

# **A REVIEW OF ETHNOCENTRIC BIAS FACING INDIAN WITNESSES<sup>1</sup>**

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This paper is a review of the ethnocentric bias facing Indian witnesses in the Canadian court system and the use of technical rules in Indian treaty and land titles cases.

The written treaties that have been the subject of litigation in Canadian courts were drafted by the Crown's representatives. It is the contention of the Indian beneficiaries that these written treaties do not correspond to the meaning as understood by the Indian parties. The Crown view of Indian treaties having the status of domestic contracts is a deviation from the practice of recognizing treaty-making as a process that takes place between nations.

The United States provides us with an example that is particularly attractive to Indian Peoples, especially given the close bonds that exist between the Indigenous Peoples of the two countries. The courts in the United States have developed unique codes of construction in interpreting the treaties. These codes are guided by the classic opinion of Chief Justice Marshall in *Worcester v. Georgia*.<sup>2</sup> The courts have construed Indian treaties, as justice and reason demand, by looking at the substance of the right without regard to technical rules. Indian people know that since 1832, the United States Supreme Court has recognized, in very strong language, that under the United States Constitution Indian treaties are accorded the same dignity as that given to treaties with foreign nations. United States legal theory accords the tribes the status of "domestic dependent nations."

In the 1876 case of *United States v. 43 Gallons of Whisky*,<sup>3</sup> the Supreme Court affirmed that "the power to make treaties with the Indian tribes is, as we have seen, coextensive with that to make treaties with foreign subjects of diplomacy." Treaties with Indians tribes, however, differ from foreign treaties in at least two important respects. Through the application of special canons of construction, Indian treaties are construed in favour of the Indians. Further, the United States courts will not find that Indian treaties have been abrogated by later treaties or legislation unless there is a clear and specific showing in the later enactment that abrogation was intended. Neither of these rules applies to treaties with foreign nations; the

rules are based upon the trust relationship with Indian tribes, a factor not present in international affairs.

From a Canadian perspective, one of the most significant aspects of these cases is that many inherent rights have been held by the courts to be reserved implicitly by the treaties. The doctrine of inherent tribal sovereignty is the source of many Indian rights in the United States, and it is given the force of law by the courts. Important resource rights, such as reserved water rights, are implied from the treaties and agreements by which Indian reservations were created.

In analysing the Canadian case law of today, unfortunately, one finds that it is replete with extreme loyalty to technical rules rather than to the substance of the right. It is my submission that treaties must be interpreted, and oral promises considered, in the light of the substance of the right without regard to technical rules.

It seems foolhardy that Indian people did in fact agree to cede, surrender and release huge tracts of land in exchange for as little as five dollars a year for each beneficiary. As perceived by Indian people, this practice of theft and discrimination has evolved into hard-core domestic law. Indian litigants have sought to introduce oral testimony to prove their land claims, but their oral submissions have been given little weight. This is seen by the litigants, and by other Indian people, as an example of the rules being used to perpetuate injustice against Indian people.

The written history I have used in my analysis of Indian treaties is a problem for Indian First Nations. Relevant Indian legal history must look primarily to conventional non-Indian sources. These sources reflect the will of the dominant colonial authority and the manner in which the federal government established and altered the legal relationship between Indian societies and more newly arrived non-Indian governments.

Questions of perspective are critical in Indian legal history. A scholar's viewpoint on the development of the legal relations of Indians and non-Indians makes a difference in that scholar's research agenda, analysis and formulation of historical conclusions. In addition, a scholar, when conducting legal research, is faced with the adversarial system. The adversarial system pushes historical analysis into extreme positions. Questions of law and history are forced into black-and-white issues, whereas the normal ambiguous historical record often requires the scholar to refrain from drawing such sharp antagonistic lines. The problem of historical objectivity has to be considered at all times when this type of work is being conducted. In analysing the written history of Indian treaties, we are faced with sources that have a bias toward legitimizing the colonial expropriation of Indian resources and the displacement of Indian Nations by Europeans.

The first round of treaties were entered into by Indian Nations with

the French during the period 1534 to about 1760 and with the English from 1670 to 1713. These treaties established the practice of recognizing the validity of oral promises as unwritten treaties made with Indian Nations. Prior to the arrival of Europeans in the Americas, Indian Nations had experience with the treaty-making process. They recognized each other's sovereignty by forming compacts and by entering into treaties, trade agreements and military alliances. Early on in the Indians' relationship with Europeans, Indian diplomatic protocol was adopted, and treaties were constantly renewed by means of gift distributions accompanied by feasting, speeches, and the awarding of medals and honours.

An alliance is effective only if it is understood and honoured by both parties. In order for the alliance to be effective, it was essential that the Indian Nations understand the treaties. Hence, written treaties were considered irrelevant. The Indians' understanding and acceptance of the treaty was paramount in order to establish the treaty terms.

The second set of treaties were between the English and the Cree in the 1800s. At the time, the Cree were the largest group of Indians in the area now known as Canada. War was not a great concern, and these treaties served to enjoin the Cree as trading partners of the English. As one historian I have used extensively, Olive Dickason, notes, the Indians would have been negotiating for an alliance to secure trade. "Absolute propriety" was a concept they would not have understood, as it was completely foreign to them. Dickason concludes that the Indian Nations felt that the Hudson's Bay Company was paying them "rent." This conclusion is based on interviews with elders from the 1970s to the present.

The early relationship between Indian Nations and Europeans was grounded in sharing the land, goods and services as evidenced in the unwritten treaties, which were kept alive by their renewal with gifts, feasts and assemblies. It was the English who, not trusting oral agreements, insisted on European-style written treaties, which means they assumed the presence of a hierarchy and centralized authority in Indian societies. The written treaties were recorded by only one of the negotiating parties, and this party's concepts, practices and language were foreign to the other party. The most significant aspect of these early written treaties was that they were not land cession treaties but treaties of peace and friendship.

In 1758, a conference was held in Easton, Pennsylvania, between representatives of the Iroquois and the colonial and British authorities. They negotiated an alliance between the Indian Nations and the British. Many of the terms of this treaty were reached by mutual accord were later restated in the *Royal Proclamation of 1763*. After the *Royal Proclamation of 1763*, the priorities of the signed treaties changed. Instead of being peace and friendship treaties, they became land cession treaties. Land cession treaties were signed in Canada in the areas now known as Ontario, the prairie

provinces, the northeast corner of British Columbia and the southern portion of the Northwest Territories. Hundreds of treaties and treaty-like instruments, such as surrenders, have been signed since 1763. Some were entered into in order for the Crown and Indian Nations to end hostilities and for peace and friendship, and others for land cession. As far as the Indian parties were concerned, a standard practice was for the Crown to promise protection to the Indians in return for land and resource provisions.

The convention first established by the French-Indian unwritten treaties that the treaties be negotiated based on the Indian Nations' diplomatic protocol and guidelines for negotiations were emulated in later treaties, such as Treaty 6. The minutes of the commissioners' party describe in great detail the ceremony observed by the Indian Nations prior to the grand assembly. Chiefs, medicine men, councillors, singers and drummers, and their citizens made a grand entrance onto the grounds of the treaty assembly area to set the stage for the treaty discussions. These deliberations were considered to be what the Indian Nations agreed to. The deliberations formed the treaty, and not the later written version.

The disparity between the Indians' understanding of the treaties and the actual contents of the written documents are clarified if the verbal promises, assurances and guarantees given by the treaty commissioners during negotiations are regarded as an integral part of the treaty agreements. For example, in Treaty 4, at no time in the deliberations—as recorded by the government treaty party—did anyone refer to the extraordinary term that the Indian Nations had agreed to cede, release, surrender and yield up to Canada all their rights, titles and privileges whatsoever to seventy-five thousand (75,000) square miles of land. There is the concern that the Indian speeches may not have been properly recorded because they would have had to be translated and because they were being recorded by a person from a different culture. However, the speeches of the appointed government spokesman, Alexander Morris, are recorded accurately, according to his own verification. His presentations signify a treaty of peace and friendship, and not a land cession treaty as set out in the written treaty. In other parts of Canada, similar problems about the written treaties and the oral promises abound.

The weaknesses and inequities of the Canadian treaties were canvassed in a Canadian court decision in which the question of duress was acknowledged by His Honour Justice Bernstein in *R. v. Batisse*.<sup>4</sup> He asserted that

Indians have been hunting and fishing in Northern Ontario from time immemorial. Since the earliest days of colonization their rights to occupy and use their ancient lands have been recognized, and hence all North American Governments have taken steps to reach agreements with the Indians to regulate those rights and control development in Indian lands. When Treaty

No. 9 was negotiated, the parties to the Agreement were on grossly unequal footings. Highly skilled negotiators were dealing with illiterate people, who, though fearful of losing their way of life, placed great faith in the fairness of His Majesty, as represented by federal authorities.

Justice Bernstein then reached certain conclusions:

As a matter of fact, a careful reading of the Commissioner's Reports makes it fairly obvious that the Indians thought they were dealing with the King's personal representatives and were relying on the word of His Majesty rather than officials of Government. They agreed to give up their interest in their land for a few reserves (carefully chosen by the Government to be far away from any potential sources of hydro power) and a few dollars per year per family. As a result, approximately 90,000 square miles of resource-rich land was acquired by the Crown, free of any beneficial Indian interest, for an absurdly low consideration (even for that time). It is still not clear whether Indian treaties are to be considered basically as private contracts or as international agreements. If the former, then the very validity of this treaty might very well be questioned on the basis of undue influence as well as other grounds.

Cultural and linguistic differences compounded the divergent interpretations of what was negotiated by the treaty-making parties. The interpreters were attempting to communicate culturally based concepts that did not have equivalent meanings in the disparate languages. Language is the means of expression of a people's shared cultural values and world view. Attempts to find concepts that would have the same meaning for each side of the bargaining process in the negotiating stage would be difficult. To then attempt to set these down in written form in the language of only one of the parties, so that it corresponds to the understanding of the other party, with an oral tradition, would be exceedingly difficult, if not impossible. Leaving aside the question of bargaining in bad faith, the cultural and linguistic differences alone resulted in misunderstanding of what the true treaties were.

By the time of the later treaties, did the Indian people know that the intent at the time of signing was to "cede, release, surrender and yield . . . forever their rights, titles and privileges whatsoever to the lands"? One must look at the cultural meaning of "cede, release, surrender and yield . . . forever their rights, titles and privileges whatsoever to the lands" to get a true understanding of what those words meant to each party. In conducting a study on oral terms, one must be cognizant that there may not ever have been a meeting of the minds.

The most significant case that has gone outside the written words of

the treaty to determine the underlying meaning is *Re Paulette et al. and Registrar of Titles* (No. 2),<sup>5</sup> decided by Judge William Morrow the Northwest Territories Supreme Court in 1973. In that case, the question of the different conceptions of the Indian treaties was central. The issue was whether there was a reasonable argument that Treaties 8 and 11 had not extinguished the Aboriginal title in the Northwest Territories, although the text of the treaties indicated they had. The court had the benefit of archival evidence, anthropological evidence and the oral evidence "from many of the chiefs who had actually signed the caveat as well as testimony from Indians and others still living who remembered the treaty-making negotiations."

When he was receiving oral evidence by witnesses who were not at the original treaty sessions, Morrow admitted the oral history into evidence as an exception to the hearsay rule. According to the oral testimony gathered by the court, what was not intended, despite the unequivocal nature of the language of the treaties, was that all rights in the land be given up. In light of the evidence, the court held that a *prima facie* case had been made by the caveators that they had certain Aboriginal rights in the land in question that had not been extinguished by the treaties.

Unfortunately, the decision was overturned by the Northwest Territories Court of Appeal on the purely technical ground that a caveat could not be filed where there is no Crown grant or agreement by the Crown to issue a grant. This decision was affirmed by the Supreme Court of Canada on the same narrow basis. No dispute was taken with Mr. Justice Morrow's findings. In fact, the comprehensive land claims negotiations cover this area as if there were no land cession treaties.

Another case that did establish the different understanding of the meaning of the treaties is *Dreaver v. The King*,<sup>6</sup> decided in 1935. The Exchequer Court had to construe the terms of Treaty 6. Chief Dreaver had been present at the signing of the treaty in 1876 and remembered the promises made by the commissioners. He testified, among other things, that the negotiators had promised that the Indians party to the treaty were to have free medicine, drugs and medical supplies, and that was what the "medicine chest" clause in Treaty 6 meant. Mr. Justice Judge Angers accepted Chief Dreaver's testimony and found:

the treaty stipulates that a medicine chest shall be kept at the house of each agent for the use and benefit of the Indians at the direction of the agent. This, in my opinion, means that the Indians were to be provided with all the medicines, drugs or medical supplies which they might need entirely free of charge.

Although *Dreaver* has been viewed by Indian people for decades as a landmark decision on treaty rights, it made so little impact on the legal community

that it was not reported until the 1970s.

In reviewing the rules of the interpretation of treaties, it is necessary to clarify that the rules went through a profound change with the passage of the *Constitution Act, 1982*. Before 1982 the doctrine of parliamentary supremacy empowered Parliament to pass legislation that superseded Indian treaties, and treaties could be modified or extinguished. Under the *Constitution Act*, treaty rights are recognized and affirmed, and by section 52, such constitutional rights are given supremacy. By section 25, the equal provisions in the *Charter of Rights and Freedoms* cannot derogate from treaty rights. Section 35.1 requires that Aboriginal representatives must be consulted before any changes are made to treaty rights. With these fundamental constitutional guarantees, the courts have been willing to make broad statements honouring treaty terms.

A case that addresses the question of oral promises that were not included in the written treaty, and that has established rules of interpretation, is *Taylor and Williams*.<sup>7</sup> The written treaty is known as Treaty 20, and was entered into by the Crown and six chiefs of the Chippewa Nation in 1818. At the council meeting that took place before the actual signing of the document, the Crown negotiator, in response to requests made by the chiefs regarding their hunting and fishing rights, answered, "The Rivers are open to all & you have an equal right to fish & hunt on them." The written treaty did not contain any reference to hunting or fishing rights. Associate Chief Justice MacKinnon, who gave the decision of the court, pronounced as follows:

Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect.

In light of the oral traditions of the tribe, the historical context of the treaty and character of those who entered into the treaty, Associate Chief Justice MacKinnon held that the minutes recording the oral negotiation were part of the treaty and that the "treaty" guaranteed to the Indians the right to hunt and fish. This is a rare case where the court has been willing to supplement the deficiency of the written text of the treaty with the oral word.

In the historical facts raised relating to Treaty 4, however, we would be precluded from using evidence not explicitly included in the written treaty by the 1988 *R. v. Horse* case.<sup>8</sup> Mr. Justice Estey in *Horse* ruled that evidence from outside the written text of the treaty is only considered if the language of the written version of the treaty contains an ambiguity.

Even if the courts apply the fair, large and liberal construction rule, Indians continue to have serious problems in having their side of the story accepted. Notwithstanding *Paulette* and *Dreaver*, the courts have tended to be followers of technical rules, to the dismay of Indian First Nations in Canada. As an example, *Dreaver* was weakened in *R. v. Johnston*.<sup>9</sup> The Saskatchewan Court of Appeal had to construe the meaning of the "medicine chest" clause of Treaty 6. Mr. Justice Culliton held that in interpreting the clauses of a treaty, "one must first look to the words used and give to those words the ordinary meaning that would be attributed to them at the time the treaty was made." In order to interpret these provisions, Mr. Justice Culliton felt it in order to resort to "whatever authoritative record may be available of the discussion surrounding the execution of the treaty." After "perusing" *Treaties of Canada with the Indians of Manitoba, the North-West Territories and Kee-Wa-Tin* by the Honourable Alexander Morris, P.C., Mr. Justice Culliton concluded that he could not find anything historically, or in any dictionary definition, or in any legal pronouncement, that would justify the conclusion that the Indians, in seeking and accepting the Crown's obligation to provide a "medicine chest," had in contemplation a provision of all medical services, including hospital care. As far as *Dreaver* was concerned, Mr. Justice Culliton distinguished the case on its facts, and while he expressed no opinion as to whether Judge Angers interpreted the "medicine chest" clause correctly, he found nothing to support the extended definition of the phrase.

According to the Canadian legal system, oral history is characterized as "hearsay" because the declarant is unavailable for the truth of the contents to be tested by the court. Although the cases suggest that the courts have accepted, in the absence of written records of Indian history, oral history, evidence so admitted must be the best evidence. When such evidence has been provided recently, however, it has been rejected or not given weight.

The courts have described the best evidence to be that given by those best able to give such evidence. These would include the recipients of a long line of uninterrupted recounting of the oral history, and the oldest living Indian members able to recount this history. As many of these people as possible should testify to this knowledge, in order to create a "concurrence of voices" to persuade the court. Also, the oral history should be confined to historical fact and not anecdote, though the courts have not finally decided on the question of where anecdote ends and history begins. If anecdote seems relevant, it might be accepted by the court. Which culture makes the decision of what is relevant is a problem. Human beings are making that decision and human thinking is clearly motivated by cultural attitudes, which could be biased intentionally or unintentionally against a



different culture. Lastly, oral history that is clearly hearsay can only be submitted if all those who had first-hand knowledge of the historical event are dead. These rules have been developed in an adversarial system that is foreign to Indian culture.

The hope of utilizing the courts to establish oral promises is somewhat dashed by the inability of judges to understand elders, and the inability of the elders to communicate within the court system. This was evidenced in the recent 1993 federal Court of Appeal case of *Apsassin v. The Queen*,<sup>10</sup> which was lost by the Indian plaintiffs. The case concerned whether the Indian people had consented to the surrender of certain reserve lands. The events that were the subject of the court action took place in 1940, 1944 and 1945. The federal Court of Appeal followed the trial judge's decision<sup>11</sup> to reject all of the testimony advanced by the Indian witnesses—elders who were direct witnesses to the events—and instead adopted the testimony of the Crown's witnesses.

At the time of the trial judge's decision in 1988, thirteen members of the First Nations who had attended the 1944 meeting and fourteen who were present at the 1945 meeting were still alive. Only six provided evidence regarding events in the years preceding the 1945 surrender meeting and gave details about what actually happened at the meeting itself. The evidence of three of these witnesses had been taken on commission in 1980, and the remaining three testified *viva voce* at the trial. Five of the six Indian witnesses testified in their native language. All of the Indian witnesses' evidence was rejected by the trial judge. The following is a summary of his reasons for rejecting their testimony.

1. The judge found that, on the video-taped evidence, the interpreters appeared to lack any experience as legal interpreters and were members of the plaintiff First Nations who were interested personally in the outcome of the trial. He also found that the questioning of the witnesses was not properly conducted by counsel. The examination had barely begun when, in lieu of addressing questions directly to the witnesses, counsel addressed inquiries to the interpreter, indicating the substance of the information they wished to obtain from the witnesses. The interpreter addressed the witnesses, at times at length and with exchanges between only the interpreter and witnesses, and then the interpreter would turn to counsel to deliver an answer, a short answer after the lengthy exchange. The trial judge found such a proceeding improper. The trial judge was concerned about the accuracy and had the interpretations verified. Counsel agreed that the interpretation of the commission evidence of one of the Indian witnesses was so inaccurate that it had to be disregarded, and another was modified. The trial judge made several observations in respect of video-taped

evidence: that there should be direct frontal close-ups of witnesses' faces by the camera so that the judge can observe the demeanour of the witnesses, that commission evidence should be taken before a legally trained person or a judge and that video-taping of oral testimony should be provided for in the Rules of Court.

2. The judge said that the general thrust of the evidence of the Indian witnesses was that they personally had not consented to the surrender. Some stated that others had been opposed to the surrender or that it had hardly been discussed. The main complaint, however, seemed to be that they had been promised by the chief at the time that they would receive a lot of money, which they saw little of or did not receive. The judge found the evidence of the witnesses to be unreliable: they seemed to have been coached; they could not recollect the meeting; they retracted their statements on cross-examination, and they were not responsive to questions. Based on the manner in which these witnesses testified and in light of documentary evidence and evidence from witnesses for the defence, he found that the Indian witnesses' testimony was founded on the fact that oil was discovered on the reserve some thirty years later rather than on a true recollection and description of what actually took place.

The judge found, in the main, the evidence of the defence witnesses to be accurate. His comments are of assistance to us in appreciating and understanding what kind of evidence is accepted by judges, and how such evidence can be foreign and adverse to the Indian manner of oral history. The judge made the following comments in respect of the defence witnesses:

1. The Indian Affairs official who presided at the surrender meeting and took the surrender was feeble, tired, quite senile and suffering from considerable memory loss when he testified; however, the judge found him to be sincere and sympathetic toward the Indian people because of one comment he made to the Indian litigant's counsel: "And it is nice to know you are interested in the Indian people." In light of that remark and in light of the manner in which he gave his testimony, the judge was convinced that he was not the sort of person who would trick the Indians, or who would fail to conduct the meeting in a fair and conscientious manner. The judge found that his conduct, particularly during cross-examination, added credibility and weight to the letters, reports and documents signed by him pertaining to the issue.
2. The man who was an RCMP constable in 1945 testified that the proposed surrender was discussed extensively by the Department of Indian Affairs with the Indian people at a treaty meeting of July 25 and

26, 1945. His testimony contradicted that of the Indian witnesses, who said that the surrender was first brought up in the crucial September surrender meeting without giving them a chance to think it over. This witness had written a report on the July meeting. The judge was impressed by the evidence of this witness and considered him to be absolutely independent and disinterested in the outcome. He testified under cross-examination that the chiefs had told the Indian agent at the time that they wanted to sell the reserve and that they were assured that other land would be obtained for them closer to their traplines. The testimony that the Indians knew well in advance of the proposed surrender was reinforced by the game warden. He said he had met with some of the Indian people and the Department of Indian Affairs about the proposed selection of alternate sites for a reserve, at which time the proposed process for a surrender was discussed. The judge found the game warden's recollection of the events to be convincing. The game warden's memory was refreshed by reference to his personal diary.

3. The Indian agent testifying on commission in 1981 described the events of the surrender meeting. The judge believed his recollection to be true and accurate. He, too, was able to refresh his memory from his own diary. He testified that the surrender vote was conducted fairly, and that the process described established that the true informed consent of the Indians present was obtained.
4. The judge accepted the official documents of the day. The description of the events in these documents led him to accept the testimony that the informed consent of the Indian people was obtained.

It is the contention of the Indian people that principles of the court process tend to create fundamental problems for Indian people because of differences in culture. There is an overwhelming gulf between the Indian and the Anglo-Canadian culture on which the court process is based. The two cultures operate from very separate and different beliefs, myths and history. A Crown attorney familiar with Indian witnesses has commented:

Acts are never merely acts. They are also signals of attitude. Those signals, however, are often culture specific. When acts are seen, but their signal content misinterpreted, it is impossible to avoid forming inaccurate interpretations of others. Until we understand what particular acts mean to the other, we will continually ascribe motivations and states of mind which are well off the mark.<sup>12</sup>

Addy J. in *Apsassin* made the observation that the video-taped evidence should include frontal close-ups of the witnesses' faces so that the judge could

observe the demeanour of the witnesses. Looking someone straight in the eye is not necessarily seen as implying honesty in some Indian cultures. In an earlier motion, Addy J. wrote on the law governing exceptions to the hearsay rule:

At no time, in recent memory at least, could the law governing exceptions to the hearsay rule have been accurately characterized as either clear, absolute or certain: it has constantly been re-examined and subjected to equivocal causistic distinctions arising from the unceasing search for truth which preoccupies both lawyers and Judges. During this search they frequently feel unjustly and unfairly hampered by precedent, artificial rules and procedural barriers prescribing various limits to exceptions to the hearsay rule and therefore regularly seek to push beyond them. There do exist however distinct limits beyond which the search cannot extend, without seriously jeopardizing that very goal and indeed, at times, compromising the twin principles of reasonableness and fairness which must govern the whole judicial process.

The testing of the accuracy of any statement of a fact is, generally speaking, every bit as important as the evidence itself. Since one of the most effective tools for carrying out this task is the cross-examination of the person purporting to have direct knowledge of the matter, this means of testing evidence must always be protected and never circumvented or thwarted where it is reasonably possible to trust the evidence by employing it. The substance of hearsay is not subject to effective testing at trial by cross-examination.<sup>13</sup>

The courts in Canada have used an exception to the hearsay rule to establish the reputation of public or general rights in advancing an Indian claim. Much of the evidence consists of the oral history and tradition of the tribe as retold by the elders. Because this exception to the hearsay rule is little used today, except for Indian cases, the courts have not developed extensive guidelines for its use. The Indian litigants have an insurmountable task to explain their case, not only because of loss of memory and old age, but also because of cultural differences.

As the judges and elders attempt to define and identify the true oral promises of the treaties, both sides are faced with insurmountable problems, not only of language but also of culture. It has been found that "the person who, on the other hand, has never lifted the 'language curtain' behind which other people move and talk and think and feel in a way which is peculiar to them, may not even suspect that there is a way of living which is distinct from his own, let alone understand it."<sup>14</sup>

Unfortunately, only Anglo-Canadian laws, based on customs, values and practices foreign to Indian people, continue to be applied when interpreting

Indian treaties. The mistakes that arise from such a practice are overwhelming. A language has specialized vocabularies that reflect a people's unique solutions to problems and explanations of their concepts. The language of the white man is used in the treaties to adopt a land-holding system that is foreign to Indians, and to explain a concept of giving up rights to the land. Certainly, the evidence is that the European concept of land holding does not have an equivalent in the Indian culture. It is arguable that there would not be a meeting of the minds when the concept of Indians giving up their land was imputed to them.

Much of Indian history is unwritten. It is based on the oral tradition of accounts, parables, stories and legends passed on from generation to generation. This form of record keeping is at odds with the Anglo-Canadian legal system. Judges have expressed frustration over this form of history. The oral terms of Aboriginal and treaty rights have been placed before them by Indian witnesses in a manner they cannot understand. Even Indian people themselves have problems in obtaining information because there are very few people who can communicate with the keepers of the stories—namely, the elders—who communicate in their own languages.

Indian languages have specialized vocabularies reflecting the people's unique ties to the land. These vocabularies should be studied to determine whether concepts that allowed them to "cede, release, surrender and yield . . . forever their rights, titles and privileges whatsoever to the lands" even existed. Language is the vehicle by which individuals fulfil their capacity for expression, and through this means persons achieve communion with each other. Even if a person is able to extract the intent of the treaties from the Indian perspective, he or she is faced with a difficult task of having that information accepted by a rigid legal system that believes that only its guidelines produce objectivity and are more rigorous than other systems of thought. This claim to superiority is a barrier to the use of the wisdom, knowledge and information flowing from the Indian parties to the treaties.

Clay McLeod,<sup>15</sup> winner of the William Morrow Essay Contest in 1992, wrote on the issue of judges' problems with oral history. He argues that when the rules of evidence are applied in a culturally relevant, unbiased fashion, it becomes clear that oral histories can be admitted as evidence and that it is proper for courts to accept oral history as evidence. He argues that judicial notice can be exercised to consider the Aboriginal perspective.

Judicial knowledge, however, is based on each person's view of history. Mr. McLeod found this to be a problem in his reference to certain judicial reasons, including comments by Steele J. in the *Bear Island*<sup>16</sup> case that oral history "may be contradicted by factual records." Steele J. let his ethnocentric biases in favour of the literacy of his own culture blind him to the value of oral histories; oral histories are just as capable of contradicting

"factual records" as "factual records" are of contradicting oral history.

In the dissent in the *Horseman* case, Wilson J. also fell victim to her own ethnocentric biases. She asserted that the evidence of oral history regarding the meaning of treaties is relevant "where it confirms the archival evidence with respect to the meaning of the treaty." By regarding oral history evidence as a source of confirmation of archival evidence, Wilson J. implicitly denies that it is useful as a primary source of historical knowledge.<sup>17</sup>

Because the cultural differences and historical differences are so vast between the doctrine of oral history and the Canadian judicial system, a system outside the present court process is required for the proper identification and definition of treaties.

## NOTES

- 1 This speech is taken from a longer paper entitled "The Interpretation of the Treaties Entered into by the First Nations and the Crown, and the Nature and Status of the Oral Promises in Relation to the Unwritten Terms of the Treaties," dated July 20, 1993, prepared by Delia Opekokew for the Royal Commission on Aboriginal Peoples. The views and conclusion are those of the author.
- 2 3 U.S. (Pet.) 515 (1832).
- 3 93 U.S. 188 (1876).
- 4 (1977), 19 O.R. (2d) 145 (Dist. Ct.).
- 5 *Re Paulette's Application to File a Caveat*, (1973), 42 D.L.R. (3d) 8, [1973] 6 W.W.R. 97 (N.W.T.S.C.).
- 6 (1935), 5 C.N.L.C. 92 (Exch. Ct.).
- 7 (1981), 34 O.R. (2d) 360.
- 8 [1988] 1 S.C.R. 187.
- 9 (1966), 56 W.W.R. 565 (Sask. C.A.).
- 10 [1993] 2 C.N.L.R. 20.
- 11 *Apsassin v. Canada*, [1988] 1 C.N.L.R. 73.
- 12 Rupert Ross, *Dancing with a Ghost: Exploring Indian Reality* (Markham, Ont.: Octopus, 1992), 3.
- 13 [1987] 4 C.N.L.R. 14, p. 16.
- 14 *Report of the Royal Commission on Bilingualism and Biculturalism: General Introduction* (Ottawa: Queen's Printer, 1967), xxxiii, quoting UNESCO, *The Teaching of Modern Languages* (volume of studies deriving from the International Seminar organized by the Secretariat of UNESCO at Nuwara Eliya, Ceylon, in August 1953) (Paris, 1955), 11.
- 15 C. McLeod, *Alberta Law Review* 30 (1992): 1276.
- 16 *Attorney General for Ontario v. Bear Island Foundation et al.*, [1985] 1 C.N.L.R. 1 (Ont. S.C.).
- 17 C. McLeod, *Alberta Law Review* 30 (1992): 1282.