when it is deemed as part of the cultural framework of the indigenous peoples, and it is admitted in the context of a society of tribal peoples who use oral communication in their intergenerational storytelling and allegiance to their ancestral lands.

### *B. Episteme In Indigenous Cultural Framework*

The accumulation of oral tradition in indigenous societies is based on a "collective enterprise" because a narrator does not generally hold singular authority over a story, and the nuances evident in distinct versions of a specific history are "peer reviewed" if the events and the various ways people have internalised them. The validity of oral histories flows from the group, and it stems from the principle that no one person can claim ownership to an entire history of the people. The narrators will "document" the histories and will recite from the source of their knowledge, such as a great grandparent or an elder in their family. This is sometimes referred to as "oral footnoting".[118]

The collective responsibility that derives from this historical record and its accuracy creates a space for interacting with the environment and the landscape that provides the spatial and temporal link as the resource for original stories by the elders.[119] Admissibility naturally includes the concept of epistemology, which underlies the grounds upon which oral testimony should be admissible in court as the accepted mode of expression and memory of the indigenous claimants for land-based rights. Legal philosopher Michel Foucault's coined the concept of the "episteme" as an archaeological source to understand the way cultures organised themselves and its reflection in their behaviour. The knowledge-based phenomenon provides an insight into the expressions of the institutional structure of a people that "predominated in a historical time

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[117] McHalsie, *supra* note 65 at 82, "[t]he academic world and the oral history process both share an important common principle: they contribute to knowledge by building upon what is known and remembering that learning is a life-long quest."

[118] Wendy C. Wickwire *To See Ourselves as the Other's Other: Nlaka'pamux Contact Narratives*, 75 CANADIAN HISTORICAL REVIEW 1, 19 (1994).

[119] There is scholarship in the exploring of this connection between landscapes, indigenous peoples, and their oral traditions. *See, e.g.,* KEITH BASSO, WISDOM SITS IN PLACES (Univ. of N.M. Press, 1996); JULIE CRUIKSHANK, DO GLACIERS LISTEN? LOCAL KNOWLEDGE, COLONIAL ENCOUNTERS AND SOCIAL IMAGINATION (UBC Press, 2005); EDWARD CHAMBERLAIN, IF THIS IS YOUR LAND, WHERE ARE YOUR STORIES?: FINDING COMMON GROUND. (A.A. Knopf Canada, 2003); Hulan *supra* note 68; DELL HYMES, IN VAIN I TRIED TO TELL YOU: ESSAYS IN NATIVE AMERICAN ETHNOPOETICS, (Univ. of Neb. Press, 1981); LAURA J. MURRAY & KEREN RICE, EDS. TALKING ON THE PAGE: EDITING ABORIGINAL TEXTS (Univ. of Toronto Press, 1999); Val Napoleon, *Delgamuukw: A Legal Straightjacket for Oral Histories?*, CANADIAN J. OF L. AND SOC'Y 20, 123 (2005); ROBIN RIDINGTON & JILLIAN RIDINGTON. WHEN YOU SING IT NOW, JUST LIKE NEW: FIRST NATIONS POETICS, VOICES, AND REPRESENTATIONS. (Univ. of Neb. Press, 2006).

period" when their own set of beliefs and customs distinguished and created their epistemology.[120] There is an assumption that the empirical scientific principles cannot define an objective truth or be rationally defended as against other epistemic principles.[121] This implies that the episteme is believed by any group of people as their recorded fact and a set of beliefs in which their structures are founded as truthful.[122] It also rejects the notion that there is one set of beliefs that are overriding as truth in determining what is regarded as accepted fact in that particular period or epoch.

The philosophical argument creates a methodology to evaluate the relationship between language and the law by a recourse to episteme that can be understood in the context of the bonds of the kinship in an indigenous group. Oral histories can be adequately appreciated if the orally-transmitted representations of the historical past rely on memories which conform to reliability and accuracy of the landscape. The implication is that the objective truth which challenges western beliefs depends on the episteme of the tribal people and this is grounded in their own environment and story-telling.[123] The admissibility of evidence should be adjudged by its epistemological basis in any pre-trial hearing to determine that it should be allowed in as evidence.

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[120] Foucault describes Episteme as follows: "…if in any given culture and at any given moment, there is always only one episteme that defines the conditions of possibility of all knowledge, whether expressed in a theory or silently invested in a practice." MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES, 178 (Vintage Books, 1994). In subsequent writings, he expanded and defined that several epitomes may exist and interact at the same time, being parts of various knowledge systems, "[t]he episteme is the apparatus which makes it possible for the separation, not of the true from the false but what may from what may not be characterised as selfish" MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE, 197 (1981).

[121] Critics of Foucault believe that "an episteme is a set of ordered but unconscious ideas that are foundational in determining what is regarded as accepted knowledge in particular periods of time". In order "to unearth the episteme of a period one engages in a metaphysical 'archaeology.'" However, the episteme is "not a general body of knowledge or natural science and is a form of unconscious stratum underlying and being the precondition for accepted knowledge in each historical period." JOSÉ GUILHERME MERQUIOR, FOUCAULT 36 (2nd ed., 1991).

[122] Flynn defines the theoretical framework arrived at by Foucault as based on "structuralism" Thomas Flynn, *Foucault's Mapping of History, in The Cambridge Companion to Foucault* 29-48 (Gary Gutting ed., 2005). Structuralism is considered a study of human activities "[which] has had a profound effect on linguistics, sociology, anthropology (and other fields in addition to philosophy) that attempts to analyze a specific field as a complex system of interrelated parts." It describes "perception and thought itself are constructed and not natural, and that everything has meaning because of the language system in which we operate. It is closely related to semiotics, the study of signs, symbols and communication, and how meaning is constructed and understood." *See* The Basics of Philosophy, *www.philosophybasics.com/movements_structuralism.html*.

[123] McHalsie, *supra* note 65, at 22. McHalsie elaborates on the historical connection in learning about a Stó:lō memorial ground, demonstrating how he acquired knowledge by listening to his elders and the significance of location in the production of historical understandings. The power of his historical understanding is a consequence of the increase of his own knowledge; "[t]he other thing, too, is that at Í:yem there's the Eayem memorial, there's a monument. It's a memorial to the Stó:lō people: they've got the sign right there. It says 'Eayem memorial 1938 AD Erected by the Stallo Indians in memory of many hundreds of our forefathers buried here. This is one of six ancient cemeteries within our five-mile Native fishing grounds which we inherited from our ancestors. RIP'. That memorial is set up at the cemetery there at the IR [Indian Reserve] also known as Bell Crossing."

Episteme is critically evaluated by anthropologists to overcome "colonial ideologies that remain embedded in social discourse, with communicative processes legitimizing contemporary power structures in the ways they represent individuals, institutions and their interests".[124] It has been argued that the concept of episteme invites the consideration of "the politics of identity and the ethics inherent in encounters of difference … to … emphasize inequality, disjuncture and the impossibility of understanding and accommodation".[125]

The post-colonial framework requires understanding of epistemology of the indigenous peoples, and anthropologists Frenkal and Shenhaw argue that such an understanding will override the presumption that colonial societies have no philosophical underpinning. A non-binary epistemology suggests "collapsing the boundary between West and non-West and allowing for hybridity to filter in, without denying the asymmetrical power relations between them".[126] The adoption of a non-binary perspective will lead to improved insight as " to show how western and nonwestern experiences (and representations) are inseparable; and how binary perspectives may purify the colonial practice and mask its hybrid history".[127]

The purpose of obtaining cultural knowledge in this context of post colonialism is to achieve justice when dealing with tribal land claims; appreciation of episteme would lead to an insight for judicial evaluation of evidence when submissions are heard in court.[128] The retention

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[124] Raka Shome, *Postcolonial Interventions in The Rhetorical Canon: An "Other" View*, 6 COMMUNICATION THEORY, 40 (1996).

[125] "The constituent element of this theory is the building of a communications ethic based on alternative frameworks from a variety of indigenous sources that is postulated by a group of Kaupapa Māori researchers who derive their insights from Māori epistemologies that include complex relationships and ways or organising society." Robert I. Westwood & Gavin Jack, *Manifesto For a Postcolonial International Business and Management Studies: A Provocation*, 3 CRITICAL PERSPECTIVES ON INTERNATIONAL BUSINESS, 246, 255 (2007). Westwood and Jack's project of decolonizing communication ethics draws on six key elements that are an integral part of Kaupapa Māori. They have a set of six variables on "re-visiting communication ethics drawing on the concepts of tino rangatiratanga or the principle of self-determination, taonga tuku iho, the principle of cultural aspirations which underscores the emotional and spiritual dimensions of being; whanau or the principle of the extended family which is central to Māori ways of organizing; and kaupapa or the principle of collective philosophy." This is designed to formulate a form of communication ethics that is grounded in the protean place but honours all people who inhabit it. Pihama L (2001). *Tihei Mauri Ora: Honouring Our Voices, Mana Wahine as a Kaupapa Māori Theoretical Framework*, 78 UNIV. OF AUCKLAND (unpublished doctoral thesis), available online at *www.kaupapaMāori .com/assets//PihamaL/tihei_mauri_ora_chpt4.pdf*.

[126] Michal Frenkel & Yehouda Shenhaw, *From Binarism Back to Hybridity: A Postcolonial Reading of Management and Organization Studies*, ORGANISATION STUDIES 3 (2006), available at https://doi.org/10.1177/0170840606064086

[127] *Id*

[128] Sámi scholar Rauna Kuokkanan defines indigenous epistemes as the norms are arrived at to attain an insight into "distinctive ontologies." This process will substitute "knowing the other" with that of understanding "see[ing]" the existence of other peoples that have "long been rendered invisible." The "indigenous episteme co-exists with those of the west" as represented by the dominant culture. This rests on the assumption that "indigenous relationship onotologies and distinct temporalities, in which past and present are not divorced, co-exist with the realist ontology and linear temporality in which the Western continuously shed the past" in the movement towards the future. Along with this is the acknowledgement that "there is an alternative vision of the human: those who have stayed in place for more than thirty thousand years." This is an argument Kuokkanan frames as meant to "enlarge the spectrum of

of inter-generational stories deserve recognition *because* of their preservation, and they should be adopted as part of the reception theory of evidence. Those stories are an important part of how law functions in an environment and the impact of the customs on the language and culture of a group that would be facilitated by the admissibility of oral testimony submitted as truth of the facts stated.[129] The knowledge that is stored in epistemology of indigenous customs should enable litigation to proceed and for oral narratives to be tendered in evidence if the reception theory is adopted.

The contemporary debate has moved to accepting storytelling and questioning whether oral materials have *veracity* to modern anthropological approaches which concentrate on the issue of *reliability*. This discourse is concerned with examining the ways in which contemporary people utilise these narratives to evaluate the current circumstances of the tribes and their memory and perception of their histories. There is an evolving study in which the case law, treaty interpretation, and evidential guidelines have all contributed to this development.

At present an issue that prevents the admissibility of oral evidence from Native witnesses is the evidence that is agreed upon by both parties in the case. This process of co-production "has become increasingly popular in the last decade" but its problem is how " to admit co-produced information as evidence. While the methods of admitting novel scientific evidence and oral history evidence are well understood, co-produced evidence does not fit neatly into either category".[130]

Miller argues that this is "certainly the view of mainstream practising lawyers and judges," and he proposes that there is need "to clarify how oral materials might enter into the practice of common law other than simply noting that to fail to do so would place Aboriginal people at a disadvantage and that fair dealing requires".[131] The assimilation of "Aboriginal law into the a larger, national body of law" does not "clarify the particular problems of evidence law and the creative arguments that might be made regarding" its compatibility in the Canadian courts**.**[132]

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perspectives in institutions in which indigenous peoples can participate." RAUNA KUOKKANAN, RESHAPING THE UNIVERSITY: RESPONSIBILITY, INDIGENOUS EPISTEMES, AND THE LOGIC OF THE GIFT (UBC Press 2007).

[129] "Stories require the law to be accountable to a critique from outside its hermetic closure; one that insists that legal language and legal business as usual implicate master narratives, ideologies, and concepts that have a place in other domains of culture as well, and cannot be insulated and protected purely as legal terms of art." Peter Brooks, *The Narrativity of Law*, 14 LAW & LITERATURE 1, 9 (2002).

[130] David Isaac**,** *Novel Science or Oral History? The Admissibility of Co-Produced Information in Canadian Courts*, 56 ALBERTA L. REV., 881-902 (2019).

[131] Bruce, *supra* note 11, at 25-6.

[132] *Id.* at 28.

The difficulty to which Miller refers is that "in integrating oral traditions into the court is simply defining the term and its cognates. Too many of the definitions, or manipulations of definitions, appear to have been created by those without direct experience with them, or are too focused on a limited inventory of examples and types". This form of reasoning avoids recognising the epistemology of the sources and wisdom, and is an imposition of an inflexible approach based on rigid application of formulistic concept of language that ignores the historical tradition that are non-textual and tendered as evidence in the "form of critical, lively intelligence which surrounds status, activities, gestures, and speech".[133] The framework that will override such an approach is a receptive theory based upon a concept that prescribes meanings from the perspectives of anthropologists to analyse the processes over time in order to rationalise and understand cultural idioms in the present age.[134] This is a semiotic inquiry that relies on , signs, speech and gestures and historical meanings and inferences can be drawn by the listener based on a "broad theoretical and evidential foundation with language defined as communication based on symbols rather than grammar with the "progression of signs (icon, index and symbol)" as a convention.[135] The admissibility of indigenous witness testimony will be reliant on understanding the interactions through movement and expression, and not by genre, tone, structure, and the social conditions which are typical of interpreting the literary texts.[136]

The reception theory can be applied by analogy to landscape architecture by its accuracy and detail stored in the memory of the narrator. The main difference with literary works is that oral narratives are accessible only to the imagination and the physical landscapes are accessible to the senses as well as to the imagination. This differs from the typical analysis of landscapes and does not uphold accepted terms of definition such as "formal" and "picturesque," unless those terms had significance for landscape viewers and can be contextualised. The landscape historian John Dixon Hunt in exploring the "virtual reality of gardens" states that the literary reception theory of designed landscapes can be adapted to its study and is an approach through the "experience of gardens enlarges how we understand their significance and understanding".

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[133] *Id.* at 29.

[134] The reception theory takes into consideration the essential divergence between the literary texts that form documentary evidence and the oral story telling as evidence that needs de coding for the listener. Umberto Eco established the term "aberrant decoding" to describe when the listeners interpretation differs from what the artist intended. It is presumed that the less shared heritage a reader has with the narrator, the less he or she will be able to recognise the speaker's intended meaning, and this is generally "if two readers have vastly different cultural and personal experiences, their reading of a text will vary greatly" Umberto Eco, *Towards a Semiotic Enquiry into the Television Message*, *in* TELEVISION: CRITICAL CONCEPTS IN MEDIA AND CULTURAL STUDIES, VOLUME 2 131-50 (Toby Miller, ed., 1965).

[135] Lawrence Barham & Daniel Everett, *Semiotics and the Origin of Language in the Lower Palaeolithic,* 28 J. OF ARCHAEOLOGICAL METHOD AND THEORY 535, 579 (2021).

[136] The word genre comes from the French (and originally Latin) word for kind or class. The term is widely used in rhetoric, literary theory, media theory, and more recently linguistics, to refer to a distinctive type of text. Daniel Chandler, *An Introduction to Genre Theory*, http://visual-memory-co.uk/daniel/documents/intgenre (1997).

Hunt's argument assumes that the "survival of gardens and landscapes is largely related to their public reception" and he raises questions about the preservation of historical sites. This can be interpreted on the same basis as premised on memory of the narrator in story-telling to claim land ownership because they rely upon a visual reality of establishing a connection with land by means of oral narratives rather than a literary connection. The principles can be applied in the reception theory of land that extends it to presentation of the conservation which accords with the indigenous claims upon the estate.[137]

The indigenous peoples accounts based on oral narratives is a reflection of the virtual reality that the testimony is premised upon and it should be judged on its accuracy and reliability. It will draw a link with the judicial interpretation by understanding the epistemology that provides different terms to the same facts which have a precedent in the historical circumstances of tribes and their connection with the land that enables the claim to rest on the semiotics of expressions and gestures.[138] This could be formalised in the law by the concepts that are in lexiconic usage of the indigenous peoples and could serve as platform for admissibility of hearsay evidence under the best evidence rule without any procedural barriers.

## IV. CONCLUSION

Throughout history, indigenous societies in North America have relied on the oral transmission of stories, histories, lessons, and other knowledge to maintain a historical record and sustain their cultures and identities. The Western discourse had come to prioritise the written word as the dominant form of record keeping and until recently the abstract concept of *terra nullius* designated the indigenous societies with no prior title to land. This has been proven to be misplaced because the debate of oral historiography has been framed in oppositional binaries: oral/writing, uncivilised/civilised, subjective/objective. The critics of oral history tend to frame its epistemology as subjective and biased in comparison to writing's assumed rationality and objectivity.

The notion that authors of written documents tend to be received logically as authorities and their subjects and deeds are presumed as fact ignores the reasoning that the authors of written documents bring their own agendas, inclinations and prejudices to their work which may render their testimony as false. The issues that may arise that militate against the admission of oral narratives is the rule against hearsay in the common law courts that attaches great

[137] JOHN DIXON HUNT, THE AFTERLIFE OF GARDENS: PENN STUDIES IN LANDSCAPE ARCHITECTURE (Univ. of Pennsylvania Press, 2004).

[138] Harold J Berman argues that cultural idioms as evidence in the common law courts are part of the revitalisation of judge made law, writing that "[l]egal language cast in terms understandable to all , can be enriched by the power of poetry liturgy, literature and art." HAROLD J BERMAN, LAW AND LANGUAGE: EFFECTIVE SYMBOLS OF COMMUNITY 9 (John Wittle Jr. ed., Cambridge Univ. Press 2013).

importance to reliability, or the consistency of evidence with which the plaintiff/claimant will recollect the same source about the events on separate occasions. The issue of veracity and the degree to which the form or content of a single testimony conforms to other testimonies are for the courts to evaluate. It may also be necessary to determine if the evidence being tendered to establish a connection with the ancestral property is obsolete in terms of not giving rise to a chain of narrative originality.

There is a more responsive attitude towards the acceptance of oral evidence in court which stems from the Constitution Act, section 35, which requires the rights of the indigenous peoples to be "recognised and affirmed" through a process of reconciling tribal and non-tribal interests. The principle was stated in the *R v Van der Peet* case that the special nature of land claims and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged. The obligation is on the courts to view the evidence presented by the claimants from their perspective. The courts must evaluate the oral history and along with the best evidence and hearsay rules that will enable them to decide upon its admissibility and probative value.

In the U.S., the Federal Court of Claims and the circuit courts have the power to hear oral evidence based on narrative accounts, but they have not adopted a standard rule or specific regulations to admit such evidence. The discretion of the judges in the cases involving indigenous story telling as evidence has created ambiguities in this area, and while there are clear rules which cause the exclusion of such evidence the corresponding rule as to what leads to its inclusion are not ascertainable in the judgment of the courts.

The western-centric logic of documentary evidence as the only means of arguing a case with substantive proof is not borne out by scientific analysis. Anthropological and archaeological evidence points to a strong connection between land and tribes and communities who have lived there since time immemorial. This has been established by cartographic and empirical techniques that could form geographical and geological supporting evidence. However, storytelling is an ancient tradition among the indigenous peoples and its admissibility based on oral narratives encompasses all of these meanings that can help move beyond a superficial treatment of oral histories. The knowledge of the culture of the tribal peoples is a prerequisite in basing an understanding ingrained in their epistemology. These are intellectually informed exercises of thought and belief and science corroborates them and a general principle can be established that they should be treated as 'virtual' reality. It is the accuracy, reliability, and detail that the court should consider in determining their admissibility in court.