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ABORIGINAL PRACTICE POINTS

Evidentiary issues—oral tradition evidence

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EVIDENTIARY ISSUES—ORAL TRADITION EVIDENCE

I. Supreme Court of Canada Jurisprudence on Oral Tradition Evidence

A. Van der Peet and Delgamuukw

Just over 10 years ago, in August of 1996, the Supreme Court of Canada ruled in the *Van der Peet* decision that "courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims." Chief Justice Lamer, writing for a majority of the Court in that case, set out the proposition as follows:

> In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.[1]

1 *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 68.

Chief Justice Lamer returned to his comment the following year in his majority ruling in the *Delgamuukw* case, where the Supreme Court of Canada held that the trial judge's failure to appreciate the evidentiary difficulties inherent aboriginal claims led him either to exclude or to afford no independent weight to the various forms of oral tradition evidence adduced by the Gitksan and Wet'suwet'en claimants.[2] Chief Justice Lamer noted that the *Van der Peet* decision required courts to adapt the laws of evidence in order to give due weight to "the aboriginal perspective" on practices, customs and traditions and on a group's relationship with the land. He continued:

> In practical terms, this 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 reference to pre-contact practices or, [...] in the case of title, pre-sovereignty occupation, those histories play a crucial role in the litigation of aboriginal rights.[3]

After identifying some of the difficulties that arise in using oral tradition evidence to prove historical facts, Chief Justice Lamer continued as follows:

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. [...] To quote Dickson C.J., given that most aboriginal societies 'did not keep written records,' the failure to do so would 'impose an impossible burden of proof' on aboriginal peoples, and 'render nugatory' any rights that they have (*Simon v. The Queen*, [1985] 2 S.C.R. 387 at 408). This process must be undertaken on a case-by-case basis.[4]

In *Delgamuukw*, the oral tradition evidence was grouped into three broad categories, each requiring a separate analysis from the trial judge with respect to its admissibility and the weight to be afforded it.

1. Adaawk and kungax

The most formal of the categories of oral tradition presented to the court were the *adaawk* and *kungax* of the claimant First Nations, which Chief Justice Lamer described as follows:

> The adaawk and kungax of the Gitksan and Wet'suwet'en nations, respectively, are oral histories of a special kind. They were described by the trial judge, at 164, as a 'sacred 'official' litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House.' The content of these special oral histories includes its physical representation totem poles, crests and blankets. The importance of the adaawk and kungax is underlined by the fact that they are 'repeated, performed and authenticated at important feasts' (at 164). At those feasts, dissenters have the opportunity to object if they question any detail and, in this way, help ensure the authenticity of the adaawk and kungax.[5]

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2 For the purposes of this paper, I will follow the practice adopted by some writers of distinguishing between the terms "oral history" and "oral tradition," reserving the former to describe the first-hand account of an individual who has direct experience or knowledge of a past event or situation occurring within his or her lifetime, and using the latter to refer to accounts of narratives or information passed down from generation to generation, often (but not always) within predominantly oral societies. While either category can contain elements of hearsay, it is oral traditions passed down from generation to generation that tend to generate the most attention in aboriginal claims litigation.

3 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 84.

4 *Delgamuukw*, *supra*, at para. 87.

5 *Delgamuukw*, *supra*, at para. 93.

The *Delgamuukw* claimants adduced the adaawk and kungax both to prove use and occupation of land, and to demonstrate the central significance of the lands to the claimants' culture. The trial judge ruled that the adaawk and kungax were admissible insofar as they fell into a known exception to the hearsay rule, which allowed declarations of deceased persons to be repeated by witnesses as proof of public or general rights. However, the trial judge afforded the adaawk and kungax no independent weight, because the oral traditions relayed information that was not "literally true," lacked sufficient detail about the lands whose history they recorded, and blended fact and belief, history and mythology.

Chief Justice Lamer disagreed with approach taken at trial, not because the trial judge had mischaracterized the weaknesses in the adaawk and kungax as evidence, but because the attributes described were "features, to a greater or lesser extent, of all oral histories, not just the adaawk and kungax." The Chief Justice concluded that if the trial judge's approach were to be endorsed, oral tradition evidence would never be given independent weight and could only serve to provide confirmatory evidence in aboriginal rights litigation. This in turn would result in the undervaluing of the oral traditions of aboriginal people, contrary to the principles expressed in *Van der Peet*.[6]

2. Recollections of Aboriginal Life

The Supreme Court also found that the trial judge had erred by discounting another form of oral tradition evidence adduced on the part of the Gitksan and Wet'suwet'en, termed "recollections of aboriginal life." Chief Justice Lamer understood the phrase to refer to testimony about personal and family history that was not part of the formal adaawk and kungax traditions. The heading encompassed evidence within the personal knowledge of a witness and declarations of the witness's ancestors concerning land use.

The trial judge accepted these "recollections of aboriginal life" as proof that immediate ancestors of some claimant group members had used land within the territory in question at least for the last 100 years. The evidence was deemed admissible and given weight insofar as it served this purpose. However, in the trial judge's view, the evidence did not establish specific enough land use, far enough back in time, to allow other findings with respect to aboriginal title. Chief Justice Lamer criticized the trial judge's approach as placing an almost impossible burden of proof on the claimants. He agreed with the claimants that, even if the oral tradition could not be used conclusively to establish pre-sovereignty occupation of land, it might still be relevant to the question of whether current occupation had its origins in the period prior to sovereignty.[7]

3. Territorial Affidavits

The last category of oral tradition evidence adduced in *Delgamuukw* consisted in territorial affidavits, that is, affidavits sworn by claimant group chiefs attesting to the territorial holdings of each Gitksan or Wet'suwet'en house. Although the trial judge acknowledged that the territorial affidavits comprised the best available evidence on the issue of traditional internal boundaries within the claimed land, he

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6 *Delgamuukw*, *supra*, at para. 98.

7 See *Delgamuukw*, *supra*, at para. 101. Although Chief Justice Lamer did not hesitate in *Delgamuukw* to transfer to the problem of proving title his *Van der Peet* insight that court must avoid imposing an impossible burden on claimants by demanding conclusive proof of pre-contact aboriginal activities, it could be argued that the Court's reasoning does not necessarily apply with the same vigour in both instances. Whereas it is true that no written records existed prior to contact, there may well be pertinent written records—albeit written almost exclusively by and for newcomers—showing use and occupation by aboriginal groups by the time of sovereignty. For instance, if sovereignty in BC dates, as some have argued, from the Oregon Treaty of 1846, that would allow for several decades of written records documenting aboriginal use and occupation in many parts of what is now BC. The oral tradition pertaining to use and occupation would nevertheless be necessary to show the aboriginal perspective(s) on occupation.

nevertheless refused to admit the affidavits under public reputation exception to the rule against hearsay, ruling that the reputation was too narrowly local to be accepted. He also questioned the independence and objectivity of the evidence given that land claims had been discussed among the claimant groups for many years.

Chief Justice Lamer again disagreed with the trial judge's approach, and commented as follows:

> The requirement that a reputation be known in the general community, for example, ignores the fact that oral histories, as noted by the Royal Commission on Aboriginal Peoples, generally relate to particular locations, and refer to particular families and communities and may, as a result, be unknown outside of that community, even to other aboriginal nations. Excluding the territorial affidavits because the claims to which they relate are disputed does not acknowledge that claims to aboriginal rights, and aboriginal title in particular, are almost always disputed and contested. Indeed, if those claims were uncontroversial, there would be no need to bring them to the courts for resolution. Casting doubt on the reliability of the territorial affidavits because land claims had been actively discussed for many years also fails to take account of the special context surrounding aboriginal claims, in two ways. First, those claims have been discussed for so long because of British Columbia's persistent refusal to acknowledge the existence of aboriginal title in that province until relatively recently, largely as a direct result of the decision of this Court in *Calder, supra*. It would be perverse, to say the least, to use the refusal of the province to acknowledge the rights of its aboriginal inhabitants as a reason for excluding evidence which may prove the existence of those rights. Second, this rationale for exclusion places aboriginal claimants whose societies record their past through oral history in a grave dilemma. In order for the oral history of a community to amount to a form of reputation, and to be admissible in court, it must remain alive through the discussions of members of that community; those discussions are the very basis of that reputation. But if those histories are discussed too much, and too close to the date of litigation, they may be discounted as being suspect, and may be held to be inadmissible. The net effect may be that a society with such an oral tradition would never be able to establish a historical claim through the use of oral history in court.[8]

Because of the mishandling of the oral tradition evidence at trial, and the impossibility of rectifying the problem at the appeal stage given the complexity of the evidence in the case, the Supreme Court ordered a new trial for the Gitksan and Wet'suwet'en claimants.

B. Mitchell

Delgamuukw was not, however, the Supreme Court's last word on the admissibility of, or weight to be accorded to, oral tradition evidence. In *Mitchell*, a case involving a Mohawk community's claim to an aboriginal right to import certain goods over the US/Canada border without incurring duty, current Chief Justice McLachlin clarified the Court's ruling in *Delgamuukw* with respect to oral tradition evidence in the following terms:

> In *Delgamuukw*, mindful of these principles, the majority of this Court held that the rules of evidence must be adapted to accommodate oral histories, but did not mandate the blanket admissibility of such evidence or the weight it should be accorded by the trier of fact; rather, it emphasized that admissibility must be determined on a case-by-case basis (para. 87). Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge.
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> [...]

8 *Delgamuukw*, *supra*, at para. 106.

> In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions. Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective. Thus, *Delgamuukw* cautions against facilely rejecting oral histories simply because they do not convey 'historical' truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted.[9]

As Chief Justice McLachlin explained, the usefulness requirement allows a court to consider whether evidence that might normally be excluded should nevertheless be admitted on necessity grounds, for example, where no other evidence of an aboriginal practice or its significance is available. This much was plain from the *Delgamuukw* decision. However, Chief Justice McLachlin went on to note that even where the evidence may be necessary in the sense outlined above, it must still be deemed reasonably reliable before a court should admit it. Arguably, this second principle was not as clearly delineated in *Delgamuukw*.

Chief Justice McLachlin noted that the more contentious issue in *Mitchell* was the interpretation of and weight to be accorded to the oral tradition evidence, once admitted. The Supreme Court of Canada acknowledged that the principles engaged in weighing evidence are not absolute. Once oral tradition evidence is admitted, however, the aboriginal perspective it brings to the issues should be given "due weight."[10] The Chief Justice continued with the following comments:

> There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, '[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse' (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14). In particular, the *Van der Peet* approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Placing 'due weight' on the aboriginal perspective, or ensuring its supporting evidence an 'equal footing' with more familiar forms of evidence, means precisely what these phrases suggest: *equal* and *due* treatment. While the evidence presented by aboriginal claimants should not be undervalued 'simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case' (*Van der Peet*, *supra*, at para. 68), neither should it be artificially strained to carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated.[11]

Using the criteria set out above, Chief Justice McLachlin reviewed the evidence that had been adduced at trial with respect to the claimed Mohawk traditional practice of trading goods north of the St. Lawrence River. After observing that the trial judge in *Mitchell* had himself stated that there was "little direct evidence that the Mohawk, prior to the arrival of the Europeans, brought goods from their homeland and traded with other First Nations on the Canadian side of the boundary," she expressed disagreement with the trial judge's conclusion that the right had nevertheless been made out:

> On this question, McKeown J. was quite correct to state there exists 'little direct evidence.' This leads to the second contradiction: the inconsistency between this concession of little direct evidence and the finding of an aboriginal right. This is not

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9 *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, at para. 31 and 34.

10 *Mitchell*, *supra*, at para. 37. The phrase recalls Lamer C.J.'s ruling in *Delgamuukw*, *supra*, at paras. 82 and 84.

11 *Mitchell*, *supra*, at para. 39.

> to suggest that an aboriginal claim can never be established on the basis of minimal evidence, direct or otherwise, provided it is sufficiently compelling and supports the conclusions reached. In this case, however, the 'little direct evidence' relied upon by the trial judge is, at best, tenuous and scant, and is perhaps better characterized as an absence of even minimally cogent evidence.[12]

The majority decision in *Mitchell* also clarified the holding in *Delgamuukw* with respect to continuity and the relevance of known later practices to earlier situations or activities for which no direct evidence is available. In this instance, although documents and records written at the time of treaties attested to Mohawk trade on a north-south axis, these could not serve to prove that the same trade already existed at the time of contact. This was particularly true given that the historical record also indicated that the earlier period was subject to feuding and warfare between the groups who later traded with each other.

Finally, the Court assessed the value of inferences that might be drawn from uncorroborated evidence:

> The trial judge also relied on evidence of Mohawk participation in the Montreal-Albany fur trade as suggesting pre-contact trade along a northerly route. He rejected the assertion that this fur trade activity arose solely in response to the arrival of Europeans, reasoning that 'it seems highly unlikely that the Mohawks would start trading immediately upon the arrival of the Europeans if they had not been involved in some prior trade' (at 39). In his view, 'a north-south trade existed prior to the European presence and after the arrival of the Europeans, the trade was expanded to include furs' (at 37). While this inference may indeed be drawn from the evidence, it is drawn in the absence of any other evidence—oral or documentary, aboriginal or settler, direct or otherwise—substantiating the existence of this pre-contact trade route. It cannot carry much force.[13]

Chief Justice McLachlin concluded as follows on the weight that ought to have been accorded to the evidence, including the oral tradition evidence, adducing an ancestral practice of trade north of the St. Lawrence in the relevant time period:

> As discussed in the previous section, claims must be proven on the basis of cogent evidence establishing their validity on the balance of probabilities. Sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim. With respect, this is exactly what has occurred in the present case. The contradiction between McKeown J.'s statement that little direct evidence supports a cross-river trading right and his conclusion that such a right exists suggests the application of a very relaxed standard of proof (or, perhaps more accurately, an unreasonably generous weighing of tenuous evidence). The *Van der Peet* approach, while mandating the equal and due treatment of evidence supporting aboriginal claims, does not bolster or enhance the cogency of this evidence. The relevant evidence in this case—a single knife, treaties that make no reference to pre-existing trade, and the mere fact of Mohawk involvement in the fur trade—can only support the conclusion reached by the trial judge if strained beyond the weight they can reasonably hold. Such a result is not contemplated by *Van der Peet* or s. 35(1). While appellate courts grant considerable deference to findings of fact made by trial judges, I am satisfied that the findings in the present case represent a 'palpable and overriding error' warranting the substitution of a different result (*Delgamuukw*, *supra*, at paras. 78-80). I conclude that the claimant has not established an ancestral practice of transporting goods across the St. Lawrence River for the purposes of trade.[14]

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12 *Mitchell*, *supra*, at para. 42.

13 *Mitchell*, *supra*, at para. 50.

14 *Mitchell*, *supra*, at para. 51.

Since the *Mitchell* decision was rendered in 2001, it has been frequently cited by trial and appellate courts. Mr. Justice LeBel, in his reasons in *Kitkatla*, reaffirmed the Supreme Court's assessment in *Mitchell* in the following terms.

> Even if this case remains a division of powers case, the comments of McLachlin C.J. on evidentiary standards and problems in aboriginal law cases in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, remain highly apposite. In such cases, oral evidence of aboriginal values, customs and practices is necessary and relevant. It should be assessed with understanding and sensitivity to the traditions of a civilization which remained an essentially oral one before and after the period of contact with Europeans who brought their own tradition of reliance on written legal and archival records. Nevertheless, this kind of evidence must be evaluated like any other. Claims must be established on a balance of probabilities, by persuasive evidence (*Mitchell*, at para. 39, *per* McLachlin C.J.). 'Sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim ...' (*Mitchell*, at para. 51, *per* McLachlin C.J.).[15]

II. Application of the Supreme Court's Rulings on Oral Tradition Evidence: The Roger William Litigation

A. Admissibility

In *Delgamuukw* and *Mitchell*, the Supreme Court of Canada held that oral tradition evidence must be evaluated on a case-by-case basis. Oral tradition evidence should not be considered automatically admissible; on the other hand, it should not necessarily be subjected to the same tests for admissibility as in "a private law torts case." The question consequently has arisen as to what procedure and what standards a trial court should adopt for determining whether or not the oral tradition evidence of a particular group should be admitted in a particular case.

In the *Roger William* case, the Xeni Gwet'in First Nations Government and Tsilhqot'in National Government sought to adduce oral tradition evidence in support of a claim of aboriginal rights and title to an area southwest of Williams Lake.[16] The oral tradition evidence was loosely grouped into two categories.[17]

The first category—constituting the majority of the oral tradition evidence in the case—could be roughly characterized as "recollections of aboriginal life" as that heading was described in *Delgamuukw*. It consisted in a witness's account of what he or she had learned from deceased

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15 *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146 at para. 46. See also *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220 at paras. 68-70.

16 *Roger William et al. v. HMTQ British Columbia et al.* is an aboriginal rights and title claim brought by Chief Roger William of the Xeni Gwet'in First Nations Government on behalf of his band (in relation to rights) and on behalf of the Tsilhqot'in Nation (in relation to title) against BC, the Regional Manager of the Cariboo Forest Region, and the Attorney General of Canada. The claim involves an area of approximately 4000 square kilometres located on the Chilcotin plateau in the vicinity of Ts'il?os and Nuntsi provincial parks. The *Roger William* claim area constitutes about 5% of the total area claimed by the six member bands of the Tsilhqot'in Nation. The writer acts as counsel for BC on the case, for which final argument will be heard in the spring of 2007.

17 Neither category of oral tradition evidence adduced by the plaintiff in the *Roger William* case was as formal or as structured as either the adaakw or kungax of the Gitksan and Wet'suwet'en or the territorial affidavits adduced by individual houses in the *Delgamuukw* case—a fact that lends support to the Supreme Court of Canada's understanding that no one set of specific rules is likely to created that can be used for all oral tradition evidence.

individuals within the community concerning genealogy or traditional activities and practices. For example, a witness might testify that, according to her father (now deceased), the witness's great grandfather had lived at a certain time and acted as chief, or that according to her grandmother, the family used to trap muskrat in a particular area.

The second category consisted primarily in a witness's version of legends and stories of events from the more distant past—accounts said to be shared by the larger community. For example, a witness might relate parts of the legend of the Bear Husband, or describe a battle with the Lillooet said to have taken place centuries before.

Early in the trial, the defendant Crowns brought an application asking the Court to establish a procedure for determining the admissibility of oral tradition evidence prior to the adducing of such evidence at trial. Each Crown sought a slightly different order. The Province sought a preliminary procedure for individual witnesses that would vary according to the type of oral tradition evidence being led. It took the position that oral tradition evidence with respect to events in the distant past ought to be treated more stringently than evidence pertaining to genealogy or to traditional activities and practices.[18]

1. Recollections of Aboriginal Life

With respect to evidence pertaining to genealogy or to traditional activities and practices, the Province submitted that the threshold for admissibility should be relatively low. It argued that, generally speaking, the information conveyed should be admitted if it was:

- necessary or useful—for example, in order to demonstrate the existence of family ties or past practices or to present an aboriginal perspective on evidence that may or may not be available from other sources, and
- reasonably reliable—for example, if the witness could identify the source of the information, and if that source was known to have participated in the traditional practices of the claimant group.

For example, in a case involving the claim of a right to trap, if a witness testified that her grandmother used to trap muskrat in a specific location within the claim area, BC submitted that the preliminary procedure should establish that the grandmother was indeed a respected member of the claimant community. If so, and if no special arguments weighed against the credibility of the evidence, the information would likely be accepted as necessary or useful in order to establish the right, as well as reasonably reliable.

2. Legends and Histories Related to the Distant Past

When it came to oral tradition evidence with respect to events in the distant past said to be shared by the larger community, BC took the position that the preliminary procedure should have two stages.

The Provincial Crown argued that the plaintiff should first be required to adduce evidence of the use that is made of oral traditions within the claimant community, and of the methods employed in order to preserve the authenticity and reliability of the traditions passed down. BC submitted that it didn't matter how or by whom the evidence was adduced as long as the source itself was reliable and as long as the evidence allowed the defendants and the Court to understand the basic elements of how this community conveyed oral traditions of past events. Issues to be canvassed included whether there were oral traditions that only certain members of the community could convey, whether certain

18 This distinction, and the rationale behind it, is described in more detail below.

circumstances were necessary for proper transmission, and whether there were any indicia of authenticity or reliability of which the Court should be aware.

Second, as had been requested with respect to oral tradition evidence concerning genealogy or traditional activities and practices, BC asked for the opportunity to engage in a brief preliminary examination of each witness who would be providing oral tradition evidence of past events, in order to ensure that the witness was capable of providing reliable oral tradition evidence based on the criteria that the plaintiff had himself—through his counsel and witnesses—provided to the Court.

3. Argument Regarding a Preliminary Procedure for Determining Admissibility

Counsel for the Tsilhqot'in objected to the order sought by the defendants. The plaintiff suggested that all the oral tradition evidence adduced by various witnesses over the course of the plantiff's case should be heard first, and the question of what was or was not admissible could be addressed in final argument.

The Crown defendants submitted that such an approach would not permit effective cross-examination and testing of the evidence as it was received. In the Crown's view, the Court would not be able to fairly evaluate the reliability of a particular witness's oral tradition evidence, and defendants' counsel would not be able to fulfil their function in testing that evidence, if neither the Court nor Crown counsel understood the structures and methods for conveying oral tradition evidence in the particular community.

The Crown's concern was not an idle one. It was well established in the jurisprudence that different aboriginal groups make use of discrete methods for transmitting and authenticating the oral traditions of the community. The methods employed by the Gitxsan and Wet'suwet'en, described in *Delgamuukw*, have already been discussed.[19] In the *Jacob* case, the Court described how the Sto:lo ascertained the cultural legitimacy of the *sqwelqwel* and *swoxwiyam* traditions through a process described as "oral footnoting," which similarly involved public statement and restatement, with the added factor of penalties that could be imposed for failure to demonstrate the authenticity of the speakers' account.[20] The Ontario Superiour Court's decision in *Wasauksing First Nation* gave an account of the various mnemonic devices developed by the Anishinabe/Wasauksing culture to facilitate the memorization of, and to prompt the accurate recital of, Ojibway teachings, and of how members of that community could achieve various degrees of expertise in traditional knowledge through education and the formal guidance of qualified elders.[21] The case law also established that some communities, such as the Iroquois and the Mi'kmaq, used wampum belts to record and prompt the accurate conveyance of treaty promises.[22] In Australian jurisprudence, it emerges that within some aboriginal communities, traditional knowledge is conveyed along formal gendered lines, with the result that there is women's knowledge that cannot be heard by men, and men's knowledge that cannot be heard by women.[23]

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19 See also, regarding Gitksan practices of conveying oral tradition, *Gitxsan First Nation v. British Columbia (Minister of Forests) (*a.k.a. *Skeena Cellulose)*, [2003] 2 C.N.L.R. 142 (B.C.S.C.) at paras. 40-51.

20 *R. v. Jacobs*, [1999] 3 C.N.L.R. 239 (B.C.S.C.) at paras. 57-59.

21 *Wasauksing First Nation v. Wasausink Lands Inc.*, [2002] 3 C.N.L.R. 287 (Ont. Sup. Ct.) at paras. 133-65.

22 See the discussion below concerning the use of wampum belts as mnemonic devices for the recollection of events and agreements as raised before the Provincial Court of Nova Scotia in *Marshall*: see *R. v. Marshall*, [2001] 2 C.N.L.R. 256, paras. 56-65.

23 See, for example, *Chapman v. Luminis Pty Ltd.* (No 5), [2001] FCA 1106 (Federal Court of Australia).

Until the argument on admissibility, neither the Court nor the Crown in the *Roger William* case had any information concerning the methods of transmission or the safeguards of accuracy of oral traditions within the Tsilhqot'in community.

4. The Court's Decision Regarding Admissibility in Roger William

After hearing the submissions of counsel, and—importantly—after receiving affidavit testimony from an ethnographer for the plaintiff familiar with the Tsilhqot'in community's practices for conveying oral tradition evidence—Mr. Justice Vickers provided an order loosely along the lines of what BC had requested. In his ruling, he held as follows:

> At the outset of the trial it would be helpful for counsel to outline the traditions of the people they represent relating to the questions of:
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> 1) how their oral history, stories, legends, customs and traditions are preserved;
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> 2) who is entitled to relate such things and whether there is a hierarchy in that regard;
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> 3) the community practice with respect to safeguarding the integrity of its oral history, stories, legends and traditions;
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> 4) who will be called at trial to relate such evidence, and the reasons they are being called to testify.[24]

With respect to the second stage, the preliminary investigation of the individual witnesses who would be testifying, Mr. Justice Vickers wrote:

> A Tsilhqot'in or Xeni Gwet'in person is not called in this trial as an expert witness. He or she is called to testify as an ordinary witness. Like any ordinary witness, the hearsay component of their evidence must meet the threshold tests of necessity and reliability on the issue of whether it is to be admitted as evidence at trial.
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> Thus, assuming the test of necessity is met by the death of persons involved in the events being testified to, when a witness is called upon to give hearsay evidence counsel should give a brief outline of the nature of the hearsay evidence to be heard. Before the evidence is heard, there should be a preliminary examination of the witness concerning the following:
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> a) Personal information concerning the attributes of the witness relating to his or her ability to recount hearsay evidence of oral history, practices, events, customs or traditions.
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> b) In a general way, evidence of the sources of the witness, his or her relationship to those sources and the general reputation of the source.
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> c) Any other information that might bear on the issue of reliability.
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> This inquiry will not be a *voir dire*. The evidence given would be evidence in the case. Upon the conclusion of plaintiff's counsel's questions, counsel for the defendants will have their opportunities to cross-examine the witness on the issues of necessity and reliability. On the conclusion of the evidence on this preliminary inquiry, arguments on the admissibility of the evidence would be heard. I do not envision this to be an elaborate procedure. It would not preclude counsel from raising a specific objection to particular portions of a witness's evidence if it was an objection that could not have been made at the preliminary inquiry stage. Finally,

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24 *William et al. v. British Columbia et al.*, 2004 BCSC 148 at para. 24.

> and perhaps it goes without saying, the weight of the hearsay evidence is always an issue open for counsel to debate during final arguments.[25]

B. Weight

Where oral tradition evidence is admitted at trial, the question remains of how to evaluate the weight it should be afforded.

In the *Roger William* case, the plaintiff provided, through the affidavit of an ethnographer, a list of criteria recognized by the Tsilhqot'in that could affect the reliability of oral traditions as evidence. For this community, factors that were weighed positively included:

- the age of the person conveying the oral tradition;
- the traditional knowledge of the people who raised the person conveying the oral tradition;
- whether the person conveying the oral tradition had lived and experienced a traditional life-style;
- whether the person conveying the oral tradition spoke or at least understood the native language; and
- whether the person conveying the oral tradition was known to be honest and trustworthy.[26]

These base-line factors, while raised during the argument concerning admissibility, equally applied to the question of weight. Other criteria that might be used to evaluate the weight of a given oral tradition, as adduced by one or more witnesses for the plaintiff, were also raised from time to time in trial. How widespread is a given tradition within the claimant community? How consistent were the accounts of a given tradition advanced by different witnesses? Can we find published accounts of a given tradition in the work of ethnographers, or local historians and storytellers? If so, would the witnesses have knowledge of these published accounts?

In order to better understand what factors may be relevant to the evaluation of the evidence adduced by the Tsilhqot'in lay witnesses in the *Roger William* case, Canada led expert evidence from an anthropologist, Dr. Alexander von Gernet, who specializes in the field of aboriginal oral traditions. Dr. von Gernet submitted two reports, both of which were deemed admissible as expert opinions under the *Mohan* test, notwithstanding the objections of plaintiff's counsel.

1. Dr. von Gernet's First Report: Understanding Oral Tradition Evidence Generally

In the first report, Dr. von Gernet expressed his general opinion on what oral traditions of different kinds can and cannot demonstrate in a forensic setting. In contrast to other scholars who examine the oral transmission of traditional knowledge as a primarily academic study, Dr. von Gernet approached the analysis of oral traditions from a narrower, more positivist perspective. In his view, the legal tests

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25 *Ibid.*, at paras. 27-29. In the decision rendered by Mr. Justice Vickers, the process sought by the Crown in this second phase of the oral tradition procedure was characterized as a "voir dire." While BC did seek a preliminary procedure, in BC's view the witness's responses in the preliminary procedure would become a regular part of the trial record. Canada's submissions sought a more stringent procedure for the reception of oral tradition evidence, which was explicitly characterized as a *voir dire* and which would have required that witnesses providing oral tradition evidence be qualified as experts.

26 See Mr. Justice Vickers' synopsis of the Dewhirst affidavit in *William et al. v. British Columbia et al.*, 2004 BCSC 148 at para. 7.

for establishing aboriginal rights or title generally required that claimants establish that specific practices or forms of occupation occurred at specific dates on specific lands. His expert opinion concentrated on demonstrating to the court how an aboriginal group's oral traditions might relate to this question. His preferred approach involved the testing of oral tradition evidence adduced in court by reference to external sources: archaeology and documentary history, for the most part.

One of Dr. von Gernet's main points in the first report was to distinguish between consistency and validity in the evaluation of oral tradition evidence. He noted that an oral tradition may be both widely known and repeated with remarkable consistency in a given community, and yet be completely at odds with the documentary or archaeological record. Dr. von Gernet gave an example—described as "a cautionary tale" in his report—drawn from his own previous experience as an expert researcher in the *Marshall* trial in Nova Scotia.[27]

As did the contemporaneous *Bernard* case from New Brunswick, the *Marshall* case involved in the prosecution of Mi'kmaq defendants for illegally cutting timber on Crown lands. Counsel for the accused in both cases raised a defence based both on a treaty right to cut timber as well as on aboriginal title to the cutting sites.[28] In both the *Bernard* and *Marshall* trials, the defence called as an expert witness Chief Stephen Augustine, acknowledged both as a hereditary Mi'kmaq Chief and as a *Putus* or keeper of Mi'kmaq oral traditions.

A key element of the defendants' case in *Marshall* involved a wampum belt in the Vatican collection examined and photographed by anthropologist David Bushnell in 1905. Mi'kmaq leaders asserted that the wampum belt was of Mi'kmaq origin, and recorded an agreement reached between the Mi'kmaq and the Catholic Church in 1610. Mi'kmaq oral tradition was said to provide the key for interpreting the wampum belt, which acted as a mnemonic for recalling the 1610 agreement and its circumstances. For the *Marshall* case, Chief Augustine not only recreated the Vatican wampum belt based on photographs, but also gave an elaborate reading of the belt based on the teachings he had received traceable through generations of Mi'kmaq elders.

Alexander von Gernet was engaged by the Nova Scotia Crown to respond to Chief Augustine's evidence in the *Marshall* trial. As part of the research for his expert opinion, Dr. von Gernet travelled to the Vatican to examine the wampum belt and to search for any documentation concerning it. Upon examination, Dr. von Gernet considered that the materials used to make the belt indicated an early 19th century date for its manufacture, and its design suggested an origin more likely Iroquois than Mi'kmaq. In order to make certain his findings, he tracked down the letters that accompanied the wampum belt when it arrived in the Vatican from Canada. The documents, dating from 1831, gave the meaning of the wampum figures and indicated that the belt was a gift to the Pope from the Iroquois and Algonquins of Kanesatake. Following the receipt of Dr. von Gernet's evidence, counsel for the defendants withdrew their reliance on Chief Augustine's testimony on the wampum belt.[29]

The moral of the "cautionary tale" in *Marshall*, from Dr. von Gernet's perspective, ought not to be misunderstood. No one accused Chief Augustine, or anyone representing the Mi'kmaq, of purposely fabricating an oral tradition in order to further claims raised in the litigation. Nor was the point to contest the evidence that the Mi'kmaq history of the wampum belt was part of an oral tradition that had been publicly affirmed, transmitted, and given group validation at least since the time of Chief Augustine's grandmother. Instead, Alexander von Gernet's point was—as Jan Vansina had already

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27 See *R. v. Marshall*, [2002] 2 C.N.L.R. 256.

28 The Supreme Court of Canada upheld the trial judges' holdings in both the *Bernard* and *Marshall* decisions, finding that neither defence could be maintained on the facts: see *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43.

29 The trial judge noted he would consider Chief Augustine's error with respect to the wampum belt when determining the weight of his other expert evidence.

noted in his seminal work on oral traditions—that internal consistency and pervasive knowledge of an oral tradition does not ensure its (historical) validity.[30]

2. Dr. von Gernet's Second Report: Oral Traditions of the Tsilhqot'in

In the second report in the *Roger William* case, submitted a few months after the first, Alexander von Gernet commented on aspects of the particular oral tradition evidence adduced by the Tsilhqot'in witnesses. There was no grand unmasking involved in Dr. von Gernet's analysis of the Tsilhqot'in oral tradition. As a result of time constraints and the instructions he was given, Dr. von Gernet did not compare the Tsilhqot'in oral tradition evidence with archaeological and documentary records. He also confined his analysis to oral traditions concerning specific historic events and periods, such as the conflict between newcomers and aboriginals at Bute Inlet and on the Chilcotin plateau in 1864 and the period leading up to the presumed date of sovereignty for BC in 1846. His main conclusion was accordingly quite narrow: in his view, the oral tradition evidence adduced in the *Roger William* case, taken by itself, could not establish whether or not the Tsilhqot'in had exclusively used and occupied the claim area prior to 1846.

Dr. von Gernet's opinions were attacked in court simultaneously for being so obvious as to be unnecessary, and for demanding far more from oral tradition evidence than the court itself required. It is worth looking at both of these criticisms in more detail.

Counsel for the plaintiff, arguing against the admissibility of Dr. von Gernet's reports, suggested that oral tradition evidence presented no special difficulties for the Court, and that the trier of fact ought to be able to interpret and weigh the evidence relying solely on common sense, just as he or she did with other forms of evidence. Without entering into a discussion of what common sense has to do with a court's evaluation of evidence, it could be noted that the argument was at least somewhat counterintuitive, given that oral tradition evidence had been regularly excluded as unreliable or discounted by the courts prior to the *Van der Peet* decision. It is also worth noting that, despite the Supreme Court's expression of the routine nature of a court's interpretation of documentary records in *Delgamuukw*, early on in the *Roger William* case Mr. Justice Vickers ruled that an expert historian's evidence was required to assist the trier of fact interpret historical documents.[31]

Re-reading the passage in *Delgamuukw* concerning the differences between oral tradition evidence and documentary records, it seems likely that Dr. von Gernet would side with Mr. Justice Vickers rather than with Chief Justice Lamer. In Dr. von Gernet's view, writers of documents are no less inclined than transmitters of oral tradition to select certain events or details for communication to others. A single written document from an authoritative source can spawn a whole historical tradition, despite the fact that the original source may be mistaken or biased or self-serving. In short, documentary records, no less than oral traditions, are frequently "woven with history, legends, politics and moral obligations" as well as other factors that could be considered tangential to (although very difficult to separate from) the determination of historical truth.

And yet documentary records have at least one characteristic that is generally important to courts and not always shared with oral traditions: they are relatively easily datable. Once an account is written, it is fixed in time. If the trier of fact has access to the original, he can trust that the account has not changed in the time intervening between the date at which the account was recorded and his reading. This doesn't mean that the modern understanding will be the same as that of the document's author; it simply means that the record itself is fixed. In contrast, an oral tradition can and often does change and shift with every telling, rendering it difficult to determine whether a given detail was part of the original account, or whether it was added at some point along the trajectory to the trier of fact.

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30 Jan Vasina, *Oral Tradition as History* (Madison: Wisconsin UP, 1985).

31 *William et al v. British Columbia et al.*, 2004 BCSC 1237.

Certain forms of oral tradition do not purport to speak to specific events set in specific times. They may speak to an undated custom or practice, such as the use of a particular hook for fishing, or a family's use of a camping area. Alternatively, they may transmit a legend or tradition set in mythical or semi-mythical past, when animals spoke and daylight was yet to be created. These kinds of oral traditions do not readily lend themselves to the task of answering questions centered on specific time frames, such as whether or not a claimant group exclusively occupied an area prior to 1846. Other forms of oral tradition do, on the other hand, precisely set out to record specific events, such as the negotiations preceding a treaty or an agreement with the Church in 1610. The impulse of a forensic anthropologist like Dr. von Gernet might be to seek corroboration in documentary or archaeological records in both instances, either to provide a date where no specific time frame is supplied by the oral tradition, or to verify the content of the oral tradition by reference to external sources where the tradition may have changed over time.

To the extent that an expert anthropologist does require documentary or archaeological corroboration before accepting the relevance of an oral tradition, is he or she making unreasonable demands on the evidence? An expert's ability to be persuaded no doubt depends in great part on the expert's prior experiences with oral traditions and on the kind of question the expert has been instructed to answer. One anthropologist may find that a group's oral tradition concerning its ancestry is more reliable than the documentary record, if, for instance, the vital statistics records in question are confused or contradictory. Another anthropologist might, like Dr. von Gernet, have seen the oral traditions of numerous groups fall short of their promises when the documentary records are examined.

In either case, it is important to remember that the expert is not bound by the same rules as the court, and may indeed require more or less proof than the trier of fact before he or she is persuaded as an anthropologist. The issue of how the trier of fact should determine the cogency of oral tradition evidence remains open to debate.