Int J Semiot Law
DOI 10.1007/s11196-015-9419-8

"Oral Tradition" as Legal Fiction: The Challenge of Dechen Ts'edilhtan in *Tsilhqot'in Nation v. British Columbia*

Lorraine Weir[1]

Abstract Often understood as synonymous with "oral history" in Indigenous title and rights cases in Canada, "oral tradition" as theorized by Jan Vansina is complexly imbricated in the European genealogy of "scientific history" and the archival science of Diplomatics with roots in the development of property law and memory from the time of Justinian. Focusing on *Tsilhqot'in Nation v. British Columbia*, which resulted in the first declaration of Aboriginal title in Canada, this paper will discuss Tsilhqot'in law (Dechen Ts'edilhtan) in the context of the court's deployment of Vansina's theory and its genealogy, and conclude that "oral tradition" functions as a legal fiction enabling the court to remain in the familiar archive of its own historiography while claiming to listen to the Elders.

Keywords *Tsilhqot'in Nation v. British Columbia* · Oral tradition · Oral history · Aboriginal title · Jan Vansina · Indigenous law · Dechen Ts'edilhtan

"...one can read above the portals of modernity such inscriptions as 'Here, to work is to write', or 'Here, only what is written is understood'. Such is the internal law of that which has constituted itself as 'Western'.".

Certeau [22: 134].

1 Introduction

In his classic essay, "Checking the Evidence: The Judge and the Historian" [30], Carlo Ginzburg describes a positivist perspective on evidence being "analyzed only in order to ascertain if, and when, it implies a distortion, either intentional or

✉ Lorraine Weir
Lorraine.Weir@ubc.ca

[1] Department of English, University of British Columbia, Vancouver, BC V6T 1Z1, Canada

Published online: 28 March 2015

unintentional." Among the possibilities which then confront the historian, according to Ginzburg, are the following:

> "…a document can be a fake; a document can be authentic, but unreliable, insofar as the information it provides can be either lies or mistakes; or a document can be authentic and reliable. In the first two cases the evidence is dismissed; in the latter, it is accepted, but only as evidence of something else. In other words, the evidence is not regarded as a historical document in itself, but as a transparent medium – as an open window that gives us direct access to reality." [30, p. 294]

Ginzburg goes on to characterize these assumptions as "undoubtedly wrong and intellectually unfruitful" though "still shared by many historians." However, he also rejects what he calls the skepticism of the social sciences which has emerged in response to positivism, seeing the critique as implicated in the position it challenges or, as he memorably puts it, substituting a wall for an open window. Both positions, he argues, "take for granted the relationship between evidence and reality" [30, p. 294], a relationship which Ginzburg sees as "highly problematic," contextually specific, and situationally determined.

It is the positivist historian's open window of "fact" and "truth" which is most apparent in Indigenous title and rights cases in Canada, including a recent case like *Tsilhqot'in Nation v. British Columbia* [2007 BCSC 1700; hereafter *Tsilhqot'in*] which produced the first declaration of Indigenous title in Canada [2014 SCC 44]. While this breakthrough is sometimes assumed to reflect the efforts of trial judge David Vickers to adhere strictly to the Supreme Court of Canada's ruling in *Tsilhqot'in*'s precedent, *Delgamuukw* [1997, 3 SCR 1010], that oral history evidence be "placed on an equal footing with the types of historical evidence that courts are familiar with" (*Delgamuukw* 87; *Tsilhqot'in* 136), the court accomplished this goal by distinguishing "oral history" from "oral tradition," thereby separating Tsilhqot'in law (Dechen Ts'edilhtan) from what the court determined to function as "history" and placing little or no weight on what it construed as "legends." Pheng Cheah describes the aporia "where the postcolonial national body must accept the other within but cannot clearly discriminate between what it welcomes into itself" and itself as nation. [16, p. 394] That aporetic combination of welcome and denial of recognition is what Justice Vickers calls "reconciliation" in spite of his acknowledgment that the court and the nation must decolonize. [*Tsilhqot'in*, 1046] Postcolonial (on occasion) in rhetoric, decolonial (at times) in practice, the court constitutes "oral tradition" as what Ginzburg calls "evidence of something else," evidence not accorded the weight of a historical document.

Looking onto the "reality" of its own self-perception, the court welcomes and seeks reconciliation with what it calls "the Aboriginal perspective" which is to say its own construction of the histories, languages and cultures of Indigenous nations and the identities of Indigenous peoples themselves, internalized by the state into itself in an act of incorporation of "the other." This is "sovereignty's alchemy" [8], the process by which the state expresses its own origin in terms of its colonial belief that "Indigenous Peoples provide only a source (in a physical sense) of doing history, so that the history can be owned, manipulated and presented by others" [69,

p. 104]. As we will see, "sources" in a documentary sense as well since the court's theory of "oral tradition" and "oral history" constructs Tsilhqot'in people in terms of a discourse of sources, origin, documentary archives, a hermeneutics of suspicion incipient in the gradual distancing of *lex scripta* (written law) from *lex non scripta* (unwritten law), and also a distancing of written from *un*-written law in which oral tradition is subsumed as a mode of un-writing and a gradual silencing of oral memory.

One sign of this gradual transformation in weight placed on documents is the archival science known as Diplomatics, a rigorous practice of textual analysis initially applied to medieval charters to determine their authenticity (or forgery) and incorporated through the work of German historiographers like J.M. Chladenius, J. G. Droysen, and F. Schleiermacher into the development of "scientific history" [33] associated with Leopold von Ranke and, in the late nineteenth century, with the publication of such textbooks of Geschichtsphilosophie (philosophy of history) as Bernheim [5] and Langlois and Seignobos [41]. Diplomatics and "scientific history" arrive in Indigenous title and rights cases in Canada via the work of historian Jan Vansina which has been relied on extensively by Crown expert Alexander von Gernet [67, 68] whose views have been subjected to incisive analysis by a number of scholars [2, 5, 9, 36, 45] and, in particular, by legal anthropologist Bruce Granville Miller in his important book, *Oral History on Trial*. [44] Relying primarily on the work of Brownlie, Miller and Walkem [13, 44, 69], this paper discusses not Von Gernet but his major source, Vansina, in relation to Justice David Vickers' theory of oral tradition in *Tsilhqot'in*. In turn, some of Vansina's major sources from "scientific history" and Diplomatics are discussed and a genealogy of oral tradition in terms of one of its roots, *traditio* in Justinian's *Institutes*, and some offshoots will be considered first in relation to the formation of Vansina's theory and then in relation to Vickers J.'s uses of it.

This trajectory may seem curious given the Supreme Court of Canada declaration of Aboriginal title in June 2014 to almost half of the claim area (more than 1750 sq. km) in this case, a decision which left the trial judge's findings intact and without criticism. However, although *Tsilhqot'in* is a victory for oral history evidence, it is much less so for oral tradition. While the division between these two categories as constituted by Vansina is itself deeply problematic, it has been incorporated into an effective strategy for hearing oral history evidence given the evidentiary constraints of "hearsay." However, as Walkem writes, "Indigenous oral tradition evidence becomes lost in the interplay between the separate determinations of admissibility and weight" [69, p. 178]. Such evidence is also lost in the court's antithesis between what it classifies in terms of the genealogy of *traditio* as "legend," and what meets the test of "scientific history." Justice Vickers, like McEachern C.J. before him, invokes "sincerity" to make this point:

> "Tsilhqot'in people rely upon this legend [of Ts'il?os and ?Eniyud] to assert that they have occupied these spaces since the origins of the land itself. I do not challenge the sincerity of these beliefs. However, neither this legend nor the legend of Lhin Desch'osh can be taken as evidence that Tsilhqot'in people

> used or occupied these locations from the beginning of time." [*Tsilhqot'in,* 174]

In spite of his earlier acknowledgment of the significance of Dechen Ts'edilhtan (Tsilhqot'in law), Vickers J. here consigns to the trivializing realm of "legend" two of the great origin stories of the Tsilhqot'in people, which is to say laws about the reciprocal relations among land, waters, humans and animals, laws which instruct about relationships, respect, the consequences of things being out of balance, spiritual power and the negative energy of fear in relation to danger. Thus the "open window" of Vickers' concept of "legends and stories" enables the view of the ethnographic "real" through the court's "Ethnographic Narrative." The Indigenous "other" is once again introjected into the state's narrative of multiculturalism and reconciliation, a narrative which subordinates Indigenous peoples to the Settler nation's continuing assertion of sovereignty.[1] It is important that the 'title win' in *Tsilhqot'in* not obscure the significance of the court's theory of "oral tradition" and its potential impact in future cases involving Indigenous nations.

Lon Fuller famously defined "legal fiction" as a fiction which enables the law to do what it does [28]. This paper will argue that the court's theory of "oral tradition" is a legal fiction modelled on Vansina's conceptual binary of "oral history" versus "oral tradition," a binary in which is embedded the European genealogy of *traditio*. The basic genealogical structure of "oral tradition" will be outlined in the first section of this paper in preparation for an analysis, in the second section, of Jan Vansina's theory in relation to the genealogy of which it is a part. The analysis will then proceed to Justice Vickers' use of Vansina in his *Tsilhqot'in* judgment, with particular attention to the binary of "oral history" versus "oral tradition" which organizes his analysis of this evidence. The paper concludes with a discussion of the significance of gwenIg (Tsilhqot'in, "story," "a narration of true events") in relation to Dechen Ts'edilhtan (Tsilhqot'in law) which governs and animates the connections among place names, customs, "stories," spiritual traditions, Tsilhqot'in language. As Chief Roger William put it, "That's the only way that we were Tsilhqot'in" [*Tsilhqot'in*, 145].

2 From *Traditio* to "Scientific History"

> "The objectification of the norms to which one is committed frequently, perhaps always, entails a narrative –a story of how the law… came to be, and more importantly, how it came to be one's own."
> Robert Cover, "Nomos" [19, p. 45]

How we tell the story of how Settler law in Canada came to be in relation to its own theory of Indigenous oral history has a lot to do with the history of law's concepts of *traditio* and of *memoria*. Derived from *tradere* (Lat., 'to trade' or 'to

[1] See Gordon Christie's analysis of Crown obligations re consent and consultation in the context of Indigenous title [18]. See also [11] and [12].

hand over'—*Oxford English Dictionary*, hereafter OED), *traditio* is "the last natural mode whereby things may be acquired" according to Colquhoun's 1851 *Summary of the Roman Civil Law* [17] and he traces it back to Justinian's definition: "as occupation was a natural mode of acquisition, tradition was so too—that is, the possessor abandoned it, whereupon it became fictitiously *res nullius*, and was again capable of occupation…" [39, p. 64], rather like the colonial deployment of *terra nullius* in the service of "'discovery." In Justinian's *Institutes* [Bk. II.1.40], "the tradition was the evidence of… abandonment," circumventing adverse possession since in the case of *traditio vestita*, "the owner puts another into possession with the intention of conferring on him a real right" while, in the case of *traditio nuda*, "delivery may be performed by giving the thing into a person's hand, or laying it before him…." [39, p. 65] *Traditio nuda* may also be applied to "the marking of timber by a buyer, with the consent of the seller" [39, p. 65]. Classified as normally a "material" or "corporeal" act, whether "naked" or "clothed," *traditio* also designated "[t]he delivery of an immovable (a piece of land)… executed through introduction of the acquirer on the land and his walking around the boundaries of the property" [4, p. 739]. The logic of *traditio* was obviously convenient in relation to many aspects of colonization and for good reason anticipates concerns with "timber" as well as with Indigenous land resignified as "property."

As a trading provision, a mode of delivery and securing possession, tradition will have a long half-life in European law, signifying "transmission of statements, beliefs, rules, customs, or the like, esp. by word of mouth, or by practice without writing" by 1591 [OED], "an immemorial usage" by 1593, and "a giving up, surrender; betrayal" by 1653. [OED] The association of "word of mouth" with the absence of writing accords with "immemorial usage" insofar as "time immemorial" is associated in English law with the time before September 3rd, 1189. This arbitrary division, introduced by the Statute of Westminster (1275), marks a line in the sand between the new world of "legal memory" associated with "*lex scripta*" [written law] and the old world of "*lex non scripta*" [unwritten law] and "primitive" people. [70] In its association with the "immemorial," "tradition" thus bears the heritage of that determination of which forms of writing the law will acknowledge and which forms will be consigned to law's origins in speech and memory, now reconfigured in terms of what is *not* written and, as Blackstone writes, associated with the "primitive" and "ignorant" people of past days. [7, p. 764]

Medieval developments of *ars memoria* (the Classical art of memory) inform the repositioning of the "immemorial" and lead back to *traditio* through the branch of *memoria* known as *actus memorandi*, a "process [which] should ideally lead to the drawing of 'conclusions from a thing conceived to another thing concealed, and to extracte out of things knowne the knowledge of things unknown.'" [31, p. 107] In this adaptation of property to memory, *actus memorandi* was also referred to as "*traditio* or *interpretatio*, the unwritten authority that would accompany the custody of the various codes or written laws," and Goodrich has described this process in terms of the construction of a parallel between concealment and revelation, on the one hand, and the transfer relations of absence and presence of ownership on the other. [31, p. 107] Thus the process of interpretation synonymous with tradition takes on in language the signification associated with tradition in terms of property.

As property was once delivered into "a person's hand," so meaning is delivered into the mnemonic and cognitive possession of the interpreter. The mnemonic process of tradition identified and represented "'the image of things forepassed in the same manner as if they were now actually and really present'" [31, p. 107], delivering the mnemonic image from the past into the symbolic present of discourse. These operations of interpretive transmission associated with "tradition" seamlessly underscore the oral dimension of memory.

In these stages on the path toward the development of what will become modern evidentiary procedure, the "unwritten authority" of *traditio* and of what sixteenth-century English antiquary John Leland called "*in hominum memoria*… [or] the memory of men living" [73, p. 29] is distinguished from the association which began in Roman law with written documents understood in terms of "perpetual memory" (*'ad perpetuam rei memoriam'*) [43, p. 7, quoting Duranti [24]]). MacNeil writes that "[p]erpetual memory was linked originally to records and subsequently to archives. In both cases, the concept was not intended to communicate the idea of eternity or eternal preservation, but, rather, the idea of continuity, stability, endurance, and trustworthiness" [43, p. 7]. Lacking the archival perpetuity of documents, *traditio* came to be associated in the twelfth century with *testimonia* as the living voice of witnesses who can be examined face to face as opposed to the "*vox mortua instrumentorum*" (dead voice of instruments or documents) [43, p. 14 quoting Levy]. But the living voice of tradition would suffer a further sea change as trust in memory was challenged and the oral/aural dimension of *memoria* came to be seen through archival eyes accustomed to documentary perpetuity. Thus seventeenth-century French jurist François Baudouin stressed that when a witness's statement is read in court, it must be presented "verbatim and intact since any alteration or suppression would amount to dictation of his testimony" [43, p. 21]. Derivative accounts must give way to originals or what he calls "archetypes" lest "history, which has been tossed about in many repetitions and besprinkled with the words of many versions, will often be at last contaminated, and thus degenerate to fable" [43, p. 22, quoting Baudouin]. These cusp points between document and speech, between "dictation" and degenerate "fable," anticipate the struggles over "legends" (or "myth" or even "legend story") in cases involving Indigenous oral history and capture the instability of the concept of "verbatim" in association with "dictée," writing from speaking. The fact that "verbatim" or "word for word" repetition will ironically come to be a test of oral tradition evidence is here visible on the distant horizon. However, the emerging science of Diplomatics will take documentary proof to a new level of methodological rigor, becoming the paradoxical foundation of Jan Vansina's theory of "oral tradition."

During the period known as the *bella diplomatica* (diplomatic wars) between the Bollandists and the Dominicans in the seventeenth century, the Jesuit Bollandist scholar Daniel Van Papenbroeck published a treatise in which he "contested the authenticity of ancient documents in monastic archives, including some forty Frankish (Merovingian and Carolingian) charters preserved in the archives of the French Abbey of Saint-Denis, to the grave consternation of its Benedictine monks" [57, p. 378]. Dom Jean Mabillon was selected to respond to this challenge and published *De re diplomatica libri VI* (1681) six years later, on the basis of his study

of countless early medieval charters and other documents in Benedictine libraries and archives across France. Mabillon set out "to distinguish authentic charters from forgeries or suspect documents" [57, p. 378] by undertaking analysis of external and internal evidence ("handwriting styles, language and punctuation, formulaic expressions, signatures and monograms, materials (parchment, ink, and seals), and chronology. Special attention was paid to variations in record-keeping practices over time and by place and to the historical and cultural context in which the documents were prepared" [57, p. 378]. This analytic approach enabled Mabillon to extrapolate general rules and demonstrate "what might be expected to be found in a document," thereby enabling the isolation of any inconsistencies or deviations from the norm. [71, p. 13] Thus Diplomatics, the field originating in Mabillon's work,

> "…sought to establish a record's legal and historical truth on the basis of its documentary truth. Moving from the observation of perceptible matters of fact (the elements of the document itself) to assertion about imperceptible matters of fact (the past in which the document was created), diplomatic methodology transformed written facts into historical sources and nurtured the belief that knowledge about a past to which there was no direct access could nevertheless be attained by examining documentary traces." [43, p. 31]

Duranti describes the "core of diplomatics" as the principle that "all records can be analysed, understood and evaluated in terms of a system of formal elements that are universal in their application and decontextualized in nature" [71, p. 5, quoting Duranti], and the universalist claims of this field not only shared the European dream of a universal history [15] but also served its purposes well. Putting "historical research on a more systematic basis," Mabillon's articulation of the "technical discipline of diplomatics" both convinced Papenbroeck that he had been mistaken and created new work for the monks of Saint-Germain who, as historian James Turner puts it, "were devoting their labor largely to shoring up the grandeur of France" and the French crown by the early eighteenth century [62, p. 56].

The reach of the science of Diplomatics came to extend across Europe, influencing the development of positivist historical methodology during the long nineteenth century and resulting in the founding of the Ecole Nationale des Chartes in Paris in 1821. Contemporary Ecole des Chartes scholar Olivier Guyotjeannin has described "the research pattern of inquiry" to which this institution has devoted itself as "Where is the original?" [34, p. 420] Where the answer two centuries earlier might well have been the testimony of a living witness, the response in the light of Diplomatics was an extension of the "archetypal" document for which Baudouin had sought: "the document as witness" [34, p. 417]. The scholarly pursuit of the "document" resulted in the increasing specialization of Diplomatics and the splitting off of the field which became known as Archivistique (archival studies) from documentary paleography in the second half of the eighteenth century, leading to the development of an investigative taxonomy beginning with the study of form, tradition, "genesis", the critique of the false, and systems of dating, and to contemporary concerns with metadata in archival work [34, pp. 416–17; 41]. Slowly, the "document" became a "monument" ("le 'document' est 'monument'")

[34, p. 417] and the voice of tradition as living memory began to be silenced [32, pp. 1–2].

The shift from living memory to the apparent stability of the document characterized the emerging discipline of History during this period as well. The medieval "exploitation of oral sources" had included "informal tales and folklore" [73, p. 31] and sixteenth-century English antiquary John Leland had not hesitated to include the "common voice" or "common fame" as well as the "opinion of the learned and literate" [73, p. 30] in his work. In this, he was not unusual in his time or somewhat later among Elizabethan and early Stuart antiquaries according to Woolf. However, signs of "a growing reaction against the use of traditional [oral] sources" emerged in the early 1600 s and Woolf notes a mistrust of such sources among legal philologists like John Selden [73, p. 40]. It was during this time that "the written word came into its own as the basis of law and of legal training" in England. "Lawyers wrote and studied the documentary, the visible, and came to rely on it to a greater degree than the spoken and remembered" [73, p. 40]. During the same period, historians like the Anglo-Saxon scholar William Somner came to use oral tradition as a "last resort" [73, p. 42] while Sir William Dugdale in his *Antiquities of Warwickshire* (1656) "could report oral traditions for amusement, but he took a pedantic, almost malicious delight in correcting or disproving them from the manuscript sources which he knew so well" [73, p. 43]. At roughly the same time in France, this drive to correct and disprove as well as to identify forgeries was, as we have seen, the province of Diplomatics.

As oral sources began to be relegated to "second-class evidence" by the mid-seventeenth century in England [73, p. 43], antiquarian Anthony Wood remarked that any oral traditions he included in his work were identified by his readers as having come "from the mouths of rusticks, [and] may be accounted noe truer then the tales of Robin Hood and Little John." Nevertheless he includes them because "among them [they] may have somthing in the bottome thereof of truth, though much of it lost by the longinquity of time since acted" [73, p. 45, quoting Wood]. Here Woolf notes the "emergence of a social as distinct from a merely intellectual—bias against such sources" amid the class-stratified society of later seventeenth-century England, screening and controlling oral tradition "by confining its impact on historical awareness to the margins and footnotes of learned texts built on written documents" [73, p. 48]. This practice erected "a social barrier between 'proper' history and mere legend" [73, p. 48], a barrier which was powerfully reinforced by the development of universalist "scientific" history during the long nineteenth century. This barrier between "proper" history and "mere legend" is replicated in the distinction made by the court between Euro-Canadian, Settler conventions of historiography, on the one hand, and Indigenous traditions of history and law or what the court unfortunately characterizes as "the Aboriginal perspective," on the other.

In England during the eighteenth century, "the law of evidence in its infancy was concerned almost entirely with rules about the authenticity and the sufficiency of writings" [40, p. 1181]. Langbein notes that the most influential eighteenth-century book on evidence, Gilbert's *The Law of Evidence* (1754), was organized around "the distinction between written and unwritten evidence, but written evidence occupied

virtually all the book" as Gilbert tried to subsume all of the rules under one principle, the "best evidence rule" which is "oriented to documentary authenticity" [40, p. 1173], a field already well developed by Diplomatics in Europe.[2] However, it was not until the end of the eighteenth century and across the nineteenth century that the modern law of evidence supplanted the older law in England, and "the effort to treat the document-preferring best evidence rule as the organizing principle of the law of evidence" was abandoned, resulting in evidentiary focus instead on the oral testimony of witnesses at trial [40, p. 1194]. In Europe, the civil law retained a focus on documentary proof as did Vansina's sources among nineteenth-century German and French historiographers who associated progress with the Rankean "cult of the document" as well as with an intense and encyclopedic emphasis on methodology [29, p. 68]. Drawing heavily on the analytic categories and processes of Diplomatics and dismissive of oral tradition as a source, authors of methodology handbooks like Ernst Bernheim in Germany and F. Langlois and F. Seignobos in France taught the rigors of textual analysis and source criticism in the service of "truth" and "facts."

Bernheim, who was a medievalist, believed that "[t]he first main task of the historical method, beside the collection of the material, is to establish related events as facts" in order, as he says, "to make certain that they really have happened" [61, pp. 316–17]. In his classic compendium, *Lehrbuch der historischen Methode* (1st ed., 1889, followed by six further editions between 1889 and 1908), Bernheim sought to establish history as a science, maintaining this to be possible only through "methodical criticism" to which the *Lehrbuch* is dedicated [61, p. 319]. Bernheim divided historical sources into either "traces" (primarily documents) or "tradition" ("that which has been transmitted and processed by human minds") but his classification of tradition as "opaque" echoed the mistrust of a century earlier since it was not direct evidence of past events and he recommended that tradition be used "only in conjunction with and as a supplement to written sources" [29, p. 18]. Although Bernheim developed a taxonomy of "tradition" (pictorial, oral, written), further subdividing oral tradition into narrative (*Erzählung*), saga, anecdote, proverb, story (archaic, *Histor*), and song (*Lieder*) [5, p. 494], his categories reflect the development of "folklore" studies in Germany during this period more than they do an interest on Bernheim's part in this source.

Enjoining historians to avoid the "temptations" of artistic writing and the "romantic evocation of the past," Bernheim saw history as "establishing the true facts about the past" [49, p. 176]. In the service of this goal, he advocated "self-distanciation" for the historian together with rational self-control and analytic rigor, all in the service of Ranke's principle of "objectivity" with its famous catch-phrase, "wie es eigentlich gewesen" or the reconstruction of history "as it really happened." Like Mabillon, Bernheim understood the process of historical reconstruction as "scientific" in its rigorous work with writing, that is, with documents, inscriptions

[2] Langbein states that [u]nlike the modern rationale for excluding hearsay, which emphasizes as the critical deficiency that the hearsay declarant cannot be cross-examined, Gilbert focuses entirely on the cautionary effect of the Solemnities of an Oath.'…[T]he hearsay rule was not yet in place in a recognizably modern form in Gilbert [40, pp. 1175–6].

and other forms of written evidence.[3] However, Bernheim's scientific rigor stops short of the hermeneutics of suspicion perfected by Langlois and Seignobos who counsel that after a preliminary investigation of authorship and sources,

> "… we attack the document. As we read we mentally we analyse it, destroying all the author's combinations, discarding all his literary devices, in order to arrive at the facts, which we formulate in simple and precise language." [41, pp. 190–191]

What withstands the attack may be "truth" but not much else: "[i]n history we see nothing real except paper with writing on it…. The historian has nothing before him which he can analyse physically, nothing which he can destroy and reconstruct" [41, p. 217]. He [sic] must proceed by selecting and grouping the "facts" according to a schema which they set out, while excluding anything from "that mode of transmitting anonymous statements which is called tradition. No second-hand statement has any value except in so far as it reproduces its sources; every addition is an alteration, and ought to be eliminated" [41, p. 180] and even "documents [must be searched] for statements derived from oral tradition in order that we may suspect them" [41, p. 181]. Unlike Bernheim, Langlois and Seignobos require corroboration [38, p. 144] as will Crown expert Alexander Von Gernet in *Tsilhqot'in*. Legend, "the most striking form of oral tradition," is particularly suspect as "[i]t arises among groups of men with whom the spoken word is the only means of transmission, in barbarous societies, or in classes of little culture, such as peasants or soldiers" [41, p. 182]. Where Bernheim classifed legend as a survival of rumor [61, p. 375], Langlois and Seignobos distrusted it as "the work of imagination" rather than the "reality" of "fact" and although it may contain "some grains of truth," legend remains "a mirage produced by an invisible object according to an unknown law of refraction" [41, p. 183, quoting Niebuhr].[4]

Disembarrassing his theory from these kinds of claims about "barbarous societies" as well as from the hyperbolic resistance to "oral tradition," Jan Vansina reversed the valences of the scientific history approaches of Bernheim and Langlois/Seignobos, redeploying analytic approaches designed for documents to the oral narratives which had been displaced from "proper history" to degenerate through repetition into fable as Baudouin had said. Through his scientific commitment to the principle that methods and rules are themselves neutral and universal, invisibilized in their application to "sources" which themselves take on visibility through the process of textualization and are then constituted as objects having facticity, Vansina operates at the intersection of oral narrative and documents, making one into the other for purposes of historicization in the mode of his own European culture, seeing through the "transparent medium" of "scientific" methodology the "real" of medieval dirges heard through Bushong poems.

[3] Winfield describes Bernheim's *Lehrbuch* as the best treatise on methods of historical research, and Langlois/Seignobos as the best work in English on the subject [72, pp. 3–4]. On distanciation, see [48].

[4] Tangherlini provides a useful summary of theories of legend in the twentieth century [60]. Lanzoni believed that fable, tale, story, myth, legend, saga… are often used indifferently to express one and the same idea of a fictitious or untrustworthy account and classified legend…[as] a sweeping term covering historical falsification of any kind [29, p. 269].

3 Vansina in the Archive

Classified by Vickers J. as an "anthropologist," Jan Vansina (1929-) is a historian by training and methodology. Although he began his career at the University of Wisconsin-Madison in 1961 and is currently Emeritus professor there, Vansina has never served (or been invited to serve) as an expert witness in Canada. However, he has commented that it is "not surprising" that his work has been used in Indigenous title and rights cases "because the rules of evidence described in… [*Oral Tradition as History*] were developed in part to assess the validity of European medieval charters" [personal communication]. The influence of Diplomatics and "scientific history" will be obvious in Vansina's description of his M.A. topic assigned him by historian Jozef Desmet at the University of Leuven as

> "… a discussion of the value of a certain type of medieval dirge as a source for history. Such dirges were created for rulers or other prominent persons and sung shortly after the funeral at their gravesites. Many of these were oral compositions but a few had been written down as *probatio pennae*, that is, as samples of writing in trying out a new pen. Thus I first met the voice of oral history accidentally preserved on paper. It was a Latin voice, often poetic and strikingly appealing. Yet I learned not to linger over the beauty of the songs. My job was to discover what those dirges told us about the deeds and reputations of the deceased and how honest they were. Literary sensitivity merely dealt with the wrappings; hard-headed application of the rules of evidence with the substance."
> [66, p. 7]

Vansina's rejection of the literary aspect of the dirges and focus instead on rules and scientific objectivity evokes the strictures of Langlois and Seignobos. Equally noteworthy is the effortless association of voice and text, one category subsuming the other as it will throughout his career.

In his memoir, *Living With Africa*, Vansina writes of the spirit of adventure with which he fled the prospect of high school teaching after his degree and applied instead for a research position as an anthropologist at the Institute for Research in Central Africa, in the Belgian Congo, reflecting—as Ruth Finnegan has remarked—both the infancy of African studies and the early stage of development of Anthropology as an academic discipline. [26] After a year in Anthropology at University College, London, he studied the Bantu language for several months and was then assigned to study the Kuba people in the Belgian Congo. Vansina provides a vivid description of his first encounter with local historian Mbop Louis and Bushong *shoosh* poetry in Nsheng:

> "Suddenly Mbop interrupted the leisurely pace of his speech and exclaimed rhetorically as he addressed me, the stranger: 'We too we know the past, because we carry our newspapers in our heads.' Full of enthusiasm, he recited as proof, a number of short poems. This one was the first:

Mbe lashey bakong,	If I quarrel with the Kongo,
Mbe lanan ibamboon	If I fight with the Mboon
Kolakal adia ashe mubaan.	I will not eat their salt.

> In a burst of insight, half-forgotten dirges such as Laxis fibris, 'With loosened strings,' or A solis ortu, 'Whence the sun rises,' surged through my mind. *Those Bushong poems were just like these medieval dirges. They were texts, and hence just as amenable to the canons of historical method.* Once one could assess the value of a tradition, it could be used as a source like any other: one could then use such poems to reconstruct aspects at least of a 'real' Kuba history. That would mean a significant advance in anthropology." [66, p. 17, my emphasis]

Vansina's epiphany reflects his training not only in his assimilation of Kuba oral poetry to European concepts of "text" but also to an understanding of "historical method" as universal, "traditions" as sources "like any other," and the positivist principle of reconstruction of the "real" as the purpose of the whole exercise. Years later, he wrote that during this time he had wanted to become "a child of the Bushong" [66, p. 25] only to realize that the Structuralist "fiction of an ethnographic present had hidden the workings of the colonial situation", making it impossible for him to fulfill his dream in terms of lived experience if not in terms of analytic appropriation [66, p. 27].

Africanist David Henige has noted that Vansina began his career at a time when "primitive (i.e. oral) cultures were to be the focus of anthropological study, while historians were to be content—in fact felt obliged—to concern themselves with investigating only the past of the political elites in literate societies" [35, p. 18] or, as historian Dame Margery Perham put it in 1951, oral societies were "'without writing and so without history.'" [66, p. 40] Believing that "one could not deny a history to Africans by burying it as 'ethnology' or 'ethnohistory'" [66, pp. 38–9], Vansina sought a strategy which would undermine the claims of those who saw "oral historiography" as a contradiction in terms and he found it in the argument from Diplomatics and "scientific history" that "if historical critique—also known as 'the rules of evidence'—was valid anywhere, it should be valid everywhere" [66, pp. 38–9]. This universalism has made Vansina vulnerable to the claim that, as oral historians Selma Leydesdorff and Elizabeth Tonkin write, "[h]e is in the first place of, and has remained part of, the western research agenda" [63, p. xv] and they critique the erasure from his work of the "formal colonial presence" in Central Africa, including, of course, his own presence as a Belgian colonial.

In "The Power of Systematic Doubt in Historical Enquiry" [64], an article which Vansina describes as "the single most significant piece I ever wrote" [66, p. 173], he asks "How does one reconstruct the past? How does one explain, or eventually interpret, history?" [64, p. 109] What is to be "done with the sources once they are ready for evaluation…?" [64, p. 109] He concludes with a Cartesian fanfare: "Methodical doubt is the way to knowledge" [64, p. 124]. Between questions and fanfare is a systematic exposition of technique, which makes clear his process of

first collecting "oral traditions"—in this case, one thousand Kuba traditions—which are then construed as "historical sources" to which he applies "historical critique" which, in turn, produces a "narrative descriptive history" [64, p. 110] which is then compared with linguistic and ethnographic data and the results published. When errors are later identified and conclusions found to be inaccurate, this cautionary tale is used to illustrate the safeguards built into the "scientific method" of proof, counterproof, and comparison [64, p. 116] or what he will later call "cross-checking." By highlighting the errors resulting from his own early deficits in knowledge of language and Kuba traditions, Vansina is able to teach the importance of a "sound knowledge of the society involved and of its languages [which] is required even to begin the collection of traditions" [64, p. 120]. However, a decade later, Vansina will amplify this process, writing that "[t]he historian should attempt to complete his oral sources by outside sources that can be checked and verified as independent," including "writings, archeology, linguistic or even ethnographic evidence, etc." [65, p. 160] Here Vansina moves from philological convention to the "scientific" approach of Langlois and Seignobos, a move which Vickers J. will soundly reject in *Tsilhqot'in*.

Oral Tradition as History still bears signs of the pressure Vansina felt in his first book, *Oral Tradition - A Study in Historical Methodology*, two decades earlier to create a foundation of legitimacy for oral tradition. He writes for the reader who, like himself, comes to the subject of orality informed by print-based expectations from which they must slowly be prised free, and the binary of orality and literacy sets up the rhythm of the book. He begins with the Akan proverb, "Ancient things remain in the ear" and reflects on the "marvel" and the "curse" of oral tradition, of messages which "exist, are real" but vanish as they are told, leaving only memory. However, if "[n]o one in oral societies doubts that memories can be faithful repositories which contain the sum total of past human experience" [65, p. xi], many people in literate societies—and particularly historians—will be in need of instruction so they may evaluate the "validity" of oral traditions "as a source of history" [65, p. xii]. Taking for granted the analytic procedures of Diplomatics and the methodology of Bernheim et al., Vansina writes that his task is to introduce "the usual set of rules of historical evidence" which are "a single whole," "the method of history," and which can be applied everywhere since, echoing the confident universalism of the handbook writers, he maintains that "all human thought and memory operates [sic] in the same way everywhere and at all times" [63, p. xiii]. Although he uses African examples familiar to him from early fieldwork, Vansina argues that he is dealing with "general conditions" worldwide, his purpose being first to provide a general description of oral tradition, and then a "discussion of how a tradition becomes a record, a testimony or a text to which the rules of textual criticism should be applied" [65, p. xiv], guiding the reader from a study of what oral tradition "is" to its "value for historical reconstruction" [65, p. xiv]. In the course of this salvage operation, Vansina fails to problematize or even take critical notice of his colonial assertion of European methodology and categories in relation to the profoundly different cultures, languages and traditions of the African poems and songs he textualizes. Doubtless this absence of critical self-reflection has contributed to the ease with which Vansina's work has been adapted for use in the

context of Indigenous oral history as it is frequently configured in Canadian courtrooms.[5]

Given the significance which the category of "oral history" has for Vickers J., it is interesting to observe that Vansina himself gives it short shrift, including it as one item in the category "the generation of messages" and associating it with "reminiscences, hearsay, or eyewitness accounts about events and situations which… occurred during the lifetime of the informant" [65, p. 12]. Writing dismissively about oral historians, he warns of problems with "research design" due to the way in which he believes interview subjects to be selected, the bypassing of "in-depth analysis" and the production of "'immediate history'" which "save [s] sources from oblivion" [65, p. 13] without protecting them from superficiality. In a teleological argument, Vansina argues that "historical method" is constitutive of "history" [65, p. 199] and, following Bernheim and Langlois/Seignobos, that "historical accounts" are "narratives deemed to be true" [65, p. 167]. He stresses that the historian's interpretations "should at least be more believable than the already existing oral hypothesis" where a "local" hypothesis or oral tradition exists [65, p. 196]. Again, objectivity associated with documentary history trumps the uncertainties of memory and oral tradition magnified by the claim that "[t]raditions are memories of memories" [65, p. 160].

The familiar tangible/intangible binary associated with documentary or perpetual memory as opposed to oral memory returns in Vansina as well and he writes that "there is a corpus of information in memory wholly different from a corpus of written documents" [65, p. 148]. The "inchoate" quality of memory reflects the "intangible" status of orality as opposed to the "tangible" status of documents [65, p. 195]. Like the Diplomatists and archivists pursuing their method, Vansina goes so far as to claim that "[t]angible sources survive unaltered through time and are defined by their properties as objects…" [65, p. 195]. Thus documents solve the problem of memory's unreliability because "once a written source exists it becomes permanent, it is removed from time. It is no longer affected by selection or interpretation as long as it survives…. Its past is the time it testifies about" [65, p. 191]. In contrast, memory follows "channels which are completely different from flows of information between written documents" and proof is strengthened when "a written document and a/n [oral] tradition converge, both are part of the proof" [65, p. 160], as Bernheim maintained. However, a lack of "reliable chronology in all but recent oral traditions remains one of its most severe limitations" [65, p. 185] together with "a lower order of reliability [of oral sources], when there are no independent sources to cross-check" [65, p. 199] as Langlois and Seignobos argued.

Written documents are the benchmark for Vansina as for the school of Diplomatics and it is writing which determines the meaning and interpretation accorded oral tradition. Writing is understood in terms of European literary genres, conventions of textuality and strategies of interpretation as well as in terms of philosophical values of permanence, timelessness (immortality), subjectivity

[5] Ajay Skaria contextualizes Vansina's work of extract[ing] historical grain from mythical chaff in relation to the use of Western historiography as part of the reclaiming of a history [which] was almost everywhere a crucial component of the struggle of colonized peoples for liberation [56, pp. 1–2]. This is, of course, not how Vansina understood his own work nor how it has been used in a case like *Tsilhqot'in.*

seamlessly aligned with intention and purpose, clarity in the single and unified expression of "meaning," and "false interpretation" characterized by internal inconsistency [65, p. 143], contradiction [65, p. 143], and confusion of implicit and explicit meanings. In fact, to the extent that Vansina permits "oral tradition" to occupy the stage of "history," it is to inscribe the oral narratives of Africa within a European framework of meaning-making and interpretation which renders them at best limited, not necessarily "automatically unreliable" [65, p. 197], but useful for giving us "a flavor, a picture of a different kind of past that no written source uncovers, even if it remains itself a limited and biased view" [65, p. 198]. As Ridington observes [52, pp. 39–40], Vansina privileges academics like himself who document oral narratives and are construed as the true oral historians rather than the African knowledge keepers whose narratives are collected. The "biased view" of those community experts will, of course, not qualify as history for Vansina.

As we have seen, from the perspective of writing, "oral tradition" is an "exiled narrative" [19, p. 19], *traditio*, the lost promised land of living memory, unwritten authority, the living voice of the witness, a giving up or transmission, finally a betrayal. From the perspective of *lex scripta*, "oral tradition" is the world of "primitive and ignorant people of past days" [7, p. 764] whose "mere legends" must be distanced from "proper history" and from the archive of "perpetual memory" where speech is "frozen," beyond time. Walter Benjamin associated this narrative with "Angelus Novus," the angel of history whose "face is turned toward the past" while a storm gets caught in his wings and he is propelled into the future "to which his back is turned" [3, pp. 259–60]. Benjamin, ironically, calls the storm "progress"; we might call it Settler history. It is clear at least that the genealogy of "oral tradition" which, for Justice David Vickers, culminates in the work of Jan Vansina, has little if anything to do with nènqàyní, the people of the surface of the earth [58, pp. 9–10], or with their Tsilhqot'in ancestral laws (Dechen Ts'edilhtan).

4 *Tsilhqot'in*: From "Oral Tradition" to Dechen Ts'edilhtan

> "…[L]egends and stories are the law of the land. You… call it Dechen Ts'edilhtan in Tsilhqot'in…."
> –Chief Roger William [Tsilhqot'in court transcript, 10 Sept. 2003, 00042.25–27]

> "The way I told the story, that's the way I know."
> –Elder Minnie Charleyboy [Tsilhqot'in court transcript, 31 March 2004, 00026.32–3]

The *Tsilhqot'in* title case is the culmination of events beginning with the genocidal introduction of smallpox by Settlers to Tsilhqot'in territory in 1862. In the time of the Great Dying, whole villages disappeared in days and the death toll is estimated at seventy to ninety per cent of the Indigenous population. This was the prelude to the Tsilhqot'in (Chilcotin) War (1864) and the unjust hanging of five Tsilhqot'in warriors who were defending their nation against colonial incursions

including resource extraction (gold, fur, timber), in turn resulting in destruction of habitat to which cattle ranching also substantially contributed. Further destruction came in the form of the Spanish influenza (1918–19), and tuberculosis which spread from the Residential schools when students returned home in the summer. They also brought home the lasting effects of the cultural, spiritual, psychological and physical abuse to which, in varying degrees, they had all been subjected in school.[6]

Of the six Tsilhqot'in bands which comprise the modern Tsilhqot'in National Government, the Xeni Gwet'in First Nation was geographically farthest from the clearcut logging which had transformed almost all of the other communities by the early 1990 s. The remote location of Xeni Gwet'in had contributed to keeping the Tsilhqot'in language and traditional way of life strong and, like the other five Tsilhqot'in Bands, they had never surrendered their rights and title to their land nor entered treaty negotiations. As clearcut logging came closer to their territory, the Xeni Gwet'in commenced the Nemiah Trapline Action in the Supreme Court of British Columbia on April 18, 1990. However, by May 1992 logging had advanced as far as Henry's Crossing, threatening to proceed across Tsilhqox Biny (Chilko River) into Tachelach'ed (the Brittany Triangle). Preparing to install heavy girders to support a bridge adequate to the weight of logging equipment, Carrier Lumber took out the wooden bridge which crossed over into Tachelach'ed and Xeni Gwet'in mobilized, setting up a blockade overnight and camping for three months at Henry's Crossing to prevent the new bridge span from being constructed and to protect their land. These are among the events which precipitated what became the Tsilhqot'in title case, resulting twenty-two years later (June 26, 2014) in declaration of Aboriginal title to almost half of the claim area by the Supreme Court of Canada.

The trial took 339 days over five years, produced a judgment of 450 pages, and tested the will and capacity of the community, the Elders who gave testimony, the legal team, and Justice David Vickers who found that the Tsilhqot'in people have Aboriginal rights including the right to trade in fur, that B.C.'s Forestry Act does not apply within Aboriginal title lands, that B.C. had infringed without justification the title and rights of Tsilhqot'in people since 1871, and that Tsilhqot'in people have the right to capture and use wild horses in their territory. On a technicality, Vickers J. stopped short of declaring title though he mapped the boundaries of the claim area and the portion to which title would be declared in 2014. Oral history and oral tradition evidence—along with evidence from fields including Archeology, History, Linguistics, Ethnobotany, Geography, Ethnography, etc.—was crucial to the case and twenty-nine Tsilhqot'in witnesses, most of them Elders, testified, some telling the court "oral tradition" narratives including several stories which could only be told after dark as required by Tsilhqot'in protocol. Vickers J. held special evening sittings of the court and also moved the court for three weeks to a classroom in the school at Xeni to enable community members to testify.

[6] This account is based on the author's interviews with Chief Roger William (Aug.–Oct., 2013) in connection with the oral history of the *Tsilhqot'in* title case currently in preparation by Weir and William. Smallpox history and statistics are from Swanky [59]. See also Lutz [42].

While *Tsilhqot'in* is a victory for "oral history" buttressed by extensive genealogical research,[7] it is much less so for "oral tradition." In terms of *traditio*, many reasons for this will already be apparent and Vickers J. flagged some of them himself:

> "There is always a Eurocentric tendency to look for and rely on the writer's word. Try as one might, it is difficult to read these words [of missionary reports, railroad surveyors' journals, etc.] and not see in them events as they really were. To follow this path in a trial of this nature would relegate oral history and oral tradition evidence to some lesser level of importance, contrary to the directions of the Supreme Court of Canada. Important as the historical documents are, I have attempted at all times to give equal weight to the oral history and the oral tradition evidence." [*Tsilhqot'in*, 203]

In this statement, as we have seen, Vickers J. followed the Supreme Court of Canada's ruling in *Delgamuukw* that the laws of evidence be adapted "so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts" and are placed "on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents" [*Delgamuukw* 1997, 84, 87]. However, the struggle to accomplish this adaptation begins with and is defined by documents and remains bound up with Ranke's axiom, "wie es eigentlich gewesen"—"events as they really were"—in spite of Vickers J.'s awareness that he had to create a balance which he referred to as "reconciliation." In this attempt, he proceeded from the documentary archive which was most familiar to him to the oral archive which was less familiar, thereby running the risk, as Borrows writes of *Delgamuukw*, of subordinating "Aboriginal tradition within the common law and constitutional regime" [10, p. 87]. Vickers J. struggled to address this tension in part by defining "oral history" in relation to "history" which is itself associated with those forms of "historical documents" already noted and thus of the "history of this province and… the role of Aboriginal people in that history."[8] [*Tsilhqot'in*, 1] In a revealing comment, he wrote that "historical knowledge of the area is sparse. The silence is the direct result of the fact that visits by non-Aboriginals were few and brief" [*Tsilhqot'in,* 232].

If the absence of writing (and Settler visitors) produced silence, the presence of history produced the familiar problem of "scientific history." As Vickers J. stated, quoting Lamer C.J. from *Delgamuukw*: "[t]he difficulty with these features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial –the determination of the historical truth" [*Tsilhqot'in*, 136; *Delgamuukw*, 86]. The features alluded to are "history, legend, politics and moral obligations," in a much-cited passage from *Kruger v. The Queen* (1978), though Vickers J. deviated

[7] John Dewhirst prepared detailed genealogical charts and reports on the basis of research with the Elders, a crucial part of the Plaintiff's evidentiary record in this case.

[8] Further examples of Vickers J.'s use of history include: the long history of the trial [*Tsilhqot'in*, 25, 97] and of Aboriginal people's history on this continent (5); written history [*Tsilhqot'in*, 185, 577]; the historical record from Alexander MacKenzie and Simon Fraser to the present [, 202, 621]; and the forms of historical documentary evidence. [*Tsilhqot'in*, 209, 639] Cf. [27] and [51] on history in *Delgamuukw*.

significantly by associating "legend" with "oral tradition." Writing that "Courts generally receive and evaluate evidence in a positivist or scientific manner," seeking "factual evidence" in order to determine "an objective truth," he concluded that "the 'truth' which lies at the heart of the oral history and oral tradition evidence can be much more elusive" [*Tsilhqot'in*, 137].

It was made even more elusive by the attempts of the federal and provincial Crowns to keep it from being heard at trial and on Feb. 6th, 2004, Vickers J. responded with an interlocutory ruling on oral history evidence, outlining a threshold test for the "preliminary examination of lay witnesses who intended to offer oral history evidence… to assist the court in assessing the necessity and reliability of oral history evidence" and its admissibility. [*William* et al. *v. British Columbia* et al. 2004 BCSC 1424, 99] The preliminary examination of the twenty-nine Tsilhqot'in witnesses, most of them Elders, called to testify required:

> "a) Personal information concerning the attributes of the witness relating to his or her ability to recount hearsay evidence of oral history, practices, events, customs or traditions;
>
> b) In a general way, evidence of the sources of the witness, his or her relationship to those sources and the general reputation of the source.
>
> c) Any other information that might bear on the issue of reliability."
>
> [*William v. British Columbia*, 2004 BCSC 1424, 148]

Thus Elders, who are themselves community historians and knowledge keepers, are understood in the court's terms as "sources" insofar as they are able to establish credibility in relation to their birthplace, linguistic proficiency, "traditional life experience," "lack of formal education," and so on.[9] In effect, the court created an exception to the hearsay provision through the introduction of reputation evidence in order to enable it to "reconstruct the past" by hearing "stories" from those who are deemed themselves to be sufficiently "traditional" [*Tsilhqot'in,* 435].[10] As a result, the court was able to accommodate the kinds of evidence with which it was already familiar to "oral history" while, in an unusual demonstration of fairness, requiring that the same level of scrutiny be given to historical documents as to oral history and oral tradition evidence, a an indication of Vickers J.'s rejection of the positivist axiom that "documents speak for themselves." However, this gesture also reduplicated the historiographic and evidentiary procedures imposed on oral history and oral tradition evidence, ironically (given Vickers' stated intention) increasing

[9] See Robbins [54] for lists of questions asked Tsilhqot'in witnesses by counsel for the two Crowns. I am grateful to Heather Mahony of Woodward and Company for discussion of the research process with the Elders and preparation of the Elders for trial.

[10] It is interesting to note that the common law ancient documents rule has not yet been adapted for crosscultural use with Elders giving testimony. Ancient documents must be not less than thirty years old and are supported by a presumption of trustworthiness on the basis of long existence of the document and being found in a proper place of custody… where it might reasonably be expected to be found. [43, p. 62] McEachern C.J. relied on ancient documents in relation to scientific history, admitting them into evidence as subject to weight, prima facie proof of the truth of the fact stated in them [*Delgamuukw,* BCSC, 171].

the impact of "scientific history" in the courtroom while diminishing the weight accorded to "oral tradition."

Justice Vickers approached "oral tradition" cautiously in his judgment, writing that "Appellate Courts, including the Supreme Court of Canada, have used the terms oral history and oral tradition interchangeably" and that in Aboriginal title and rights cases, both oral history and oral tradition evidence "appear" to be tendered. However, only oral tradition evidence may relate "to an event or situation which occurred prior to sovereignty assertion or first contact" [*Tsilhqot'in,* 143]. Turning to the first volume of the *Report of the Royal Commission on Aboriginal Peoples* [53, hereafter RCAP] for clarification, Justice Vickers noted the section on "The Aboriginal tradition in the recording of history" which summarizes the familiar dualist antithesis of "objective" Settler written history versus "subjective" Aboriginal oral history, with "facts" and "factual events" associated with documentary history and "truth" while it is claimed that the "Aboriginal historical tradition is an oral one, involving legends, stories and accounts handed down through the generations." Following the Cartesian schema to its colonial conclusion, "Aboriginal historical tradition" is said to be less focused on "establishing objective truth" and these "accounts [are said to]… include a good deal of subjective experience" [*Tsilhqot'in 135; Delgamuukw*, 85]. Where "facts" are associated with "oral accounts," they are cast in the negative as "not simply a detached recounting… but, rather,…'facts enmeshed in the stories of a lifetime.'" [*Tsilhqot'in,* 135] "Enmeshed" facts make for "many histories" as opposed to "truth" with its documentary clarity and rigor leading to an authoritative, singular 'history' enabling "the determination of the historical truth" in association with "oral history" [*Tsilhqot'in,* 139]. In contrast, citing *Van der Peet*, "time when there were no written records" is associated with "oral tradition" [*Tsilhqot'in,* 37]. Like Vansina bringing the Europe of Diplomatics to the "textualization" of African narratives conceived as otherwise "without" a history, Justice Vickers struggles to address the "absence" of writing, an absence which for him characterizes "oral traditions" cut loose from the chain of witness observation which might otherwise authenticate them in the manner of "oral history." In this shell game of Cartesian philosophical coordinates, Vickers J.'s commitment to the decolonization of the courts [*Tsilhqot'in*, 20] seems ironic, particularly given that in courtrooms, speech daily disappears into writing without its "orality" being noticed or problematized.

John Borrows has written that Alexander Von Gernet was "hired to produce a report for the RCAP [Royal Commission on Aboriginal Peoples]," and the definition of oral history and oral tradition in the "Aboriginal tradition in the recording of history" section of that report "reflects attempts to dichotomize oral traditions and histories" found elsewhere in Von Gernet's work [69, p. 71, f. 201], including *Tsilhqot'in*.[11] This section of RCAP also appears to be imbricated in an initiative undertaken by Indian and Northern Affairs Canada (INAC, now DIAND), a report on *Oral Narratives and Aboriginal Pasts* [67] commissioned from Von Gernet. The INAC report presents an argument which depends on Vansina (on memory, oral tradition as "text-making", textualization to permit comparison and render content

[11] See Miller's analysis of Von Gernet [44, pp. 110–43]. See also [[2], [9], [13], [36], [45], [52]] and [69].

static, the "feedback" effect, and the need for "testing") but also an array of claims which argue "oral tradition" to be synonymous with "modern oral accounts" and associated with hearsay as they allegedly "do not remain consistent over time" [67, p. 12], lack "trustworthiness" [67, p. 14], are not "literally true" [67, p. 14], and so on. Von Gernet also argues that "there can be no distinctions between Aboriginal and non-Aboriginal histories since both, by definition, have become part of a single historical trajectory" [67, p. 4] and, finally, that "people in literate traditions are also participants in an oral world" [67, p. 5], a claim which goes on to anticipate Von Gernet's assertion that "isolating oral traditions as an exotic species of evidence" is unfortunate. [68, p. 116] Despite the non sequiturs between these two reports, it is not difficult to see variations on Crown arguments in these claims as decontextualized elements from Vansina are tossed into hyperbolic attempts at reconfiguring the history of colonization, the separate cultures and histories of Indigenous nations, and even the impact of different cultures on experience. No less implicated in the genealogy of *traditio* for crafting sometimes novel variants of it, Von Gernet's arguments reflect the urgent need to challenge oral tradition evidence on the part of federal and provincial governments which fund such efforts, rendering palpable the threat posed by oral tradition evidence to the Crowns' vision of the Settler nation.

When Justice Vickers turned to Von Gernet's opinion, he had other concerns. In a strongly worded statement which is one of *Tsilhqot'in*'s major contributions to the analysis of Indigenous history in Canadian courtrooms, Vickers J. writes:

> "Despite what Canada has argued, I was left with the impression that Dr. von Gernet would be inclined to give no weight to oral tradition evidence in the absence of some corroboration. His preferred approach, following Vansina, involves the testing of oral tradition evidence produced in court by reference to external sources such as archeology and documentary history. In the absence of such testing, he would not be prepared to offer an opinion on the weight to be given any particular oral tradition evidence. If such testing did not reveal some corroborative evidence, it is highly unlikely that he would give any weight to the particular oral tradition evidence. This approach is not legally sound…. If the court were to follow the path suggested by Dr. Von Gernet, it would fall into legal error on the strength of the current jurisprudence." [*Tsilhqot'in,* 154]

However, in spite of Justice Vickers' commitment to "truly hearing…oral tradition evidence" [*Tsilhqot'in*, 132] and his acuity in relation to "testing," his judgment engages a process of resignification whereby Tsilhqot'in knowledge is separated out from Tsilhqot'in interpretive systems and consigned to the familiar Settler realm of "legends" and "myths" to be judged in terms of "sincerity" of "beliefs" [*Tsilhqot'in,* 174], and "underlying theme or lesson that provides consistency to the legend" [*Tsilhqot'in,* 178]. Culturally and historically specific, these hermeneutic criteria are incorporated into a recursive logic which binds tradition/*traditio* first to property and abandonment, as Justinian had said, and then to the silencing of living memory and the rise of the "cult of the document." Hermeneutic criteria and practices, including "oral tradition," reproduce their own culturally encoded forms of "meaning" rather than interpretation of Tsilhqot'in narratives rooted in Tsilhqot'in knowledge

systems, culture, language and history. Attempting to mask the imposition of European genre categories, hermeneutic practices are deployed in service of the relegation of oral "sources" to "second-class evidence" [73, pp. 48 & 43], creating a legal fiction which performs the dualist work of "orality" in association with the genealogy of *traditio*. Thus the court distanciates itself from the ontological challenge of unfamiliar Tsilhqot'in forms of historical narrative and philosophical knowledge while seeking to locate them within an us/them literate/oral binary of its own making, completely foreign to the stories it presumes to judge.

Justice Vickers begins his analysis of "oral history and oral tradition evidence" by dividing it into three categories:

> 1) "recollections of aboriginal life" or a "witness's account of what he or she learned from deceased individuals within the community concerning genealogy or traditional activities and practices, including land use";
>
> 2) "a witness's version of legends and stories about events from the more distant past –oral traditions said to be shared by the larger community";
>
> 3) "specific historic events" like the Tsilhqot'in War. [*Tsilhqot'in*, 163–65]

The third category pertains to "[s]tories [which] are recordings of actual events in an historical period of time" and which are told "to remind people of significant events" though not necessarily to carry a "message" [*Tsilhqot'in*, 435]. Chiasmus structures the relations here between the "actual" and the "historical," on one hand, and the "historical" and a specific form of "time," on the other such that only this specific form of time which is "historical" can actualize events. In turn, these events when recorded become "stories" which remind people of the events which they record. For example, "the story of Child Got Lost" [*Tsilhqot'in*, 799] where the combination of place name and significant event conveyed by a person now deceased (category 1) achieves fenestral transparency as opposed to the great Tsilhqot'in origin story which Vickers J. dubs the "legend" of Lhin Desch'osh (category 2) which blocks transparency and is conceived as walling the court off, as it were, from the "real" world of the court's theory of history because of its relation to the "more distant past" preserved only in community memory. In "Child Got Lost," while time governs the entry into history and the "actual," genealogy is associated with the deceased in their connection to the living but not to "legends." In contrast, Lhin Desch'osh is characterized by a past "too distant" for genealogical connection or for immediacy of event recording. Thus genealogy enters the deceased into historical time, locating origin and sequencing it in a manner crystallized by Diplomatics, while "legends," in contrast, are characterized by a temporality in excess of the operations of genealogy and an origin which so far antedates history as to be timeless and therefore, according to the court's schema, both inaccessible and unreliable. When Vickers J. prefaces his analysis of Lhin Desch'osh by asking whether "myths and legends [can] assist in any measure to provide historical evidence for the periods that are relevant in this case" [*Tsilhqot'in*, 169], his response is predictable: "the legend of Lhin Desch'osh… [cannot] be taken as evidence that Tsilhqot'in people used or occupied those locations [mentioned in the narrative] from the beginning of time" [*Tsilhqot'in*, 174]. However, Vickers J.'s

problem here is as much time as use and occupation, a form of time which exceeds clock time and becomes "mythic," thus threatening to deactualize the stasis of Settler modes of occupation and return, as "proper" history had two centuries earlier, to "mere legend" if not to Robin Hood and Little John.

Reminiscent of Langlois and Seignobos, Vickers J. roots out "imagination" (associated with "fiction") in order to access "facts" some of which are revealed in the section of the judgment on "Legends and Landmarks," where he acknowledges that Lhin Desch'osh "was the source of sunt'iny (mountain potatoes)" and that the "legend" outlines several of the boundaries of Xeni Gwet'in territory. [*Tsilhqot'in*, 653–58] After a brief discussion of other Tsilhqot'in "legends," he concludes "that the references to lakes, rivers and other landmarks formed a part of these legends for Tsilhqot'in people at the time of sovereignty assertion," thereby solving the problem of "time depth" by attaching the "legend" to 1846 (the Oregon Treaty). [*Tsilhqot'in,* 665] Justice Vickers is also careful to specify that for Tsilhqot'in people, "legends" have explanatory power though "the teller of these oral traditions does not, as a matter of routine, offer an explanation of the meaning" of the "legends" [*Tsilhqot'in*, 671], but the quest for "explanation" is part of the hermeneutic schema which includes a concept of "underlying meaning" more appropriate to Aesop's Fables than Lhin Desch'osh. However, as the trial transcript makes evident, Vickers J. had many opportunities to familiarize himself with aspects of the Tsilhqot'in legal, interpretive and cultural framework which contextualizes the narratives shared with him. It is curious to observe the contrast between his willingness to dismiss the doctrine of "discovery" [*Tsilhqot'in* 593, 596] and his resolute adherence to hermeneutics which is as fundamental to Settler jurisprudence as discovery to colonization.

Austin Sarat writes, "[i]t has long been recognized that trials tell stories and that the essential narrative elements of the trial are recorded and encoded in the transcript," but "transcripts also invite readings of silences and exclusions."[12] [55, p. 355] One of those silences arises from the absence of the Tsilhqot'in language spoken by many of the Elders in testimony and, following standard practice, rapidly translated into English by court interpreters and recorded only in English by the court reporter. Although every trial transcript may be said to "obliterate much if not every trace of what has gone into the making" [21, p. 83, quoting Dorothy E. Smith], that obliteration has a particular force in relation to the erasure of a previously unwritten record of Tsilhqot'on history as spoken by Tsilhqot'in knowledge keepers. Instead the transcript records only the rough English translations made by court interpreters whose words in English were rapidly set down by the court reporter, improvising in shorthand in the moment and transcribing later, repeating the movement from one language to another, from speech to the effort to make inscription represent sound. In *Tsilhqot'in*, the Plaintiff's legal team already had considerable experience with a version of this process before the trial as much of the "field research" required the presence of an interpreter to translate conversations back and forth, from counsel's question to the Elder's response often in Tsilhqot'in and then back to counsel in English. [14, p. 5]

[12] Thanks to my colleague Margery Fee for drawing this text to my attention.

Because many of the Elders were not comfortable being audiotaped, only one member of the legal team regularly used a small cassette tape recorder while most of the team relied on notes during interviews. For the community now, the absence of a written or taped record of Elders' testimony in Tsilhqot'in is an enormous loss, particularly as many of those who testified were/are monolingual in Tsilhqot'in, speaking the "old language" now less often heard.[13] However, as important as recording and equally fraught with problems is the issue of on-the-fly translation in a case like *Tsilhqot'in* where a translator's word choices in English are influenced by the terms used by counsel, particularly when equivalents do not exist in the language spoken by the witness. Confusions about "legend," "story" and "myth" exemplify this tension in *Tsilhqot'in* as the transcript reveals. So does the important issue of phrase by phrase, quick translations of the great founding narratives of a culture as they are told by Elders renowned for their eloquence and knowledge of repertoire. What would be the impact on Homer's *Odyssey* of rendering it, word by word, in quick translation in the moment from Classical Greek to English in the high-pressure environment of a courtroom? What reasonable person would compare the results, the best effort of a skilled translator struggling under such circumstances with the beauty and complexity of Homer's language, to the published work of a translator who had the necessary time and resources to practice his/her art? Why would the demands of Lhin Desch'osh be any different?

Court interpreters in this case came from several Tsilhqot'in communities, each with its own dialect, and the close-knit family structure of the Tsilhqot'in nation meant that interpreters were sometimes required to translate the words of a relative.[14] There was also sometimes a problematic fit between the interpreter's dialect and that of the Elder testifying, contributing further to the sense which some Elders had of not being understood in the courtroom. The Plaintiff's legal team was challenged to find enough interpreters and additionally constrained by the fact that an interpreter who had assisted during pre-trial preparation was not permitted to interpret for that witness at trial. In a report in 1999, the Aboriginal Justice Inquiry of Manitoba pointed out that Indigenous "defendants who do not speak English… will be at a disadvantage during courtroom proceedings" [1, p. 22] and this is equally true of Plaintiff's witnesses given the challenges of legal language as well as of complex English usage and familiarity with Tsilhqot'in English.[15] The small number of interpreters, with or without formal training, is another major issue in many Indigenous communities as is the question of comfort with writing where people may grow up primarily with conversational knowledge within the family. As a result, finding wordspellers may be a challenge as may the use of a consistent

[13] Lance S.G. Finch C.J. writes that even evidence adduced orally is, by nature of the court process, rendered into text; appellate courts, for example, will generally only encounter such testimony in written form; likewise the general public. Revision in the form of text has the effect of literally silencing laws and legal principles that are conceived as oral in form and intended to be received and passed on by word of mouth [25], 2.1.6]. See also [10, pp. 86–92].

[14] Australian linguist David Nash provides a similar account of the challenges of the court's use of English in the context of interpreters and claimants in land rights hearings in the North Territory, Australia [47].

[15] My thanks to Linda R. Smith for bringing this Report to my attention.

orthography where orthographic conventions are relatively recent and still in development. In addition, there is the challenge of working between profoundly different languages. With the exception of loan-words, Tsilhqot'in (a Dene language) and English have little in common. As one skilled wordspeller told me, "English is backwards!" The courtroom must have felt that way to many of the Elders as well and some clearly felt badgered and disrespected, especially during cross-examination as, according to Tsilhqot'in protocol, Elders should not be asked why questions. [58, p. 150] Even a witness like Plaintiff Chief Roger William who testified in English described it as a "very foreign language to me," having grown up speaking only Tsilhqot'in until he went to Residential school. [Transcript, 10 Sept. 2003, 00053, 40–41]

While Justice Vickers included hundreds of words in Tsilhqot'in in his judgment (including Tsilhqot'in names of persons and place names as well as the names of plants, animals, fish, seasons, types of dwellings, implements and so on), it is unfortunate that the Tsilhqot'in term gwenIg was omitted from the judgment's Appendix B (Glossary of Terms). Perhaps this error contributed to the omission of gwenIg from Justice Vickers' reasoning as well as to the cultural misrepresentation which results from reliance on Vansina's conept of "oral tradition" and its genealogy in this case. Chief Ervin Charleyboy testified that "gwenig" (as the transcript spells it) means "stories" or "legends" or "knowledge" [Transcript, 18 April 2005, 00018.18–23], a response which reflects the challenge of translating the word given the instability of "legend" in relation to "story" in English. Tsilhqot'in linguist Linda R. Smith translates gwenIg[16] as "story, a narration of true events" and stresses that Elders and their ancestors "were too busy surviving to think about making up stories" in the sense of fictive narratives. She stresses that for Tsilhqot'in people, "communication is concise—one only says enough so that the other understands what is being said" and that "silence is one of the highest values because of danger from predators and enemies. There was no thought of telling fictional stories to entertain or to teach as there were enough true examples to draw from," and the extraordinary strength and resilience of memory of those who grew up in an oral culture (as did all of the Elders who testified in this case) sustained these narratives over the generations. [Linda R. Smith, personal communication] The community's commitment to gwenIg as true stories is also reflected in the advice which is still repeated today and was given by Elders to those who were apprehensive about testifying in court: "You don't have to *remember* anything. Just tell the truth." This advice speaks to the unshakeable depth of commitment to truth in Tsilhqot'in law and practice, a truth that endures beyond remembering as repetition so deeply is it rooted in the spirit.

GwenIg may also be classified in terms of time. For example, sadanx gwenIg is "true ancient stories and events," where sadanx is

> "a time when creatures and people were able to orally communicate with one another. Creatures were able to transform themselves into people and in some

[16] The orthography of GwenIg includes \-I-\ representing the barred/i/in the APA/American Phonetic Alphabet. It is pronounced 'gwe/nik' with stress on the second syllable. Vickers J.'s practice of not italicizing Tsilhqot'in words has been followed in this paper.

> cases, people transformed into some creature and there were intermarriages between people and creatures. This seems to be a time when laws were created by creatures and humans helped in modifying those laws."
>
> [Linda R. Smith, personal communication]

Yedanx gwenIg refers to "true stories within living memory of known people or stories after the time of sadanx. These stories no longer tell of intermarriages and oral communication between humans and creatures" [Linda R. Smith, personal communication]. "Child Got Lost" belongs in this category while Lhin Desch'osh is a sadanx gwenIg which Chief Roger William associates with Dechen Ts'edilhtan, stating that the human and animal figures in this story continue to be important in terms of "how the law of the land was and is today." He draws a parallel between the Canadian Constitution and Lhin Desch'osh which is, he says, "for lack of [a] better word, a constitution for us" [Transcript, 10 Sept. 2003, 00053, 1–10]. Chief William elaborates:

> "I believe a Tsilhqot'in person has a right under what we call –what I call the Dechen Ts'edilhtan, the legends and stories, based on that, that we have a right to use the land, that we have been doing it in the past and for the future. And the reason why I say based on our legends and stories and our traditions and rituals, that's the only way we survive and we were strong and we were healthy."
>
> [Transcript, 10 Sept. 2003, 00081-82, 41-02]

Echoing Counsel's words, Chief William uses "legends and stories" but when the author asked Chief Roger William about "legend" in an interview, he said, "We got *actually happened*, like we're talkin' about gwenIg is story. I don't even know, story —like history, maybe" [14 Aug. 2013; my emphasis]. His response indicates his awareness of the associations of "legend" in English with what did *not* actually happen. In contrast, Chief William testified that history is the "story of a story" [Transcript, 24 Sept. 2003, 0029.42].

Dechen Ts'edilhtan was translated by former Chief Thomas Billyboy as "we have laid the stick; don't cross it" [Transcript, 2 June 2005, 00002, 40–41]. Tsilhqot'in law is thus epitomized in terms of the fundamental legal principle of laying down a boundary or a rule together with the threat of consequences for violation. GwenIg articulate laws and rights in a memorable form, including the creation of the land by spirit beings and animals, the relations among humans and animals and plants including seasonal cycles; stages of growth and development; birth and death; the relations and responsibilities of parents and children; the responsibilities of leaders and warriors; the power of twins; the role and responsibilities of women; puberty rituals and the coming of manhood and womanhood; proper respect for and conduct around the animals; principles of morality and the consequences of breaking the laws of the family and the community. Justice Vickers reviews testimony about these laws without construing them in relation to Dechen Ts'edilhtan or understanding the role of gwenIg relevant to each law. At times he succumbs to his own culture's sense of stories as messages

wrapped in fantasy. However, while those unfamiliar with Tsilhqot'in culture and language might, like Vickers J., understand meaning as "underlying" in gwenIg, Tsilhqot'in knowledge keepers regard these narratives as fundamental to traditional pedagogy before Residential school and providing everything a Tsilhqot'in person needs to live a good life.

The struggle to negotiate crosscultural understanding around "stories" recurs in the testimony of many of the Elders. For example, former Chief Thomas Billyboy testified that "'Stories' kind of offend me, when people say 'stories,' you know. It truly happened." [Transcript, 1 June 2005, 00033]. He says of stories and legends,

> "There's two different things that you're talking about. If it didn't happen, we wouldn't have been told. It happened. Whatever happened in our ancestors' time, that's why we were told. We had to carry the message. We were told over and over again to see –to get this straight." [Transcript, 1 June 2005, 00040. 17–22]

Crown counsel Jennifer Chow repeats:

> Q. "So you'll be telling us mainly legends, is that right, and not stories; is that fair?
> A. "The truth about what happened. It's not a legend, it's not a story. It's what happened. The truth is what I'm speaking." [Transcript, 1 June 2005, 00042, 2–6]

Chief Billyboy pushes back against the imposition of foreign terms and values, while associating both "story" and "legend" with untruth or fiction. In contrast, truth is associated with medicine and Chief Billyboy told Ms Chow that Tsilhqot'in people had "medicine men" or spiritual healers (deyen) and gwenIg are medicine. Given the enormous losses during the times of smallpox and influenza, the urgency of having to carry the message is a recurrent theme in Elders' testimony as is the proud insistence on the community's sense of survival and the need to heal from the violence of colonization. Testifying about the "legend" of "The Woman that turned into a rock," Chief Billyboy said, "we work our medicine with it and we try to cure ourself with that…. What that story is, it will help you" [Transcript, 15 July 2005, 00040.17–26]. Thus gwenIg are medicine associated with the healing and survival of the Tsilhqot'in people and their way of life.

GwenIg provide many kinds of direction, from spiritual to practical spatial orientation as Elder Minnie Charleyboy tried to teach recalcitrant Defense counsel:

> A. "The elders like that, they never had maps. They just guide you with their story.
> Q. Right. So for the place –for a place like the battle of Bute Inlet, where you have not been–
> A. Because of their –their parents had always travelled down there and that's how they know where the place is, and that's how come they're telling the story."
> ——-

> Q. "Okay. But when you were only described the location of a place you can't say for sure that it is exactly there, can you?
> A. If the story is kept on told to you over and over how to get there, you know exactly which way you have to start to get down to Bute Inlet.
> Q. So you know where to start, but do you know where the battle took place?
> A. Because the way they taught me, that's how I know."
> [Transcript, 31 March 2004, 00035.6–14]

Stories are verbal GPS systems, as this interchange makes clear, but only for those who are familiar with the traditional practice of gwenIg and have a deep knowledge of the land. Thus, in the most literal sense, gwenIg are what ethnographer Julie Cruikshank describes as "equipment for living" [20, p. 41]. But not only narrative familiarity, mnemonic recall, and deep knowledge of the land are taught in this exchange between Elder Minnie Charleyboy and counsel. As Chief Roger William explained when asked "what is a good environment for learning the stories?":

> "You know, you can –you can talk about many things, but until you're out on the land, it makes more sense. There's different landmarks about the legends and… when you see those landmarks it comes home more, and when you're out –out there, you know, being there and living it, it makes more sense…." [Transcript, Sept. 10, 2003, 00041, 20–27]

His reference is not only to experiential learning but to the core principle, "we *are* the land." [26 June 2014 speech on the day of the Supreme Court of Canada decision] GwenIg are inseparable from that spiritual bond since "they are the law of the land," Dechen Ts'edilhtan. As Chief William testified:

> "…to teach the law of the land you need to practise it to understand it. And when you make mistakes, then the legends and the stories behind the legends come back and tell you –you're reminded as you live." [Transcript, 10 Sept. 2003, 00042, 25–29]

Since the Supreme Court of Canada's declaration of Aboriginal title on June 26th, 2014, Chief William has amplified the connection between Tsilhqot'in law and rights, seeing Dechen Ts'edilhtan as parallel to the Settler legal concept of "Aboriginal title and rights," asserting the sovereignty of the Tsilhqot'in nation through a symbolic gift of an embroidered buckskin bag filled with soil from Xeni and ceremonially presented to British Columbia Premier Christy Clark when she made an official visit by invitation to celebrate the title victory in Xeni. Like the potlatch distribution of gifts to guests as part of a reciprocal economy of spiritual and material wealth, this gift to the Premier is a powerful assertion of sovereignty by the Chief on behalf of Xeni Gwet'in and other Tsilhqot'in people. The gift of gwenIg is also reciprocal in its obligations and just as Elders expect respect and attention shown through absence of interruptions and rude questions, openness to learning, and a willingness to participate with a good heart in whatever activities—like berry-picking or drying of fish—may accompany the telling of stories depending on the season, so Elders testifying in court understood themselves to be warriors standing up for their nation and sharing the treasures of gwenIg as a sign of

Tsilhqot'in spiritual and cultural power and sovereignty. For them, "the stories connect historical events and people [as well as spiritual beings and animals] who caused them to places in turn commemorated in place-names; they connect these places with resources, ecological knowledge, and emerging or already existing social laws and norms of conduct"[17] [37, p. 87].

GwenIg are not "fiction" as Euro-Canadian Settler culture understands that term with its implicit fact/fiction distinction, nor are they bound into the binary economy of subjective/objective or the class distinction of "rustick"/literate which characterizes the genealogy of *traditio* and which is easily adapted to the racialized condescension not unusual in Canadian cases involving "the Aboriginal perspective." In an oral society, gwenIg are not distinguished as 'oral'; there is no documentary archive with which they exist in tandem.[18] When Elder Patricia Guichon was asked how many times she had been told "legends," she testified "You can't count the number of times that they were told, because I don't know how to write….I –I learned by listening, and I commit these stories to memory" [Transcript, 9 May 2005, 00011.4–39]. "Oral tradition," with its long European history resolved into Vansina's theory, comes from another world. Deployed in the context of "scientific" evaluation and exclusion, it is one of the book-keeping operations[19] of colonial historiography. GwenIg is neither, in Vansina's pun, a "historiography" nor a "historiology," neither a written (graphein) history or story nor, in Droysen's usage, the theory of historiography [33, p. 80 & passim]. GwenIg does not come from a hermeneutics of suspicion fine-tuned in an archive of medieval charters. From the perspective of Dechen Ts'edilhtan, "oral tradition" is "the [legal] fiction [which] must drop out" [28, p. 117] of Indigenous title and rights cases to enable the court's recognition and acknowledgment of the sovereign integrity and specificity of each Indigenous nation's laws, language, history and culture. This is the medicine and the guidance which the Elders shared through gwenIg in *Tsilhqot'in.*

Acknowledgments I am grateful to all of the Tsilhqot'in people who have shared their wisdom, learning and hospitality with me and in particular to Chief Roger William, my collaborator on the oral history of the Tsilhqot'in title case (in preparation) and to Linda R. Smith whose generous sharing of her knowledge of Tsilhqot'in language and culture with me has contributed significantly to this paper. Sechanalʔ in gulin. Thanks also to Jan Vansina whose references in personal communication to Bernheim and the Ecole Nationale des Chartes took me on a fascinating journey. Any remaining errors are my own. An early version of this paper was presented at the Canadian Law and Society Association conference, Winnipeg, June 3, 2014. This research was supported by a grant from the Hampton Foundation, University of British Columbia, and a Humanities and Social Sciences grant from the Faculty of Arts, University of British Columbia. Last but not least, I am grateful to my family for their support, patience and forbearance over many long hours and days.

[17] This passage is Stsmél'ecqen (Ronald Ignace)'s eloquent description of Secwépemc stories which is here respectfully adapted to the description of similar Tsilhqot'in traditional pedagogy. On Tsilhqot'in concepts of the land, see [6]. See also [23], [37] and [69].

[18] Gilbert Solomon testified about ethnographer Robert Lane doing salvage anthropology on Tsilhqot'in stories: What he said was the government put him in the Tsilhqot'in territory to collect stories and all the things they knew because they're gonna lose all that…. Once we've lost everything, he said he'll bring it back to us, like, sort of like in the curriculum form [Transcript, 10 April 2005, 00025.32–42].

[19] Philosopher Mary Poovey associates the development of double-entry book-keeping with modernity [50].

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