

# “Lord, Save Us from the *Et Cetera* of the Notary”: Archival Appraisal, Local Custom, and Colonial Law<sup>1</sup>



RAYMOND O. FROGNER

RÉSUMÉ Cet article se penche sur l'éternel défi légal et archivistique d'évaluer, de conserver et de rendre accessible les us et coutumes locales non écrites. Dans l'histoire du droit et des archives publiques de l'Occident, on trouve des moments où les disciplines ont collaboré pour documenter et représenter les coutumes locales. À ces moments, certaines méthodes ont été mises au point pour capter et enchâsser dans les valeurs légales et politiques de l'ordre dominant diverses coutumes locales. Ces périodes mettent l'accent sur l'identité et la culture d'une communauté locale et permettent une vue d'ensemble des paramètres idéologiques englobants et des processus d'assimilation qui sont utilisés pour représenter les valeurs locales. J'examine deux exemples de cette interprétation légale et archivistique de la culture locale : la codification du droit coutumier local non écrit dans le code civil français et la reconnaissance provisoire par la Cour suprême du Canada de la valeur probante des coutumes autochtones traditionnelles et non écrites. Cette comparaison montre que les modèles professionnels d'évaluation archivistique ne sont pas bien adaptés aux environnements contemporains de création de documents qui comprennent le rôle des médias collaboratifs et dynamiques, ainsi qu'à la gouvernance partagée et aux liens étroits des autorités culturelles de notre constitution socialement diversifiée. L'évaluation archivistique contemporaine continue à privilégier la valeur de preuve textuelle et à formuler des décisions d'acquisition qui cadrent bien avec les modèles juridiques bien structurés et hiérarchiques de la gouvernance et de l'autorité. Ces éléments interprétatifs

- 1 This article was written under the direction of Professor Val Napoleon for the graduate studies program at the Faculty of Law, University of Alberta. It was presented at the Progressive Librarians' Guild Conference (Edmonton chapter) in 2011 and at the Association of Canadian Archivists conference in Whitehorse in 2012. In 2013, it was delivered by invitation at the international workshop Archives Futures: Manuscripts, Materiality, Methods (Bibliothèque et Archives Nationales du Québec) and at the Aboriginal Studies/Medieval Studies symposium First Nation/Last Nation (University of Ottawa). Several colleagues have offered comments, including Sarah Shea, Mary McIntosh, Linda Nobrega, and Christine Gergich. I am particularly grateful to Dr. Napoleon for her knowledge and wisdom and to Heather MacNeil for her encouragement, scholarship, and editorial talents. The quote in the title is a reference to “Dieu nous garde d'un et cætera de notaire,” in *Locutions latines et adages du droit français contemporain*, vol. 1, ed. Henri Roland and Laurent Boyer (Lyon, France: L'Hermès, 1978), 216, quoted in Donald R. Kelley, “Lord Deliver Us from Justice,” *Yale Journal of Law and the Humanities* 5 (1993): 160.

modernistes du processus d'évaluation réduisent la représentation archivistique de plusieurs groupes représentatifs de la société canadienne. Les disciplines légales et archivistiques requièrent un modèle interprétatif capable de représenter les preuves non-textuelles de groupes représentatifs, de particuliers, de régions et de l'inférence dans le cadre d'interprétation des sanctions sociales locales.

**ABSTRACT** This article considers the timeless legal and archival challenge to appraise, preserve, and reference unwritten, local custom. In the history of Western law and public archives, we find moments when the disciplines have combined to record and represent local custom. In these periods, methods were refined to capture and embed diverse local customs in the enfolding legal and political values of a dominant order. These periods highlight a local community's identity and culture and offer a view of the enfolding ideological parameters and assimilating processes used to represent local values. I consider two examples of this legal and archival rendition of local culture: the codification of unwritten, local customary law in the French *code civil* and the Supreme Court of Canada's tentative recognition of the probative value of traditional, unwritten Aboriginal custom. The comparison demonstrates that professional models of records appraisal have not adapted well to contemporary records-creating environments of dynamic, collaborative media and the distributed governance and interrelated cultural authorities of our socially diverse constitution. Contemporary archival appraisal continues to privilege textual evidence and frame appraisal decisions within structured, hierarchical juridical models of governance and authority. These modernist interpretive appraisal elements attenuate the archival representation of multiple constituencies of Canadian society. Both legal and archival disciplines require an interpretive model to represent non-textual evidence of the contingent, the particular, the local, and the inductive within the interpretive framework of local social sanction.

*Nor should the curious legendary lore and tribal history of the natives be neglected. It would be well, indeed, the myths, legends, and historical narrations which have been handed down from generation to generation, by word of mouth, or by hieroglyphic, petroglyphic, or pictorial inscriptions, were preserved in definite form.<sup>2</sup>*

This article considers “the human measure” – the timeless legal and archival challenge to appraise, preserve, and reference unwritten, local custom.<sup>3</sup> At various periods in the histories of Western law and public archives, we find moments when the disciplines have combined to record and represent local

- 2 E.O.S. Scholefield, “Report of Provincial Archivist,” *Sessional Papers, British Columbia* (Victoria: Richard Wolfenden, I.S.O., V.D., Printer to the King's Most Excellent Majesty, 1911), N10. Although R.E. Gosnell is often cited as the first public archivist of British Columbia, it was Scholefield who was the first to hold the position as a full-time, permanent position in the provincial government.
- 3 Donald R. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1990), 1–13.

custom. These periods are revealing because they not only highlight a local community’s identity and culture, but they also offer a view of the instruments used to represent these values and the means to apply them strategically. These are times when methods were refined to capture, co-opt and embed the plurality of local customs into the greater legal and political parameters of a dominant order. This article compares two moments when the encompassing cultural and juridical parameters of a dominant order encountered, subsumed, and represented the cultures and traditions of local community. The two examples are the codification of late-medieval unwritten, local customary laws of northern France and the “post-colonial” period of Canadian Aboriginal jurisprudence.<sup>4</sup> After examining both developments, I will speculate on how recent Canadian court trials concerning Aboriginal rights and title misrepresented archival principles in the judicial appraisal of evidence of Aboriginal society. I will conclude with comments on the archival disposition of traditional Aboriginal evidence in the case *Delgamuukw v. British Columbia*.<sup>5</sup>

### Appraisal in Public Archives of Colonial Societies

There is a well-documented debate in the Western archival discipline about how contemporary public archival institutions appraise records and even if they should do so at all.<sup>6</sup> Several writers have expressed concern that the

4 There is a considerable body of literature discussing the Canadian post-colonial period of Aboriginal jurisprudence. Although the first significant indigenous campaign for Native rights and title in British Columbia through a formal legal argument goes back to the *Cowichan Petition* of 1909, the *Calder* decision (*Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313, [1973] 4 W.W.R. 1) is thought to have forcefully introduced Aboriginal jurisprudence to the legal landscape. See, for example, Hamar Foster, Heather Raven, and Jeremy Weber, *Let Right Be Done: Aboriginal Title, the Calder Case and the Future of Indigenous Rights* (Vancouver: University of British Columbia Press, 2008); Russel Lawrence Barsh and James Youngblood Henderson, “The Supreme Court’s *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand,” *McGill Law Journal/Revue de droit de McGill* 42, no. 2 (August 1997): 993–1109; Sidney Haring, *White Man’s Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: Osgoode Society for Canadian Legal History, 1998); John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v. British Columbia*,” *Osgoode Hall Law Journal* 37, no. 3 (November 1998): 537–94; Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989); and B. Slaterry, “Understanding Aboriginal Rights,” *Canadian Bar Review* 66 (1987): 727–83.

5 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

6 For prominent contributions to this debate, see Luciana Duranti, “The Concept of Appraisal and Archival Theory,” *American Archivist* 57 (Spring 1994): 328–45; Terry Cook, “What Is Past Is Prologue: A History of Archival Ideas since 1898, and the Future Paradigm Shift,” *Archivaria* 43 (Spring 1997): 17–63; F. Gerald Ham, “The Archival Edge,” *American Archivist* 38 (January 1975): 5–13; Frank Boles, *Selecting and Appraising Archives and Manuscripts* (Chicago: Society of American Archivists, 2005); T.R. Schellenberg, *Modern Archives: Principles and Techniques* (Chicago: University of Chicago Press, 1956); Trevor Livelton, *Archival Theory, Records, and the Public* (Lanham, MD, and London: Society of

holdings of our public archives do not represent an inclusive and accurate depiction of the society they are mandated to represent. For Terry Eastwood, appraisal of archival records in a democratic society should be directed toward an enlightened cultural and historical understanding of belonging within local and national communities:

Citizens of a democracy have interests in the question of appraisal of archives. They have an interest in knowing how they have governed themselves and come to their current condition, and a companion interest in obtaining a sense of the condition of their community in the wider society from which they gain a sense of recognition. Archivists are the democratic delegates to perform the act of appraisal of archives to serve these interests.<sup>7</sup>

Eastwood identifies, in our struggles to formulate public appraisal policy, the often unacknowledged but vital democratic role of public archives. Contemporary political philosophy is facing similar challenges of public representation, recognition, and dialogue: “popular sovereignty in culturally diverse societies appears to require that the people reach agreement on a constitution by means of an intercultural dialogue in which their culturally distinct ways of speaking and acting are mutually recognized.”<sup>8</sup> However records are appraised for archival preservation, as legislatively mandated spaces of public dialogue and representation, the role of public archives in our modern constitution is crucial.

Supporters of traditional archival theory maintain that appraisal occurs naturally because archival material embodies fundamental, utilitarian values.<sup>9</sup> These properties are identified in certain records over time as citizens create, use, and reference required documents within the protocols of a society’s

---

American Archivists and Scarecrow Press, 1996); Hans Booms, “Society and the Formation of a Documentary Heritage: Issues in the Appraisal of Archival Science,” *Archivaria* 24 (Summer 1987): 104; Terry Cook, “Mind over Matter: Towards a New Theory of Archival Appraisal,” in *The Archival Imagination: Essays in Honour of Hugh A. Taylor*, ed. Barbara L. Craig (Ottawa: Association of Canadian Archivists, 1992), 38–70; Phillip C. Brooks, “The Selection of Records for Preservation,” *American Archivist* 3, no. 4 (October 1940): 211–34; and Verne Harris, “Contesting Remembering and Forgetting: The Archive of South Africa’s Truth and Reconciliation Commission,” in *Archives and Justice: A South African Perspective*, ed. Verne Harris (Chicago: Society of American Archivists, 2007).

7 Terry Eastwood, “Reflections on the Goal of Archival Appraisal in Democratic Societies,” *Archivaria* 54 (Fall 2002): 67.

8 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995), 29.

9 Terry Eastwood, “What Is Archival Theory and Why Is It Important?” *Archivaria* 37 (Spring 1994): 122–30; Luciana Duranti, “The Concept of Appraisal and Archival Theory,” *American Archivist* 57, no. 2 (Spring 1994): 328–44; Livelton, *Archival Theory, Records, and the Public*.

juridical system; in short, purposeful use attributes archival value.<sup>10</sup> Through controlled preservation and access, archivists maintain the trustworthiness of such valued records to serve as proof of rights, governance, and, ultimately, collective social identity.<sup>11</sup>

Critics claim that modern archives overindulge this juridical-administrative interpretation of archival value. They express concern for “a socio-cultural justification for archives grounded in wider public policy and public use.”<sup>12</sup> Most would agree with the Roman law principles of probative juridical accountability, elements of trustworthy documents, and the public faith in archives as servants to society.<sup>13</sup> Instead, the critique focuses on the deleterious framework of nineteenth-century modernism through which these principles are applied, notably historical and legal positivism. Historical positivism identifies historical knowledge as a scientific endeavour attained through the detailed accumulation of objective facts.<sup>14</sup> For archival practice, this meant careful decomposing of records in order for their intrinsic and extrinsic data to serve scientific observation.<sup>15</sup> Judicial positivism, first understood as “command of the sovereign,” developed into a normative system of state-designed rules for the guidance of society.<sup>16</sup> For archives, this privileged administrative records documenting the legislative will of the state. While both disciplines have expanded beyond these modernist principles,

- 10 For the traditional archival understanding of a juridical system and its interplay with records, see Luciana Duranti, “Diplomatics: New Uses for an Old Science,” *Archivaria* 28 (Summer 1989): 16.
- 11 For an insightful look at the role of public institutions in the formation of identity in modern democracies, see James Tully, *Public Philosophy in a New Key: Democracy and Civic Freedom*, vol. 1 (Cambridge: Cambridge University Press, 2008).
- 12 Cook, “What Is Past Is Prologue,” 43–44.
- 13 Duranti, “The Concept of Appraisal and Archival Theory,” 330–32.
- 14 Heather MacNeil, *Trusting Records: Legal, Historical, and Diplomatic Perspectives* (Dordrecht: Kluwer Academic Publishers, 2000), 32–56. On historical positivism, empiricism, and historical materialism in historiography, see Bryan Palmer, *Descent into Discourse: The Reification of Language and Writing of Social History* (Philadelphia: Temple University Press, 1990).
- 15 See, for example, A. de Broiard, *Manuel de diplomatie française et pontificale* (Paris: Éditions Auguste Picard, 1929); C.V. Langlois and C. Seignobos, *Introduction to the Study of History*, trans. G.G. Berry (London: Duckworth & Co., 1898); A. Giry, *Manuel diplomatique* (New York: B. Franklin, 1894).
- 16 For the classic nineteenth-century example of legal positivism, see John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832). For the conceptual taproots of sovereignty and the written paradigm of authenticity, see Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth*, ed. and trans. Julian H. Franklin (Cambridge: Cambridge University Press, 1992); and Jean Bodin, *Method for the Easy Comprehension of History*, trans. Beatrice Reynolds (New York: Octagon Books, 1966). See also MacNeil, *Trusting Records*, 14–17; and Julian H. Franklin, *Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History* (New York: Columbia University Press, 1966).

they continue to influence archival method and appraisal profoundly. Records appraisal remains based on administrative theories of value and a focus on the records as direct, linear embodiment of facts in textual media.

There are significant consequences, both social and archival, of the judicial/administrative interpretation of archival value. Public archives' appraisal practices have not adapted well to our contemporary records-creating environment of dynamic, collaborative media and the distributed governance and interrelated cultural authorities of our socially diverse constitution. Archival appraisal continues to privilege the textual records medium and recognizes diverse cultural identities through an enfolding and restrictive juridical sovereignty. These modernist interpretive appraisal elements attenuate the archival representation of the multiple constituencies of contemporary Canadian society. Addressing the consequences of contemporary appraisal challenges requires an interpretive model to represent non-textual evidence of the contingent, the particular, the local, and the inductive within the interpretive framework of local social sanction.

This article looks at the appraisal of unwritten Aboriginal tradition to consider this contemporary appraisal challenge. Important characteristics of unwritten Aboriginal culture and tradition pose broader challenges for public archives to acquire and safeguard a meaningful representation of the social constituencies of our constitutional democracy. These characteristics include the meaning of custody, instantaneous reproduction and distribution, the fixity and stability of form and content, collaborative authorship, reinterpretation of authenticity, and the distributed authority and responsibility of traditional Aboriginal governance.<sup>17</sup> Traditional, modernist concepts of trustworthy records, built on enfolding, statist conceptions of uniform sovereignty and textual paradigms of evidence, cohere poorly with the unwritten and communal cultural testimony – the songs, ceremonies, artwork – of Aboriginal traditions.<sup>18</sup>

Our current representation of Aboriginal communities in our public archives begins with an appreciation of the colonial-era discourse of First Nations in our public institutions. Recently, several studies in the humanities

17 This list of characteristics of traditional Aboriginal evidence possesses qualities and characteristics similar to electronic records. Similar to discrete electronic records, individual items of Aboriginal tradition are best understood within the systems in which they were created and used. See Heather MacNeil, "Proving Grounds for Trust II: The Findings of the Authenticity Task Force of InterPARES," *Archivaria* 54 (Fall 2002): 24–58. The archival perspective on electronic evidence is based on the *Canada Evidence Act* (R.S.C., 1985, c. C-5), 31.2 (1): "The best evidence rule in respect of an electronic document is satisfied (a) on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored."

18 Raymond O. Frogner, "Innocent Legal Fictions: Archival Convention and the North Saanich Treaty of 1852," *Archivaria* 70 (Fall 2010): 89.

have highlighted the history of public representation of social constituencies in our colonial governance; some have touched on the social role of archives in shaping our historic collective conscience.<sup>19</sup> Christopher Bracken’s book *The Potlatch Papers: A Colonial Case History* is an example of this approach. Bracken uses the state’s records documenting the prohibition of the Aboriginal ceremony known as the potlatch to consider the representation of indigenous society through the lens of colonial law.<sup>20</sup> He also notes the indigenous resistance to both the cultural prohibition and its implications for indigenous identity: “One of the defining qualities of that discourse, particularly after 1914, [is] the attempt by the First Nations of coastal British Columbia to seize control of the techniques of representation in order to substitute their own accounts of who they are for the stories that European Canada tells itself about them.”<sup>21</sup> The potlatch records provide Bracken with insights into both the colonial settler and European *mentalités*.<sup>22</sup> But he never directly investigates one of the most vital “techniques of representation”: the social role of public archives. He chooses instead to consider what he terms the “postal record” of governance that “began in the mail,” without examining the archival agency, the processes of archival appraisal, selection, and access, that made these records available for public study.<sup>23</sup>

Bracken focuses on colonial and continental European social values, but his wholesale use of archival sources in the British Columbia Archives touches on an important point. Our public archival memory is overflowing with the settler communities’ documentation of the indigenous colonial experience:

- 19 The latter theme has become particularly popular in the humanities since the publication of Jacques Derrida’s *Archive Fever: A Freudian Impression* (Chicago: University of Chicago Press, 1996).
- 20 The potlatch is a First Nations ceremonial activity involving ritualistic gift giving. It forms an important component of the culture, law, and economic practices of BC coastal and interior First Nations groups, such as the Heiltsuk, Haida, Nuxalk, Tlingit, Makah, Tsimshian, Nuu-chah-nulth, Kwakwaka’wakw, and Coast Salish. The federal government passed legislation in 1885 to prohibit what it understood inconsistently to be the ceremonial potlatch as practised in BC First Nations’ communities. The restriction remained until 1951. For an overview of the potlatch prohibition, see Douglas Cole and Ira Chaikin, *An Iron Hand upon the People: The Law against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990). The federal government documentation of the potlatch law is captured in the federal government fonds; see Library and Archives Canada, RG 10.
- 21 Christopher Bracken, *The Potlatch Papers: A Colonial Case History* (Chicago: University of Chicago Press, 1997), 15.
- 22 For a contrary review of Bracken’s work, see Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: University of British Columbia Press, 2002).
- 23 *Ibid.*, 1–20.

Indian agency reports,<sup>24</sup> missionary records,<sup>25</sup> trap-line records,<sup>26</sup> land reserve commissions,<sup>27</sup> and anthropological studies,<sup>28</sup> to name a few genres. This predicament directs us to consider the history of appraisal practices in public archives of colonial societies in two ways. First, as settler society developed ever more enfolding and interventionist laws and regulations to surveil, control, and direct indigenous lives, the unprecedented form (i.e. case files) and volume of the documentation became the prototypical archival record of modernity's social condition.<sup>29</sup> The encompassing meta-narrative of the *Indian Act*, the residential schools program, and the reserve system presented colonial archives with unlimited, detailed documentation of the colonial indigenous program. This colonial administrative documentation of the indigenous experience of settler society was a kind of "writing out" or erasing of the cultures and traditions of First Nations communities. This documentary by-product of the assimilation of indigenous society was acquired and preserved on a wholesale scale, and made available for archival reference. Appraisal, when considered, was neither thoroughly documented nor applied. The high-volume acquisition of these administrative records represents one of the first archival responses to the social condition of modernity. But like most positivist claims to objectivity, colonial archives did not simply acquire all documentation of the colonial experience. Colonial Aboriginal policy assumed native society was vanishing. Academics offered the concept of "salvage" anthropology to describe the need to study indigenous societies before their anticipated cultural disappearance.<sup>30</sup> Evidence of indigenous resistance to settler jurisdiction or the self-expression of local indigenous communities was correspondingly undervalued. This explains why the BC Archives holds volumes of records documenting how the government created the reserve system in British

24 BC Archives, MS-1267, "Kuper Island Indian Industrial School."

25 BC Archives, MS-1513, "Oblates of Mary Immaculate. St. Paul's Province."

26 BC Archives, GR-0934, "Central Registry files of the Department of Indian Affairs on matters pertaining to British Columbia"; BC Archives, GR-1085, "British Columbia. Fish and Wildlife Branch."

27 BC Archives, "Joint Indian Land Reserve," GR-0494, Indian Reserve Commission records, 1876–1878, British Columbia; BC Archives, Provincial Secretary, GR-1995, Royal Commission on Indian Affairs for the Province of British Columbia (1913–1916), originals, 1876–1878; "Confidential Report of the Royal Commission on Indian Affairs for the Province of British Columbia," NW 970.5 B862c O/S.

28 BC Archives, Boas, Franz, MS-0517; Franz Boas, *Indian Legends of the North Pacific Coast of America*, ed. Dorothy Kennedy and Randy Bouchard (Vancouver: Talonbooks, 2002).

29 It could be argued the administrative colonial records of the surveillance and control of First Nations communities became some of the first sets of archival records of the modernist condition. There are many studies commenting on the explosion of records and their new characteristics and genres in the modern era. See, for example, Richard Dancy, "Case Files: Theory, History, Practice" (PhD diss., University of British Columbia, 1998), 2–5; and Cook, "Mind Over Matter."

30 See, for example, Scholefield, "Report of Provincial Archivist," N10.



Columbia, including interviews with First Nations representatives “consulted” on the construction of reserves, but there is no accession record explaining how the institution acquired the fourteen Douglas Treaties (1850–54), the only treaties that formally recognized indigenous title and were signed by First Nations communities in BC’s colonial era.<sup>31</sup> E.O.S. Scholefield was painfully aware of this situation when he assumed responsibility for the government archives program in 1910.<sup>32</sup> In a period when the province was trying to negotiate “better terms” for its constitutional relationship with Ottawa, many questions were raised concerning the constitutional status of Aboriginal title and the process of colonial settlement.<sup>33</sup> In the shadow of these negotiations, Scholefield attempted, without much success, to locate colonial records of “agreements made with the Indians of British Columbia and Vancouver Island with regard to taking over their lands previous to Confederation.”<sup>34</sup> As he explained in a letter to the Secretary of State:

I am particularly anxious to obtain for the Library of the Legislative Assembly of British Columbia copies of all documents and papers, if any such exist, relating to the agreements made with the Indians of British Columbia and Vancouver Island with regard to taking over their lands previous to Confederation.... For some time past I have been making an examination of such documents dealing with Indian lands as may be found in the archives of British Columbia, but this examination has only brought me face to face with the fact that we have but few important papers relating to the treaties and agreements made with various authorities in early days.<sup>35</sup>

As federal–provincial manoeuvres over Aboriginal title in British Columbia grew increasingly intense, Scholefield was concerned with finding evidence of colonial title for “Indian lands.”<sup>36</sup> But even in this narrow juridical/administrative sense, he was a lone voice in his concern for archival records

31 Raymond Frogner, “...[T]he Land Itself with These Small Exceptions...”: Some Archival Thoughts on the Vancouver Island Treaties,” *Friends of the BC Archives Presentation*, 21 April 2013, accessed 28 January 2015, <http://bit.ly/1nv8ycc>.

32 *British Columbia Gazette*, 14932, 29 December 1910: “appointed Provincial Archivist effective 31 July 1910.” I am grateful to Frederike Verspoor for this reference. See also Royal BC Museum, E.O.S. Scholefield Fonds, MS-491.

33 Hamar Foster, “Roadblocks and Legal History, Part 1: Do Forgotten Cases Make Good Law?” *Advocate* 54 (May 1996): 356. See also Hamar Foster, “We Are Not O’Meara’s Children: Law, Lawyers, and the First Campaign for Aboriginal Title in British Columbia, 1908–1928,” in *Let Right Be Done*, 61–84.

34 Library and Archives Canada, Dept. of the Secretary of State of Canada Fonds, R174-0-6-E, Secretary of State Correspondence, General Correspondence series, R174-26-2-E, file no. 302, vol. 112, “[E.O.S.] Scholefield to the Secretary of State, Department of State, Ottawa,” 8 February 1904.

35 *Ibid.*

36 The McKenna-McBride commission was designed to be the final decision on Aboriginal title in BC, but this was not the case.

of the colonial Aboriginal experience. In the more general process of “writing out” indigenous culture, settler society was preserving the foundational evidence of its own existence. The modernist archival appraisal of colonial society, like all appraisal, carried its own agenda.

Second, the colonial legal and academic encounter with indigenous societies created a body of jurisprudence, history, and anthropology that continues to play a role in our archival depictions of indigenous culture and identity and even influences our more general contemporary archival understanding of the meaning of diverse cultures in society. Influential cultural theoreticians such as Claude Lévi-Strauss, Jacques Derrida, and Marcel Mauss debated the significance of indigenous ceremonies and protocols like the potlatch. The potlatch became a trope for the anthropological meaning of the legal and social concept of reciprocal obligation in societies organized along capitalist, social democratic, and socialist ideologies.<sup>37</sup> Indigenous social and cultural practices were so effectively pervasive in mid-century European cultural theory that even an influential contemporary study of archival appraisal cites the work of a principal modernist spokesperson, Franz Boas, the premier nineteenth-century anthropologist of the Kwakwaka-wakw peoples of the West Coast of British Columbia, to frame our common understanding of cultures in society.<sup>38</sup> Bracken’s work unintentionally reveals an ironic archival idea: while colonial archives are replete with the “writing out” of First Nations’ culture and identity – the documentation of settler society’s efforts to at best absorb or at worst eliminate indigenous societies – the social values represented in this documentation have influenced archival practices in unexpected and influential ways.<sup>39</sup>

To address this irony, critics of the traditional approach to archival appraisal direct us away from appraising the records to the functions and environments where the records were created. They advise us to highlight

the generic attributes, interconnections, and points of special intersection of conflict between creators of records (structures, agencies, people), sociopolitical trends and patterns (functions, activities, programs), and the ... citizens upon whom both function and structure impinge, and who in turn influence both function and structure, directly or indirectly, explicitly or implicitly.<sup>40</sup>

37 Jacques Derrida, *Given Time: 1. Counterfeit Money*, trans. Peggy Kamuf (Chicago: University of Chicago Press, 1992); Marcel Mauss, *The Gift: Forms and Functions of Exchange in Archaic Societies*, trans. Ian Cunnison (London: Cohen and West, 1966).

38 Franz Boas, *Race, Language and Culture* (New York: MacMillan, 1940), and *Kwakiutl Ethnography*, ed. Helen Codere (Chicago: University of Chicago Press, 1966), both cited in Duranti, “The Concept of Appraisal and Archival Theory,” 342–53.

39 For an example of a contemporary archivist in another post-colonial jurisdiction struggling with modernist archival appraisal values and the work of Jacques Derrida, see Harris, “Contesting Remembering and Forgetting.”

40 Cook, “Mind Over Matter,” 40.

Viewed this way, archivists must more fully confront the multiple influences and social consequences of the colonial project and its archival manifestations. If a single juridical system frames the juridical act, and thereby records creation, then each act of appraisal is an expression of juridical sovereignty. Identifying a juridical system predisposes us to recognize a particular kind of order, arrangement, and value of records. It determines the classification of records, particularly the basic division into public and private spheres. In the archival appraisal of colonial records, the indulgence of a dominant world view or juridical system has been assumed a priori when in fact the distinction is unclear.<sup>41</sup>

Located on the fringe of the colonial empire, pre-contact First Nations of British Columbia existed within their own social and political systems. Social ceremony was witnessed, notarized, and preserved for future reference within unique cultural and legal protocols such as the potlatch. As settler society increasingly asserted juridical sovereignty, and its colonial project to convert common earth into property, much of the indigenous-related recordkeeping of the colonial era concerned the surveillance, control, and eradication of these indigenous social and political systems. This is the principal form of indigenous records in colonial-era archives. The early years of public archives in British Columbia operated to establish the settler fact: the first schoolhouse, the first municipality, the first jail. We have moved beyond the point where our public archives are settler archives. The archival memorialization of First Nations in the current era must be done in view of the settler archives' reality. But it must begin with an approach to appraisal that more fully recognizes the political, cultural, and juridical systems of the communities creating enduring histories across indigenous societies, as well as the settler political and legal systems that engulfed them.

### *L'enquête par turbe*

Canadian First Nations communities do not offer the first example of an indigenous, local customary law and culture enveloped and represented in an encompassing sovereign legal regime. This need to capture and articulate for alternative, state-directed purposes the indigenous local custom has been a legal and archival concern since imperial antiquity. At various periods in Western legal history, methods were secured and refined to document unwritten local practice. Such is the case in sixteenth-century northern France. In

41 See, for example, Luciana Duranti, “Diplomatics: New Uses for an Old Science (Parts I–VI),” *Archivaria* 28–33 (Summer 1989 to Winter 1991–92); and de Broüard, *Manuel de diplomatique française et pontificale*, 39–55. For a challenge to this, see Jacques LeGoff, *History and Memory*, trans. Steven Rendall and Elizabeth Calman (New York: Columbia University Press, 1992).

this period, French scholars and jurists formulated a critical scholarly framework to prove customary law. Specifically, the French Enlightenment innovations on textual criticism (philology), legal history (humanism), and governance (statism) structured their critical analysis of customary law as evidence. More broadly, these French innovations built on the Roman concept of law being “written reason,” *la raison écrite*.<sup>42</sup> Taken together, these developments would become the legal rationalization of custom as reason. They inscribed in our legal and scholarly traditions the concept of written evidence as the unassailable probative format for law and scholarly research. In these efforts, a door was effectively closed to the recognition of unwritten local culture; it became something less intellectual, less valued, less formal and influential in our archival and legal professions.

In the efforts of French jurists to develop legal interpretations to prove local customary law and incorporate it into the national codification known as the *code civil*, there are parallels with how contemporary Canadian Aboriginal jurisprudence has characterized *sui generis* Aboriginal customary law as evidence of Aboriginal rights and title. Within these contemporary developments of written legal practice, the French medieval legal process known as *l'enquête par turbe* is an early Western example of how a nationalist jurisprudence adapted probative models to capture and incorporate unwritten local customary law within a political program. With the codification completed, “customary law became an object of study” and, more importantly, assimilation.<sup>43</sup> The archival copies were subsequently referenced for their probative character; the original oral sources lost their legal authority and were no longer referenced with normative legal weight. This example of the probative adaptation of French jurists brings insight to the philosophical and juridical impasse of appraising and preserving Aboriginal tradition in a manner that can be referenced in support of constitutional rights and title.<sup>44</sup>

In medieval Western Europe there existed two forms of law: law imposed by feudal authority and law founded on popular consent. In the absence of counterbalancing legislation, local customary law was virtually unique and unlimited.<sup>45</sup> Recent French studies argue that the collapse of local jurisdictions, increased regional trade, and the nationalist expanse of statist authority precipitated a growing practical need to recognize and accommodate the

42 Kelley, *The Human Measure*.

43 John Gilissen, *La coutume* (Belgium: Brepols Turnhout, 1982), 106.

44 I have presupposed Aboriginal participation in the Canadian constitution. Should Aboriginal groups select sovereignty, another paper would be needed to address the archival implications.

45 Pierre-Clément Timbal, “Coutume et jurisprudence en France au moyen âge,” in *La coutume: Recueils de la Société Jean Bodin pour l'histoire comparative des institutions* 52 (Bruxelles: De Boeck Université, 1989), 227.

prevailing regional customary law, particularly in northern France.<sup>46</sup> The late-medieval transcribers of customary law, known as *coutumiers*, were often lawyers. Their work began before the twelfth century, but the earliest extant written summaries of regional custom are from this period.<sup>47</sup> *Coutumiers* were not preoccupied with theories of customary law but remained convinced of the legal weight of local custom and the need to record valued tradition for informed legal decisions. The late-medieval scholar Philippe de Beaumanoir, in his thirteenth-century work *Coutume de Beauvaisis*, summarized the predominant legal perspective on the need to capture in text the unwritten customary law of late-medieval French communities: “It is my opinion, and others as well, that for all the customs which are currently used, are good and profitable, to be written down and registered, so that they be maintained without change, for memories are fallible and peoples’ lives are short, and what is not written is completely forgotten.”<sup>48</sup> Beaumanoir advocated the capture of unwritten custom for posterity and later in the text despaired of the ever-changing, chaotic variety of regional custom. The same despair is found in the early work of Sir Edward Coke, as he tried to formulate a documented English common law approach to custom: “Should I go about with a catalogue of several customs, I should with Sysiphus ... undertake an endless piece of work.”<sup>49</sup> In Beaumanoir’s view, law deemed “good” today should be captured and unchanged, i.e. “good” for all time. Renaissance legal history had not yet fully emerged to add a more sophisticated historical perspective. Thus, at the same time as Beaumanoir supported preserving customary law for future use,

46 René Filhol, *La preuve: Moyen âge et temps modernes: Recueils de la Société Jean Bodin pour l’histoire comparative des institutions* 17 (Bruxelles: Éditions de la Librairie Encyclopédique, 1965), 358–61. There was a division in medieval France between the *pays de coutume* (regions following customary law) and the *pays de droit écrit* (regions following written law). My paper is concerned only with the *pays de coutume*, located in regions of northern France. The *pays de droit écrit* drew northern limits in the district surrounding Bordeaux, and passed along the northern border of Périgord and Limousin, then north of Lyons, ending on the east in the region of Geneva. Roman law continued in this area serving the purpose of local customary law. Having reference to private law, codifications were not common.

47 See, for example, Philippe de Beaumanoir, *Coutumes de Beauvaisis: Livre de justice et de plet* (Paris: Alphonse Picard et Fils, 1899); and Jacques d’Ableiges and Édouard Laboulaye, *Le grand coutumier de France* (Paris: A. Durand et Pedone Lauriel, 1868).

48 Translated by the author from Beaumanoir, *Coutumes de Beauvaisis*, 4. See also Dominique Gaurier, “La rédaction des normes juridiques, source de la métamorphose du droit? Quelques repères historiques pour une réflexion contemporaine,” *Revue générale de droit* 31, no. 1 (2001): 12.

49 Sir Edward Coke, *The Complete Copy-holder, Being Learned Discourse of the Antiquity and Nature of Manors and Copy-holds...* (London: John Streater et al., 1641), cited in E.P. Thompson, “Custom, Law, and Common Right,” in *Customs in Common*, ed. E.P. Thompson (London: Penguin, 1993), 137. For similar struggles in an English context, see M.T. Clanchy, *From Memory to Written Record: 1066–1307* (West Sussex, UK: Wiley-Blackwell, 2013).

he also advocated researching the origins and influences of particular customs to resolve current disputes. This meant, contrary to his advice to maintain laws “without change,” Beaumanoir also tried to recognize an evolving, contextual sense of precedent. Placing laws in their local context, he tried incorporating Roman and canon law’s influence in an effort to untangle the ambiguous ambience of evolving local custom.<sup>50</sup> Conspicuously absent in Beaumanoir’s work is the requirement to combine and edit law for the assimilating authority of a national agenda. Nevertheless, Beaumanoir summarized the early legal requirement to capture and henceforth organize (i.e. rationalize) local custom for legal purpose.<sup>51</sup>

In addition to the general work of the *coutumiers*, offices of national authority – ecclesiastical, royal, and commercial – increasingly challenged local jurisdictions. Judges were left to prove custom in private dispute. As custom remained the “law of the land,” it was incumbent on judges to resolve disputes through appropriate customary law. They recognized that customary law was characterized by three qualities: generality, antiquity, and consistency. Generality meant that the custom must be observed by a large portion of the population in a region. As for antiquity, there was considerable dispute. Trained in classical Roman jurisprudence, some *coutumiers* argued for the Roman law’s prescription of ten years, but the most common argument referred to a canon law characterization of forty years. With regard to consistency, the custom must be irrefutable, i.e. the certitude unqualified. In this manner, another distinction was made between two subcategories of consistency: private custom and customs “*notoires*,” the latter indicating those laws commonly known and incontestable. Finally, on this narrow legal terrain of determining contested private custom, the legal process *enquête par turbe* was applied.<sup>52</sup>

The origins of the *enquête* are not exclusively found in the expansion of royal legal authority into the regions of customary law in northern France. There are examples of this process in medieval Carolingian law.<sup>53</sup> L. Waelkens

50 Gaurier, “La rédaction des normes juridiques,” 10–15.

51 As part of the royal sanction, Tessier tells us that at this time royal seals were adopted to complete the official recognition of oral transcriptions; see Georges Tessier, *La diplomatie* (Paris: Presses Universitaires de France, 1966), 122.

52 Pierre-Clément Timbal, “Coutume et jurisprudence en France au moyen âge,” in *La coutume: Recueils de la Société Jean Bodin pour l’histoire comparative des institutions* 52 (Bruxelles: De Boeck Université, 1989), 227–30. See also Jean-Francois Poudret, “Rapport de synthèse: Connaissance et preuve de la coutume en Europe occidentale au moyen âge et à l’époque moderne,” in *La coutume* 52, 511–13. According to Gerald Postema, such division of meaning is a classic normative legal approach to customary law; see Gerald Postema, “Custom, Normative Practice, and the Law,” *Duke Law Journal* 62, no. 3 (2012): 712.

53 John Gilissen, “La coutume: Essai de synthèse générale,” in *La coutume: Recueils de la Société Jean Bodin pour l’histoire comparative des institutions* 54 (Bruxelles: De Boeck Université, 1989), 460–61.

argues that its origins remain “bathed in mystery and myth.”<sup>54</sup> This is in part because modern interpretations are as wrought with political agenda as the original process.<sup>55</sup> But as centrist government authority expanded into regional law, the work of codification and the rationalization of custom became unavoidable. In the *enquête*, it was generally believed custom was, in the words of a fourteenth-century French lawyer, “proved by a meeting of ten men worthy of faith.” Across northern Europe, medieval customary law acknowledged that only the first-hand testimony of community representation could supply the rational proof of custom.<sup>56</sup> The *Ordonnance de la Chandeleur*, dated 1270, expanded on this concept. It was the first text sent from the French royal court to incorporate the word “*turba*.”<sup>57</sup> The royal bill contains several notable features. First, it describes a written procedure, a radical development for the time. Second, it does not mention unanimity in the consulted collective testimony.

Several wise men, in good repute, are to be called. Once they are called, the custom is to be proposed to them by the mouth of one of their number. The custom having been proposed, they are to declare and honestly transmit what they know and believe and have seen to be the practice with regard to the custom in question. Upon the swearing of an oath, they are to stand off to the side, deliberate, and communicate their deliberations, saying among which persons they have seen the custom practiced, who performed it in what case and in what place, if it has been the subject of judgment and what the circumstances were, and all of this is to be reduced to writing and sent to the court under the seals of the inquisitors, and they are also to be separately interrogated on what they have said.<sup>58</sup>

This *Ordonnance de Saint Louis* captures the opinion and strategy of the royal court. Incorporating important local representation embeds community leadership in the process. The royal court was conceding its weakness by allowing local representatives the freedom to “stand off” and independently “deliberate.” Nevertheless, the *turbe* represented “the people’s will,” for the French court exploited the popular contemporary maxim *decem faciunt populum*

54 L. Waelkens, “L’origine de l’enquête par turbe,” *Tijdschrift voor Rechtsgeschiedenis/Legal History Review* 53 (1985): 337.

55 *Ibid.*, 338.

56 Gilissen, “La coutume,” 461.

57 *Turba* is the Latin origin of the term “crowd.” The ordinance is commonly known as the *Ordonnance de Saint Louis* in reference to the contemporary king, Louis IX.

58 James Q. Whitman, “Why Did the Revolutionary Lawyers Confuse Custom and Reason?” *Faculty Scholarship Series*, Paper 657 (1991): 1334. For a copy of the text in Latin, see Ministère d’État - Archives de l’Empire, *Inventaires et documents publiés par ordre de l’empereur: Actes du Parlement de Paris*, 1<sup>re</sup> série (de l’an 1254 à l’an 1328), tome 1 (1254-1299), ed. E. Boutaric (Paris: Henri Plon, 1863), 242, para. 2547B. For further commentary on the *Acte*, see Gilissen, *La coutume*, 66.

– “ten makes the people.” In effect, French royal authorities could argue that they were recording and representing – and ultimately assimilating – contemporary, local legal jurisdiction.

But in spite of the public drama and ritual, the effort to encapsulate unwritten local customary law was as elusive in late-medieval France as has been in contemporary Aboriginal Canada. James Whitman makes this association clearly, if unintentionally, even using language commonly found in Aboriginal jurisprudence:

Customary dispute resolution took place in local gatherings, presided over by elders and leaders who sought to foster local consensus. By contrast, governmental courts were presided over by jurists without local ties, ignorant of local practices. Such men could not adjudicate in the way local leaders did, by assembling the populace and engineering consensus through suasion and authority. Lacking local ties, these jurists inevitably had to rely more on awe and less on authority than did local elders and leaders. And without the entire community before them, they could not supervise consensus formation. They could only do what learned lawyers are trained to do: apply some defined rule to the particular parties before them.<sup>59</sup>

In the *enquête par turbe*, Renaissance French jurists offer us an important example of Western law trying to apply textual parameters of legal reason around distributed local cultures built on complex interrelationships of land, verbal testimony, and unwritten culture and heritage. As the great social historian E.P. Thompson writes, “At the interface between law and agrarian practice we find custom. Custom itself is the interface, since it may be considered both as praxis and as law.”<sup>60</sup> What in fact was accomplished in many of the *enquêtes* was conflict resolution. With an emphasis on reconciliation, “local gatherings for law-making involved not agreeing upon ‘the rule’ but agreeing upon a peaceful solution.”<sup>61</sup> As living custom, there was room for considerable flexibility and adaptation in the process of authentication. Finally, Whitman notes, royal courts often overrode customary rulings, and there could never be enough recorded *enquêtes* for the manifold conflicts in private law. These legal vacuums were often filled with Roman and canon law, the primary reference for classically trained *coutumiers*, or completed through the royal court’s intervention.<sup>62</sup>

But if the assembled documents concerning the *enquête* are incomplete, one sees the birth, from the thirteenth and fourteenth centuries, of tendencies that are in opposition to the preceding centuries. We find a growing collection

59 Whitman, “Why Did the Revolutionary Lawyers Confuse Custom and Reason?,” 1332–33.

60 Thompson, “Custom, Law, and Common Right,” 97.

61 Whitman, “Why Did the Revolutionary Lawyers Confuse Custom and Reason?,” 1337.

62 Henri Lévy-Bruhl, “Le droit commun en France selon les coutumiers,” *Revue historique de droit française et étranger* 38, ser. 4 (1960): 412–13.



of documents claiming to represent the artificial and politically charged entity known increasingly in emerging European states: the “common custom of the realm.”<sup>63</sup> Through this statist, French court innovation, local authority has been appropriated. From here, jurists began to consult the written codes instead of customary sources. Caveats accepting unwritten custom emerged; courts recognized royal and urban legislation over testimonial custom, and “courts typically insisted that customs would only be respected if they were ‘reasonable.’”<sup>64</sup> This notion to appraise and selectively acquire and preserve for future reference essentially killed the evolution of customary law and created a repertoire of written resources to be shaped, preserved, and referenced for assimilating royal policy.

As the idea of documenting customary law gradually gained acceptance across regional France over the thirteenth and fourteenth centuries, expanding state apparatus began to provide legislation for the editing of recorded customary law. The most often cited and influential example of this is the *Ordonnance de Montil-lès-Tours* of 1454. Unprecedented for its comprehensive national scope, article 125 of this long bill established a procedure for “the official editing of custom.”<sup>65</sup> Part of Charles VII’s legislation to provide justice across the land, the three long paragraphs of article 125 offered to “simplify the various styles, usages and customs which are different according to the diversity of our Kingdom.” It proposed that “if the customs, usages and styles were written up, the trials would be briefer, the parties required to pay less, and the judgments would be clearer.”<sup>66</sup> As well as clarifying custom and expediting cost and procedure, written, redacted custom held a quality heretofore unacknowledged: “writing put to an end the variations and evolutions capable of affecting normative customary law.”<sup>67</sup> Customary law became an officially legislated, rationalized document open to the same archival control and exegesis that philologists applied to the *Justinian Code*.

The *Ordonnance de Montil-lès-Tours* did not immediately produce codification; the process continued for over a century. And this progression was not without resistance. “The 16th and 17th centuries were throughout western Europe a time of collision between the authority of kings and local ... privileges, liberties and constitutions.”<sup>68</sup> In response to statist authority, local feudal custom became located in a sacred, immemorial past; it became a bulwark

63 The phrase has been credited to Charles Dumoulin.

64 Whitman, “Why Did the Revolutionary Lawyers Confuse Custom and Reason?,” 1339.

65 Gaurier, “La rédaction des normes juridiques,” 16.

66 Translated by the author. For the complete text of article 125, see Gaurier, “La rédaction des normes juridiques,” 17–18.

67 *Ibid.*, 19.

68 J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1987), 16.

against encroaching royal constitutionalism. The response to the usurping laws of human will was a romanticized custom without a definitive single provenance. "Since there was an increasing tendency to claim sovereignty in the full sense for the king, it was natural that those who sought to defend threatened privileges or liberties should emphasize in return that their rights were rooted in a law which no king could invade."<sup>69</sup> A common expression of the period summarized the perspective of regional French communities experiencing the enfolding program of juridical constitutionalism, and the loss of their cultural authority: "Lord, save us from the *et cetera* of the notary."<sup>70</sup> By the end of the seventeenth century, such adages were the remaining resistance to the cultural assimilation of national, western European constitutions. Citing expense, ineffectiveness, unresolved "diversity of opinion," danger due to "intrigue," and local manipulation of the process, the state-sponsored *enquête par turbe* was officially abolished by the *Ordonnance de 1667* in the *parlement de Flandre*.<sup>71</sup>

The idea of a national common customary law expressing the will of the people was the ideological concept required to encode unwritten, regional custom in text. As national constitutional movements expanded across sixteenth-century Europe, such expansion incorporated culturally diverse societies into a single "common customary law." However, along with an interpretive concept, juridical authority required a process. Classical Roman legislative procedure, taught in western European law schools, regulated the process.<sup>72</sup> "Roman law ... laid stress upon the concepts of will, command and the legislator, and tended therefore to encourage the already existing idea that each institution had originated at a particular time in the will of a particular individual who had established it in substantially its present form."<sup>73</sup> By this procedural model, customs could be reduced to the point of a juridical fact, an expression of will intended to have legal consequences within a comprehensive constitutionalism.

This notion of a juridical act highlights two critical threads in the codification of French custom, one procedural and the other philosophical. On a procedural level, French jurists modelled their process to incorporate customary law into Roman legislative process. It was summarized by a pithy comment of jurist Charles Dumoulin, the best-known advocate of national

69 Ibid.

70 See "Dieu nous garde d'un et cætera de notaire," in *Locutions latines et adages du droit français contemporain*, 216, cited in Kelley, "Lord Deliver Us from Justice," 160.

71 M. Merlin, *Répertoire universel et raisonné de jurisprudence*, 5<sup>e</sup> édit. Tome Sixième (Bruxelles: H. Tarlier, Libraire-éditeur, 1826).

72 Luciana Duranti, "The Odyssey of Records Managers," in *Canadian Archival Studies and the Rediscovery of Provenance*, ed. Tom Nesmith (Metuchen, NJ, and London: Society of American Archivists and Association of Canadian Archivists, 1993), 29–60.

73 Pocock, *The Ancient Constitution and the Feudal Law*, 18–19.

codification and editor of the *Coutumes de Paris*: “Our customary laws are so different and so confused that it is very difficult to extract from them a general and certain answer. Accordingly, the law must be married with the practice, usage with reason.” Reason in law was expressed in legislation. Dumoulin argued forcefully for legislation to encode customary law. His introduction to the redacted codes of Paris expresses his confidence in legislated reason:

The text of these customs ... [has] been rendered the most accurate possible. They are useful to reference the original custom, and should be deposited in registers, either in the Parliament of Paris, or in courts and administrative offices of the kingdom. They can even be conserved in specialized libraries and cabinets ... they can be referred to in innumerable [circumstances] to reconstruct the verbal process.<sup>74</sup>

Proof of custom became legislated proof of a juridical act secured in “specialized libraries and cabinets” (i.e. public archives). This concept was defined in the contemporary study of diplomatics and became the classical archival definition:

In a society governed in all its aspects by law (be it natural, customary, common or statutory), any fact represented in an archival document is related or referable to law, and is defined as being either juridically relevant or juridically irrelevant... a *juridical* fact is an event, whether intentionally or unintentionally produced, whose results are taken into consideration by the juridical system in which it takes place.<sup>75</sup>

A juridically relevant act was accorded weight by approval in the community where it occurred. State sovereignty shifted the parameters of judicial sanction. This is when the legal bond between the modern concept of custom, the “unwritten law,” and justice began, i.e. when custom became a matter of legal convention and judicial determination.<sup>76</sup> The procedural accomplishment was to create juridical fact by an artificial, legislated consultation of a romanticized concept of “the people.”

The second critical thread of French codification is philosophical: humanism’s development of legal history. Best represented by jurists Francois Baudouin and Jean Bodin’s work, humanist legal history brought important heuristic principles to reading and understanding history.<sup>77</sup> While their focus

74 Translated by the author from Charles A. Bourdot de Richebourg, ed., *Nouveau coutumier général, ou corps des coutumes générales et particulières de France, et des provinces connues sous le nom des Gaules* ... Tome I (Paris: Michel Brunet, 1824), 1.

75 Duranti, “Diplomatics, Part 1,” 16.

76 Kelley, “Lord Deliver Us from Justice,” 176–78. See also Francois Hotman, *Francogallia*, Latin text Ralph E. Giesey, trans. J.H.M. Salmon (Cambridge: Cambridge University Press, 1972), 59–61.

77 See Baudouin’s principal work, *De institutione historiae universae et ejus cum jurisprudentia conjunctione prolegomenon libri II* (Paris, 1561). See also MacNeil, *Trusting Records*.

was public records, they influenced historiography through the idea of a universal history. From the study of Roman law, they proposed the concept of law within an evolving cultural context:

A sense of the particularity, mutability, relativity and contingency of events – came about through the conjunction of humanist learning and jurisprudence on the theory of law. Renaissance legal thought discovered growth, change and decay in the lives of states and civil societies, from which it concluded that it is necessary to understand history of human achievements.... As generations of commentators on the inherited Roman law struggled with the contrast between the ideal form of that law and the variety of legal practices and customs in Europe, so they became conscious of the different histories of states and peoples. Jurisprudence laid the basis for comparative history [i.e. universal] and suggested that the development of states is related to circumstances.<sup>78</sup>

In addition to this sophisticated view of historical evolution, Bodin and Baudouin supplied models to critique the sources of history. French jurist Jean Bodin outlined his approach: “Such is the multiplicity and disorder of human activities, such the abundant supply of histories, that unless the actions and affairs of men are confined to certain definite types, historical works obviously cannot be understood.”<sup>79</sup> Bodin was known for developing standards to assess the reliability of sources, whereas Baudouin formulated methods for analyzing the authenticity of sources.<sup>80</sup> In tandem, the two scholars set standards for the utility and understanding of primary and secondary sources. The newer and more recent a narration of the past, the more mendacious it usually becomes.

78 Roger Smith, *The Fontana History of the Human Sciences* (London: Fontana Press, 1997), 80. Franz Boas humanized this contextual idea of culture in his studies of the Kwakwaka'wakw; see Boas, *Race, Language and Culture* and *Kwakiutl Ethnography*.

79 Bodin, *Method for the Easy Comprehension of History*, 28. See also chap. 3–5.

80 These are generally recognized as the origins of the modern definitions of reliability and authenticity in archival convention. In traditional archival practice, a reliable record is true to the facts it attests to. This value is encapsulated in its form and procedures of creation. As Luciana Duranti states, “A record is regarded as reliable when its form is complete, that is, when it possesses all the elements that are required by the socio-juridical system in which the record is created for it to be able to generate consequences recognized by the system itself. A record is authentic when it is the document that it claims to be”; see Duranti, “Reliability and Authenticity: The Concepts and Their Implications,” *Archivaria* 39 (Spring 1995): 6–7. For the idea that the archival quality of authenticity is a social construction, thereby opening the possibility to attenuate its traditional interpretive archival model, see Heather Marie MacNeil and Bonnie Mak, “Constructions of Authenticity,” *Library Trends* 56, no. 1 (Summer 2007): 26–52; Chris Duncan, “Authenticity or Bust,” *Archivaria* 68 (Fall 2009): 97–118; and Bonnie Mak, “On the Uses of Authenticity,” *Archivaria* 73 (Spring 2012): 1–17. Both of these concepts of reliability and authenticity are applied rather loosely in Canadian court decisions on Aboriginal rights and title. See, for example, *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256, 2014 SCC 44 and *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33.

For as wine grows weaker the more it is diluted, and at last becomes devoid of taste, as a rumour, the long it progresses, recedes even further from the truth and constantly increases in its falsity, so a 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.<sup>81</sup>

While a principal criterion of Baudouin’s approach is the source’s proximity in time and space to the reported event, he does not distinguish “between original narrative relations, in which events are consciously interpreted, and documentary records or ‘remains,’ in which transactions are more likely to be noted unreflectively, and hence often more reliably.”<sup>82</sup> It is not difficult to see how Baudouin’s influence mitigates the probative value of generational oral histories from a variety of distributed sources critiqued in contemporary Canadian Aboriginal jurisprudence.

The French Renaissance efforts to codify local indigenous custom are useful case studies for Aboriginal jurisprudence for three reasons. First, the late-medieval legal process to acquire unwritten custom, the *enquête par turbe*, demonstrates strategies and rationalizations similar to the contemporary methods of Aboriginal jurisprudence; second, contemporaneous to codification, French Renaissance jurists conceptualized and legislated principles of documentary authenticity and reliability. These concepts continue to structure the legal criticism restricting the probative weight of customary Aboriginal evidence in Canadian courts. Finally, the methods to assert state juridical authority in Renaissance France are echoed in the first-contact manoeuvres to create a sovereign colonial juridical landscape of power and authority in nineteenth-century Canada, where First Nations were forced to articulate their rights and title. The French codifications of customary law were early examples of state civil law documents written and set aside for reference in an archival fashion, accessioned and preserved as trustworthy evidence of local custom. In this unappreciated relationship between legal and archival value, this challenge to appraise and preserve for future reference, customary law continues to defy modern archives in their relationship with First Nations’ cultural heritage. The fundamental archival endeavour, the memorialization of enduring societal values, remains to be thoroughly considered in the context of local, indigenous custom.

81 Franklin, *Jean Bodin and the Sixteenth-Century Revolution*, 133. See also MacNeil, *Trusting Records*, 1–31.

82 Franklin, *Jean Bodin and the Sixteenth-Century Revolution*, cited in MacNeil, *Trusting Records*, 15.

## Canadian Aboriginal Jurisprudence

Colonial public archives accessioned small volumes of evidence of Aboriginal societies. In this same period, colonial jurisprudence established settler sovereignty through the creation of physical and legal spaces within which colonial settlement could operate.<sup>83</sup> Evidence of local indigenous cultures and traditions, when recorded, was filtered through the interpretive legal parameters of this colonial legal process. Our archival landscapes of memory reflect our landscapes of colonial settlement.

Colonial settler states in the nineteenth century required clear uniform jurisdictions – legal spaces with well-defined, documented rights:

The modernist positivization of common law was influential in this coalescence of state authority. Legal positivism highlighted precisely documented instruments such as statutes, charters, and land surveys – modernist devices designed to detail in precise legal terms the nature of colonial sovereignty. Local custom and tradition, when acknowledged, was strictly codified and legislated within the parameters of “bounded, internally uniform” nation states.<sup>84</sup>

When confronted with indigenous local custom, colonial law was not prepared to recognize its legal value within Canadian common law. Following the European Romantic movement’s celebration of folklore and custom, modernism’s nineteenth-century positivization of law and the social sciences returned custom to a legislated fact, where Renaissance French *coutumiers* and Roman legislative procedure had placed it.

In the nineteenth century the idea of custom, though for a time central to the new sciences of society, especially anthropology and sociology, [became] marginal in modern legal traditions. Jacobins, Bonapartists, Utilitarians, and Austinians all looked to legislation as the true science of law and society and even in the historical and sociological schools of law, “custom” was a matter of legal convention or judicial determination.<sup>85</sup>

83 For the idea of the collective social process of memory and its relationship to communal space, see David A. Rossiter, “Lessons in Possession: Colonial Resource Geographies in Practice on Vancouver Island, 1859–1865,” *Journal of Historical Geography* 33 (2007): 770–90; Harris, *Making Native Space*; Cole Harris, “How Did Colonialism Dispossess? Comments from an Edge of Empire,” *Annals of the Association of American Geographers* 94, no. 1 (2004): 165–82; Cole Harris, *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change* (Vancouver: University of British Columbia Press, 1997); Borrows, “Sovereignty’s Alchemy”; Kenneth Brealey, “Travels from Point Ellice: Peter O’Reilly and the Indian Reserve System in British Columbia,” *BC Studies*, no. 115/116 (Autumn/Winter 1997/98): 181–236.

84 Frogner, “Innocent Legal Fictions,” 47.

85 Kelley, “Lord Deliver Us from Justice,” 168.

Under the influence of the nineteenth-century legal positivism of John Austin, custom had fallen altogether beyond probative legal significance.

At its origin, a custom is a rule of contact which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. Before it is adopted by the courts and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress it.<sup>86</sup>

Like the French *coutumiers*, colonial Canadian jurisprudence reduced Aboriginal cultural identity to a legal *et cetera*, placed in archival preservation for future state reference.

In 1973, the BC Supreme Court’s decision in *Calder et al. v. Attorney-General of British Columbia* rejected this notion of state-determined proof of Aboriginal rights and sent jurists in search of pre-contact, self-defined evidence of Aboriginal custom.<sup>87</sup> For this reason, this case is often considered to be the introduction to a post-modern period in Aboriginal jurisprudence. *Calder* established the notion that the probative legal roots of Aboriginal rights and title are located in the customs and indigenous legal practices of local community, not enshrined in statutes, imperial legal texts, or colonial judicial decisions. As Justice Emmett M. Hall wrote in the *Calder* decision, “What emerges from the evidence is that the Nishgas [contemporary spelling] in fact are and were from time immemorial a distinctive cultural entity with concepts of ownership indigenous to their culture and capable of articulation under the common law.”<sup>88</sup>

*Calder* began an imperative for legal scholarship and the judiciary to interpret the meaning of evidence of local indigenous culture. It inspired section 35 (1) of the Canadian *Constitution Act*, which enshrined the rights and title of First Nations. If our search for an inclusive and socially relevant perspective for archival appraisal is grounded in public policy, then section 35 is a cornerstone.<sup>89</sup>

86 John Austin, *The Province of Jurisprudence Determined*, ed. H.L.A. Hart (originally publ. 1832; repr. New York: Noonday Press, 1954), 31.

87 *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313, [1973] W.W.R. 1.

88 *Ibid.*

89 Section 35 (1) is intended to recognize Aboriginal peoples as citizens with unique rights within the constitutional fold. The section reads, “The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.” *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, sect. 35 (1).

This is also the point where legal appraisal of evidence of unwritten Aboriginal tradition differs from archival appraisal. Unlike archival practice, constitutional imperative drives the legal discipline to examine the significance of Aboriginal evidence.<sup>90</sup> The constitution acknowledges Aboriginal rights and title but it does not provide a definition of what they are or how they are proved. This has been left to judicial decisions. Since 1982, a raft of legal cases and academic work have studied the implications of using local indigenous cultural evidence for proof of rights and title. One of the most significant developments in Canadian common law concerning Aboriginal evidence is the Supreme Court's conceptualization of evidence of Aboriginal rights and title as "*sui generis*." It has become accepted in Canadian common law that decisions concerning the probative value of unwritten evidence of Aboriginal tradition and culture must be done in recognition of the evidence's uniqueness.<sup>91</sup> *Sui generis* means "of its own kind or class"; it suggests difference.<sup>92</sup> The characterization poses countless interpretive questions, but for all its vagueness it moves the interpretation in a proper direction by recognizing unique Aboriginal legal jurisdictions. Aboriginal societies organized through discrete legal traditions that predated colonial contact; these traditions are proven through the customary protocols and social sanction of local indigenous culture. Such perspective acknowledges that there is a universe of traditional indigenous legal orders interacting through their own gravitational pull, rather than Aboriginal traditions simply orbiting the sun of common law proclamations and regulations.<sup>93</sup> But in spite of the legal overtures to recognizing oral histories and traditions for proof of legal rights, there is still a sense, in Chief Justice Beverley McLachlin's words, that "the rights protected under Section 35 [may] be rendered illusory by imposing an impossible burden of proof."<sup>94</sup>

90 To date, the archival literature on the appraisal of records of First Nations societies has been significant but sparse. See Shauna McRanor, "Maintaining the Reliability of Aboriginal Oral Records and Their Material Manifestations: Implications for Archival Practice," *Archivaria* 43 (Spring 1997): 64–88; Mary Ann Pylypchuk, "The Value of Aboriginal Records as Legal Evidence in Canada: An Examination of Sources," *Archivaria* 32 (Summer 1991): 51–77; Mary Ann Pylypchuk, "A Documentary Approach to Aboriginal Archives," *Archivaria* 33 (Winter 1991–92): 117–24.

91 *Guerin v. The Queen*, [1984] 2 S.C.R. 335. See, for example, John Borrows and L.I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?" *Alberta Law Review* 36, no. 1 (1997): 12. See also *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177 (SCC), at para. 49.

92 Bryan A. Garner, ed., *Black's Law Dictionary: Standard Ninth Edition* (St. Paul, MN: West Group, 2009), 672.

93 The argument of the Crown in the path-breaking *Calder* case referenced colonial legislation and proclamations regarding land registration and legal title as evidence that Aboriginal rights and legal regimes were extinguished in the colonial era. See the Royal BC Museum draft document "Archival Records for Aboriginal Rights and Title Cases," Royal BC Museum, accessed 30 December 2014, <http://bit.ly/lhvULBF>.

94 *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 27.



It was not until seventeen years after the *Constitution Act* acknowledged Aboriginal rights that former Chief Justice Antonio Lamer formally identified the indispensable legal value of oral history as a unique form of Aboriginal evidence.

In practical terms, this [recognition of indigenous rights] requires the courts to come to terms with the oral histories of Aboriginal societies, which, for many Aboriginal nations, are the only record of their past. Given that the Aboriginal rights recognized and affirmed by s. 35 (1) are defined by pre-contact practices or, in the case of title, pre-sovereignty occupation, those histories play a crucial role in the litigation of Aboriginal rights.<sup>95</sup>

Legal proof of Aboriginal rights occurs within the Canadian common law system. Canadian common law rules of evidence are fashioned to support the integrity of Canadian court decisions. To this end, it evolved a strict separation of issues concerning law, characterized as the admissibility of evidence, and questions of fact, characterized as weight of evidence.<sup>96</sup> Since the 1997 *Delgamuukw* decision advised that “independent weight” should be accorded oral histories in proof of Aboriginal rights and title, there has been a protracted legal debate over how to recognize Aboriginal oral histories in court. Aboriginal oral testimony is admitted under an exception to the hearsay rule in common law rules of evidence.<sup>97</sup> For admission, courts have considered the reliability and authenticity of non-textual testimony. Although a long list of cases on Aboriginal jurisprudence have addressed the issues of authenticity and reliability of Aboriginal oral testimony, none of the reasons for decision directly reference the considerable archival literature on these questions.<sup>98</sup> Further, to date no court has established an admissibility threshold

95 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 84. For a critical look at *Delgamuukw*, see Val Napoleon, “*Delgamuukw*: A Legal Straightjacket for Oral Histories?” *Canadian Journal of Law and Society* 20, no. 2 (2005): 123–55.

96 MacNeil, *Trusting Records*, 32.

97 McCormick defines hearsay evidence as “testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.” See Charles T. McCormick, *Handbook of the Law of Evidence*, 2nd ed., ed. Edward W. Cleary (St. Paul, MN: West Publishing, 1972), 584, cited in MacNeil, *Trusting Records*, 37.

98 In his article “What My Elders Taught Me: Oral Traditions as Evidence in Aboriginal Litigation,” in *Beyond the Nass Valley* (Vancouver: Fraser Institute, 2000), serial expert witness for the Crown in Aboriginal trials, Alexander von Gernet, makes passing reference to McRanor, “Maintaining the Reliability of Aboriginal Oral Records and Their Material Manifestations.” For archival studies of authenticity and reliability, see MacNeil and Mak, “Constructions of Authenticity”; Duranti, “Reliability and Authenticity,” 7–8; Heather MacNeil, “Trusting Records in a Postmodern World,” *Archivaria* 51 (Spring 2001): 36–47; Armando Petrucci, *Writers and Readers in Medieval Italy: Studies in the History of Written Culture*, ed. and trans. Charles M. Radding (New Haven, CT: Yale University Press, 1995),

for Aboriginal oral testimony. The *Van der Peet* decision expressed the two basic tenets underlining the admissibility of oral history: first, “trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims”; and second, “Aboriginal evidence must not be undervalued just because it does not strictly conform to the rules of evidence.”<sup>99</sup> Recent Supreme Court decisions have begun to limit the 1997 *Delgamuukw* recommendation to use indigenous oral testimony with weight. Having recognized in *Calder* that Aboriginal rights existed in Canadian common law, more than thirty years later the court is still debating the means to admit with legal weight oral testimony as legal evidence of Aboriginal culture and identity.

In 2001, the decision of the Supreme Court of Canada in *Mitchell v. M.N.R.* repeated the ground-breaking *Delgamuukw* verdict. The ruling stated that “oral histories should be admitted as evidence where they are useful, reasonably reliable, and not subject to exclusion for undue prejudice.”<sup>100</sup> In *Mitchell*, the Supreme Court added a caution by elaborating on the concept of reliability: “The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness’s ability to know and testify to orally transmit Aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.”<sup>101</sup> *Mitchell* elaborated a test for the elements of proof of Aboriginal rights, which built on *Van der Peet*:

The test to establish an Aboriginal right focuses on the integral, defining features of the relevant Aboriginal society before the Crown’s assertion of sovereignty. A claimant must prove that a modern practice, custom or tradition has a reasonable degree of continuity with a practice, tradition or custom that was in existence prior to contact with the Europeans. The practice, tradition or custom must have been integral to the distinctive culture of the Aboriginal people in the sense that it distinguished or characterized their traditional culture and lay at the core of the Aboriginal people’s identity.<sup>102</sup>

---

esp. chap. 10, “The Illusion of Authentic History: Documentary Evidence,” 236–50; Richard Pearce-Moses, *A Glossary of Archival and Records Terminology* (Chicago: Society of American Archivists), accessed 7 April 2014, <http://www.archivists.org/glossary/>; Duncan, “Authenticity or Bust,” 97–118.

99 *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 68. The *R. v. Van der Peet* decision attempted to decide from “first principles” and jettison the ethnocentric *stare decisis* of colonial judicial work. See Barsh and Henderson, “The Supreme Court’s *Van der Peet* Trilogy,” 993–1109.

100 *Mitchell v. M.N.R.*, 2001 SCC 33, at para. 12.

101 *Mitchell v. M.N.R.*, at para. 33. For commentary on the restrictive caution *Mitchell* placed on recognizing oral histories in court, see Napoleon, “*Delgamuukw*: A Legal Straightjacket for Oral Histories?”

102 *Ibid.*, 3.

Ruling in *R. v. Williams*, Judge Vickers reiterated *Mitchell*'s caution and brought the issue into the landscape of national sovereignty. He noted that Aboriginal oral testimony should not be treated differently from other forms of hearsay evidence, but it must be done in light of the goal of “the promise of reconciliation embodied in section 35 (1).” Vickers sketched out some preliminary determining factors a court would consider for admissibility:

1. How their oral history, stories, legends, customs, and traditions are preserved;
2. Who is entitled to relate such things and whether there is a hierarchy in that regard;
3. The community practice with respect to safeguarding the integrity of its oral history, stories, legends, and traditions.
4. Who will be called at trial to relate such evidence, and the reason they are being called to testify.<sup>103</sup>

As Vickers added, “where there were no witnesses alive and the evidence was relevant, the test for necessity had been met.”<sup>104</sup> To an archivist, these points read very much like a search to determine a record's authenticity, proof that “a record is what it claims to be.”<sup>105</sup> It focuses on use and access over time: “The authenticity of a record, or rather the recognition that it has not been subject to manipulation, forgery, or substitution, entails guarantees of the maintenance of records across time and space (that is, their preservation and transmission) in terms of the provenance and integrity of records previously created.”<sup>106</sup> Writers in the archival discipline have begun to question whether a strict interpretation of authenticity is limiting the variety of influences that shape a record's meaning.<sup>107</sup> But without further expanding on the social construction of the concept of authenticity, Vickers turns to the concept of reliability, adding that defendants hold a right to interrogate the reliability of the oral history before it is admitted as evidence. Suggested questions include:

103 *R. v. Williams*, [2003] 2 S.C.R. 134, 2003 SCC 41. See also Stuart Rush, *Aboriginal Practice Points: Oral History* (Vancouver: Continuing Legal Education Society of British Columbia, April 2008), 11.

104 *Ibid.*

105 MacNeil, *Trusting Records*, xi.

106 Maria Guercio, “Principles, Methods, and Instruments for the Creation, Preservation, and Use of Archival Records in the Digital Environment,” *American Archivist* 64, no. 2 (Fall/Winter 2001): 238–69. See also Duranti, “Reliability and Authenticity,” 5–10.

107 Duncan, “Authenticity or Bust”; Mak, “On the Uses of Authenticity”; MacNeil and Mak, “Constructions of Authenticity.”

1. Is the particular evidence consistent with all of the evidence in the case when viewed in context?
2. Are there independent points of corroboration of the particular facts?
3. How, when, where, and why did the fact arise?
4. Can a reasonably logical inference be drawn from direct or indirect facts?
5. Is the witness or document relied upon (such as an expert or opinion report) disinterested and uncontradicted?<sup>108</sup>

But the reliability of records is something entirely different in archival studies: “A reliable record is one that is capable of standing for the facts to which it attests. Reliability thus refers to the truth-value of the record as a statement of facts and it is assessed in relation to the proximity of the observer and recorder to the facts recorded.”<sup>109</sup> Unlike authenticity, archival reliability focuses on the creation of the record in question. Broadly speaking, the question of legal admissibility seems to be similar to the archival question of authenticity, whereas legal weight approximates archival reliability. Even a passing comment on the social construction of these principles in an evidence-related discipline such as archival studies would add focus and context to legal decisions. Finally, based on the Supreme Court decisions in *Mitchell* and *Williams*, Stuart Rush, counsel for the plaintiff in the *Delgamuukw* case, suggests the following factors will inevitably be considered to prove legal weight:

- the age of the storyteller;
- the traditional knowledge of the persons who raised the storyteller;
- whether the storyteller has lived and experienced a traditional life;
- whether the storyteller speaks the indigenous language;
- the reputation of the storyteller in the community;
- the existence of a practice of repeating and correcting oral histories;
- the attributes of a witness to recount the oral history;
- the sources of the oral history and the general reputation of the source.<sup>110</sup>

These criteria clearly carry an obvious archival flavour. But it should be noted the archival perspective is premised on the need to safeguard over time

108 Rush, *Aboriginal Practice Points*, 11–12.

109 MacNeil, *Trusting Records*, xi.

110 Rush, *Aboriginal Practice Points*, 15. See also Stephanie P. Lysyk, “Evidentiary Issues – Oral Tradition Evidence,” *Aboriginal Practice Points* (Vancouver: Continuing Legal Education Society of British Columbia, October 2006); Peter W. Hutchins and Tanya Whiteside, “Mixed Messages, Double Standards, Eurocentrism and High Hurdles: Evidentiary Challenges in Aboriginal Litigation, Aboriginal Law: Litigation Issues” (Vancouver: Continuing Legal Education Society of British Columbia, October 2004).

the vital qualities of records holding enduring value. They might be helpful considerations for court, but they should be understood in the context of a court’s need for an immediate legal decision. Canadian Aboriginal jurisprudence is searching for paradigms to understand the authenticity and reliability of oral history. These concepts do not seem to be explicitly defined in significant decisions of Aboriginal jurisprudence.<sup>111</sup> Archival studies might add focus to this commentary; however, when the work of archival studies has been referenced in court, expert witnesses for the Crown have misapplied archival concepts and limited the legal weight of Aboriginal oral testimony.

The codification of Renaissance French customary law reminds us this has all been tried before. What has changed is the constitutional status of Native peoples and the essential requirement for Canadian juridical authority to reconcile the reality of Native rights and the evidence of their probative cultural practices. As a field of legal study, the Supreme Court decisions on indigenous rights and title, known collectively as Aboriginal jurisprudence, read as a kind of *bricolage*. From local history, anthropology, and archaeology to folklore, Native studies, and law – ideas on evidence and representation are filtered through a variety of disciplines in an attempt to create meaningful references to local indigenous cultures and identities. Many have argued that this jurisprudence is well intentioned, but the courtroom is the wrong public venue to reconcile Aboriginal rights within our constitution. Within this antagonistic forum, the Crown has turned to positivist models of evidence and sovereignty from colonial history to limit indigenous claims to distinct rights and title. Rather than adopting a collaborative, deep knowledge of the originating communities, the Crown has consistently relied on a single anthropologist, Alexander von Gernet, to pronounce on the reliability of Aboriginal history for a variety of cases involving distinct Native communities from coast to coast – an approach one anthropologist dubbed “drive-by anthropology.”<sup>112</sup> More troubling from an archival perspective, von Gernet has cited archival literature out of context to limit the weight of Aboriginal oral testimonies in court. He has referenced a UNESCO Records and Archives Management Program

111 The author has searched in several significant decisions to determine how these concepts were defined in court: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Van Peet*, [1996] 4 C.N.L.R. 177 (SCC); *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *R. v. Williams*, [2003], 2 S.C.R. 134, 2003 SCC 41; and *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313, [1973] 4 W.W.R. 1.

112 Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Vancouver: Talonbooks, 1998). Also limiting the local context of his testimony, von Gernet has relied heavily on Jan Vansina for his understanding of oral history and oral tradition. Vansina’s sources for his study were African communities; see Jan Vansina, *Oral Tradition as History* (Madison, WI: University of Wisconsin Press, 1984). See also Bruce Granville Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver: University of British Columbia Press, 2011).

(RAMP) study, “Archives, Oral History, and Oral Tradition,” to argue there is an arbitrary process of selection involved in the preservation of oral histories and traditions that takes them out of context and therefore limits their reliability. However, like all RAMP studies, this one was intended for archival work, “for archivists, curators, historical administrators and other information specialists, and the guidelines with which it concludes are based upon the experience of sound professional programmes.”<sup>113</sup>

It is the archival mission to safeguard records in a transparent manner, in their full context over time, in order for researchers to consult trustworthy evidence; if the archivist is to apply taxonomies of value in the selection process, s/he does so in an accountable manner. Von Gernet misconstrues the archival mission when he cites Moss and Mazikana as a source to argue that oral histories and traditions are “selected” for preservation and therefore subjective and less reliable.<sup>114</sup> Although von Gernet cites the RAMP work extensively for his court reports on oral history and tradition, infallibly using it to argue that oral histories are less valuable historical sources, he avoids citing the caveat of archival appraisal that Moss and Mazikana make clear, an obvious caveat given that the authors titled the section “archival appraisal”:

The archivist must, however, appraise each oral history or oral tradition record on the merits of its contents as well as on provenance, *just as must be done with other kinds of records*. Standard application of archival judgment as to the intrinsic value of the material and to primary and secondary values, administrative and historical values, evidential and informational values, and enduring or permanent values of an item for future use all must be addressed for oral history and oral tradition materials just as for traditional written records.<sup>115</sup>

While courts have struggled with an understanding of how to interpret with weight the unwritten evidence of indigenous custom and tradition, legal theory has advanced. And like recent archival theory, the developments have focused on the more general contextual provenance of natural, normative inter-relationships of local community publicly observed and sanctioned over time. The inquiry into the legal status of an individual, discrete custom is not an empirical matter; rather, it is a collaborative, normative, public process within a larger context. As Gerald Postema states, “Because custom that is likely to be eligible for legal status is a public rule, the deliberation in which it is embedded

113 William W. Moss and Peter C. Mazikana, *Archives, Oral History, and Oral Tradition: A RAMP Study* (Paris: UNESCO, 1986), i.

114 Alexander von Gernet, *Sawridge Band v. The Queen*, Edmonton, T-66-86A, Alberta, Federal Court; and *Tsuu T’ina First Nation v. The Queen*, Edmonton, T-66-86, Alberta, Federal Court (evidence, Dr. von Gernet’s expert report); cited in Miller, *Oral History On Trial*, 132–133.

115 *Ibid.*, 48 (emphasis added).

is never a private matter, but rather involves deliberation as a common, public practice.”<sup>116</sup> Recorded interviews of representatives of local communities for trial reveal valuable insights into local culture and tradition. But we must not fall into the model of the *enquête par turbe*. As Postema warns, there is no canonical beginning to customary law.<sup>117</sup> Common usage sanctioned over time, commonly and publicly endorsed, does not carry a notarized documentation.

Contemporary legal theory cautions us about the futility of searching for static individual customary traditions timelessly “integral” and comprehensively defining for modern Aboriginal societies.<sup>118</sup> Similarly, international archival standards are beginning to focus on the broader, evolving, and inter-related functions and processes that provide contextual provenance to individual records.<sup>119</sup> Recent archival description models recommend a distinction between the information produced in activities and the carriers and genres that perpetuate that information. Once identified, the web of contextual relationships – creators, participants, locales, containers – can be established.<sup>120</sup> As archivists know, evidence is not a fact but a relationship matrix. And, one might add, nineteenth-century positivist models of evidentiary proof will produce nineteenth-century models of Aboriginal jurisprudence.<sup>121</sup>

Aboriginal jurisprudence encapsulates the historic moral agency of the Crown’s sovereign relationship with First Nations. Important Supreme Court decisions in Aboriginal jurisprudence describe the “nobility”<sup>122</sup> and “honour”<sup>123</sup> at the core of the Crown’s relationship with First Nations communities. If we are to apply a democratic appraisal model to preserve an inclusive and meaningful profile of the plurality of constituents shaping our historic and constitutional identity, the body of evidence accumulated for decisions of Aboriginal jurisprudence merits public archival preservation and access. This is not to

116 Postema, “Custom, Normative Practice, and Law,” 719.

117 *Ibid.*, 713. See also Lon Fuller, “Human Interaction and the Law,” *American Journal of Jurisprudence* 14 (1969): 1–36.

118 Barsh and Henderson, “The Supreme Court’s *Van der Peet* Trilogy.”

119 International Council of Archives, *ISDF: International Standard for Describing Functions* (Paris: International Council of Archives, 2011), accessed 28 January 2015, <http://www.ica.org/10208/standards/isdf-international-standard-for-describing-functions.html>. For a similar perspective concerning electronic records, see note 17.

120 Richard Dancy, “*RAD*: Past, Present, and Future,” *Archivaria* 74 (Fall 2012): 7–41.

121 In 1970, the BC Court of Appeal judgment of Justice Herbert William Davey referenced *In re Southern Rhodesia*, (1919) A.C. 210 (P.C.) [Southern Rhodesia] to argue that “the native culture of the Indians of the mainland of British Columbia” were “a very primitive people with few of the institutions of civilized society” and therefore were not sufficiently organized to claim any rights recognized by the Crown at the time of settlement. *Calder et al. v. British Columbia (Attorney General)* (1970), 74 W.W.R. 481, at para. 483 (BCCA), cited in Michael Asch, “Calder and the Representation of Indigenous Society in Canadian Jurisprudence,” in *Let Right Be Done*, 102.

122 *R. v. Côté*, [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385.

123 *R. v. Marshall*, [1999] 3 S.C.R. 456.

suggest that public archives must acquire all trial records concerning cases of indigenous rights and title. But decisions of judicial consequence should be appraised for preservation. Significantly, one should include the archival responsibility to make the records publicly available. The British Columbia central agency responsible for records management has correctly appraised the records of such cases and recommended their full retention “because of their significant historical, evidential and informational value.”<sup>124</sup> The records identified for preservation include “factums, transcripts and appeal books.” This is an appropriate and respectful treatment of records documenting the Crown’s evolving recognition of Aboriginal rights.

But for most of these significant cases of Aboriginal jurisprudence, such as the *Delgamuukw v. British Columbia* decision, the BC Archives currently holds only the published *Reasons for Judgment* of the Supreme Court of British Columbia.<sup>125</sup> Like many of these cases, the *Delgamuukw* trial produced an enormous volume of records. The majority remain in the Attorney General’s court registry, in semi-active off-site storage, until final archival disposition. The *Delgamuukw* trial records include 579 boxes sent off-site by the Aboriginal Research Centre in 2001. They contain 369 volumes of original trial transcripts and hundreds of boxes of exhibits, including video recordings.<sup>126</sup>

Although the records are properly appraised for their enduring value, the fundamental archival element – to describe and make them accessible – is not being served. Non-government repositories are beginning to acquire some of these exhibits and other relevant records of some of the most significant trials in the history of Canadian Aboriginal jurisprudence. *Delgamuukw* is one example of this trend. On 22 April 2014, the BC Attorney General’s office announced a consent order stating that “by agreement of all parties the original exhibits from the *Delgamuukw* trial, including the audio and video materials, will be housed and preserved in Rare Books and Special Collections of the UBC Library.”<sup>127</sup> The terms of the transfer noted:

124 Civil Court Services Operational Civil Case Files – Court of Appeal, Court Services Operational Records Classification System (ORCS), schedule 100152.

125 BC Archives, NW 346.71104 B862: In the Supreme Court of British Columbia, between *Delgamuukw*, also known as Ken Muldoe, suing on his own behalf and on behalf of all the members of the House of *Delgamuukw* and others, plaintiffs, and Her Majesty the Queen in right of the Province of British Columbia and the Attorney General of Canada, defendants; reasons for judgment of the honourable Chief Justice Allan McEachern; dates of trial, 374 days between May 11, 1987 and June 30, 1990.

126 Correspondence with Sarah Shea, archivist, Government Records Service, 6 November 2014. Mary McIntosh and Linda Nobrega from the Government Records Service and Christine Gergich, Supervisor and Appellate Court Records Officer, Superior Courts Judiciary, Court Services, British Columbia, also provided important comments.

127 Supreme Court of British Columbia, Smithers Registry, “Consent Order,” BC Appeal No. CA013770, file no. 0843/84, “Correspondence with Stuart Rush, Counsel for the Plaintiffs re:



- A. The collection is not to be divided;
- B. The collection is to be maintained in the Rare Books and Special Collections within the library, in a secure environment which complies with the Library’s preservation standards for rare book storage and access, and shall provide on-site access to all Parties upon request;
- C. [A series of access protocols recognizing the sacred value of some of the recorded testimony].<sup>128</sup>

Richard Overstall, research coordinator for the plaintiffs in *Delgamuukw*, recalled that for the video-recorded testimony of the Gitksan and Wet’suwet’en chiefs created for trial, “at least five copies were made of each tape, one for the court, one for the plaintiffs’ lawyers, one each for the BC and Federal legal teams, and one for the plaintiffs’ libraries.” Suggesting a First Nations’ need for archival sources, and a possible reason to liaise with UBC Special Collections, Overstall added, “I understand that the Wet’suwet’en library copies were subsequently destroyed in a building fire.”<sup>129</sup> The consent order refers to “original exhibits,” suggesting the original public records of the court are being sent to UBC, but this is perhaps imprecise. Nevertheless, the document does not mention the Royal BC Museum or the Public Archives of British Columbia. This agreement is made possible because rule 40 of the BC Supreme Court Rules (civil) states that the court registry “may return an exhibit to the party who tendered it [for trial].” The Supreme Court rules are explicit in upholding the rights of the holders of exhibits at trial. But the transfer still raises questions over the documentation of the relationship between the Crown and First Nations communities who argue their case for rights and title. There is a risk that the documentation and exhibits used in government court decisions are being subjectively stored across libraries and archival repositories in Canada. Removing the histories still further from their original sources endangers the records trustworthiness. As McRanor has noted, “A serious problem arises if tapes and transcripts of oral accounts are never situated within, or are removed from, [their] context and made into collections that purport to be aggregations of oral records. Quite simply, they are not what they purport to be, and they are, therefore, inauthentic.”<sup>130</sup>

---

*R. v. Delgamuukw*,” 7 April 2014. The parties identified include counsel for the plaintiffs at trial (*Delgamuukw*, ... members of the House of *Delgamuukw* and others), counsel for British Columbia, counsel for the Attorney General of Canada, and counsel for the University of British Columbia.

128 *Ibid.*, 1–2.

129 Correspondence with Richard Overstall, counsel for the plaintiffs, 21 June 2014. See also Antonia Mills, *Hang On to These Words: Johnny David’s Delgamuukw Testimony* (Toronto: University of Toronto Press, 2005).

130 McRanor, “Maintaining the Reliability of Aboriginal Oral Records and Their Material

Such distribution also questions the democratic role of the public archives, particularly if one considers the 1982 *Constitution Act's* recommendation of reconciliation with First Nations communities. Like the records of the Truth and Reconciliation Commission, publicly preserving for access in an inter-related manner the exhibits, testimony, and decisions of the considerable archival material produced through Aboriginal jurisprudence fits the basic appraisal goal of preserving significant public records of governance and social identity. Preserved in the provincial public archival repository, records of Aboriginal jurisprudence are given context by other records of the Ministry of the Attorney General and by other records of First Nations communities interacting with offices of the state, as well as by the general body of records documenting European settlement.<sup>131</sup>

Writing of the settler polity's relationship with New Zealand Aboriginal communities, P.G. McHugh nicely summarizes the legal and social responsibility as it relates to public archives and the record of the settler/colonial juridical program: "The Crown, ... was ... personified through its bureaucratic processes, particularly with regard to those guiding and attending its performance of its lawful obligations and duties. Ethical integrity required bureaucratic rigour and propriety as well as consistency and independence."<sup>132</sup>

In the words of the provincial Freedom of Information Commissioner, a fuller recognition of the government's democratic responsibilities to British Columbians to maintain its record keeping system is reaching a critical stage.<sup>133</sup> The consent order is one example of significant records of government dispersed or potentially lost, and made available through a variety of institutional policies and practices, rather than acquired, preserved, and made cohesively available in the public archives of the province. The cost, as the Information and Privacy Commissioner for British Columbia has recently noted, is the potential loss of "records of key actions and decisions of government."<sup>134</sup> Should there be any doubt as to the contemporary public value and historic weight of court records used in Aboriginal jurisprudence, one need only witness the timely and appropriate recognition that Premier Christy

---

Manifestations, 76–77.

131 The Archives of the Royal BC Museum is attempting to address this with a project to identify and reference related records used in significant decisions of Aboriginal jurisprudence. See the draft document "Archival Records for Aboriginal Rights and Title Cases," Royal BC Museum, <http://bit.ly/1hvULBF>.

132 P.G. McHugh, "Sir John Salmond and the Moral Agency of the State," *Victoria University Wellington Law Review* 38 (2007): 746.

133 Elizabeth Denham, "Special Report: A Failure to Archive – Recommendations to Modernize Government Records Management," Office of the Information and Privacy Commissioner for British Columbia, July 2014, accessed 26 January 2015, <https://www.oipc.bc.ca/report/special-reports/>.

134 *Ibid.*, 3.

Clark offered to the representatives of the Tsilhqot'in First Nation following the court's *Tsilhqot'in Nation v. British Columbia* decision in June 2014.<sup>135</sup>

After all that has been considered, I return to the troubling original question: how does one insert an ongoing indigeneity into archival practice and preserve a living document such as a customary oral testimony? If public archives are ever to produce a meaningful and representative depiction of contemporary social values, there must be a participatory appraisal, selection, and acquisition process in which the role of description is not the privileged domain of those who study its specialized semantics – a self-defined process to express the contingent, the particular, the local, and the inductive within the interpretive framework of local social sanction. And this sanction must be ongoing in the appraisal and conservation of remembrance. As West German archivist Hans Booms famously observes, “Only the society from which the material originated and for whose sake it is to be preserved can provide archivists with the necessary tools to assess the conceptions by which they bring the past into the present.”<sup>136</sup> Public archives will never acquire and preserve a meaningful and inclusive archives of records to embody the values and identities of society without fuller participation from the communities participating in our representative constitutional democracy. This is where the *enquête par turbe* collapsed. This explains why recognition of regional identity played an important role in the French Revolution. Since the revolution, “public” records of social identity have been caught in a state-purposed definition of the “people.” As a legislated public institution, archives have seen archival principles entangled in the politics of enfolding power and sovereignty. Ultimately, the best-case scenario is for First Nations communities to control their own representational evidence within their own social and administrative protocols; with cultures and traditions preserved, recognized, and appropriately represented, the related communities can participate more fully in relationships of governance at the constitutional table.

Can we save the records of Aboriginal identity from “an *et cetera* of the notary”? Records documenting Aboriginal identity have lived on the threshold of our colonial houses of memory for generations. In 1982, they found permanent lodging within the Canadian constitution, and Canadian common law has since debated their legal tenancy, their evidential value, in numerous decisions. Their archival residency has not been equally considered in public archives appraisal policies, and their admission into public archives and subsequent

135 *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256, 2014 SCC 44. See also Dirk Meissner, “B.C. Apologizes for Hanging Six Tsilhqot'in Chiefs 150 Years Ago,” *Province*, 23 October 2014, <http://www.theprovince.com/apologizes+hanging+Tsilhqot+chiefs+years/10319151/story.html>.

136 Booms, “Society and the Formation of a Documentary Heritage,” 37.

preservation and access remain in the shadows of settler society. The first step in reformulating the appraisal of records documenting the relationship of the settler polity and the colonial project with First Nations is a recognition that our contemporary juridical environment has evolved beyond the binary public/private nineteenth-century constitutional landscape of John Austin and A.V. Dicey.<sup>137</sup> Firstly, and at all times, First Nations communities should have the option to control the discourse of their representation of themselves. One might argue this was done with the Delgamuukw exhibits; however, they now seem twice removed from their original context. Secondly, if public archival appraisal practice is truly a retrospective endeavour, the role of the public archives at the turn of the twentieth century – to serve as a documentary foundation for the establishment of settler society – must be acknowledged.<sup>138</sup> A responsible public archives must not interpret historic truth but remain forcefully accountable for its transparent and unhindered interpretation: “A non-corrupt legal system is not the outcome of a complacent so much as vigilant past”;<sup>139</sup> such vigilance is the role and responsibility of the public archives. Finally, Canadian political philosophers for years have acknowledged relationships of governance, authority, and public representation. These archival concerns can only be addressed through “seeing the diverse cultural and national identities of citizens as overlapping, interacting and negotiated over time.”<sup>140</sup> In the records they acquire, public archives are a source of dialogue for public recognition of the plurality of constituents in our constitutional democracy. To appraise records in this sense requires recognition of the complexity of players and discourse, as well as the conflicting cultural authorities and references, that combine to create a record. In James Tully’s words, “The study of the practices of governance, whether narrow or broad, must proceed from two perspectives: from the side of the forms of government that are put into practice and from the side of the practices of freedom of the governed.”<sup>141</sup> There are multiple experiences and histories of the same past beyond the distinction of public and private; not all fit comfortably into the Whiggish reading of colonial history as a relentless progression of settler society.

The term “First Nations” has been adopted into our political discourse without our fully recognizing its implications for the functions of governance or the archival role to document such political entities in public archives. The purpose of the title “First Nations” is in part to address our colonial legacy and

137 See, for example, A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed., publ. 1915; repr. Indianapolis: Liberty Classics, 1982).

138 *R.E. Gosnell v. Minister of Lands and Atty Genl for Dominion* (1912), Victoria 03283 (BC SC). See also Foster, “Roadblocks and Legal History, Part 1,” 356.

139 McHugh, *Aboriginal Societies and the Common Law*, 150.

140 Tully, *Public Philosophy in a New Key*, 22.

141 *Ibid.*

to represent Aboriginal societies more fully across Canada within our constitution, and, one would hope, our public archives. In this light, Chief Justice McLachlin, in her 2014 *Tsilhqot'in Nation v. British Columbia* decision, has moved Aboriginal jurisprudence another step away from the legal positivism of juridical sovereignty and the historical positivism of socially decontextualized evidentiary criticism. Her decision more fully accepts the legal weight of Aboriginal oral history, and offers greater recognition to Aboriginal legal title. McLachlin's decision reminds us that we aspire to a socially relevant, inclusive, and representative public archives that recognizes and invites the participation of the social constituencies of our multicultural society.

Although section 35 of the Canadian constitution enshrines the recognition of Aboriginal identity within the framework of the constitution, there must also be a corresponding policy to promote the remembrance of “existing rights.” We are what we choose to remember, but we are also what we choose to forget. Our public archives are filled with detailed documentation “writing out” the memory of Aboriginal communities from colonial society. Hidden in the grammar, formalities, and *et ceteras* of this text is the indigenous voice – very faint, very human. As Philosopher Charles Taylor writes, a public policy of remembrance is a social necessity. Democratic recognition and remembrance of minority cultural communities shapes our collective identity: “a ... group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves.... Due recognition is not just a courtesy we owe people. It is a vital human need.”<sup>142</sup> This need must be served in our public institutions of law and memory.

**Raymond Frogner** holds a Master of Arts degree in history (University of Victoria, 1991) and a Master of Archival Studies degree (University of British Columbia, 1999). He has worked as a digital archivist for the computer animation firm Mainframe Entertainment (now Rainmaker Entertainment, Inc.); as a government records archivist at the Provincial Archives of Alberta; and as a general archivist for the Municipality of Esquimalt, British Columbia. For ten years, he was the associate archivist at the University of Alberta, where he was responsible for private records. He is currently the private records archivist at the Royal BC Museum (Archives). In 2010, his

142 Charles Taylor, *Multiculturalism and “The Politics of Recognition: An Essay,”* ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 1992), 25–26. See also James Tully, *Public Philosophy in a New Key: Democracy and Civic Freedom, Volume 1*, Democracy and Civic Freedom (Cambridge: Cambridge University Press, 2008); Terry Eastwood, “Reflections on the Goal of Archival Appraisal in Democratic Societies,” *Archivaria* 54 (Fall 2002), 59–71.

*article in Archivaria 70, "Innocent Legal Fictions: Archival Convention and the North Saanich Treaty of 1852," won the W. Kaye Lamb Prize and the Alan D. Ridge Award of Merit. His archival interests include First Nations records and digital records.*