P. Michael Jerch Law Office
P. MICHAEL JERCH B COMM (HON) LL.B.

April 23, 2009

The changing stature of oral history as evidence

www.jerchlaw.com

In November of 2007, the T'silhqot'in First Nation's Aboriginal title case before the BC Supreme Court came to a close, largely in favour of the First Nation. Their Aboriginal title to about half of their claimed lands was recognized, and it was acknowledged that their Aboriginal rights on this land had been infringed without justification. It was also found the BC forestry regulations do not apply on their Aboriginal title lands.

To win their case for the existence of their Aboriginal title to their traditional territory, the T'silhqot'in First Nation relied on the oral history testimony of their community's most knowledgeable members. In Justice Vickers' decision he gave careful consideration, not only to the oral history evidence, but also to the issue of oral history as evidence. As a result, the decision in the T'silhqot'in case is one of the most clear and thorough treatments of oral history as evidence that any court in Canada has yet provided.

The treatment of oral history or oral traditions as evidence in the Courts still appears to be a work in progress. Courts in Canada are still working out how to handle a type of evidence that it has historically disregarded. There are not yet established protocols in place for how to hear oral history testimony, or for how to weigh it alongside other types of evidence with which the Court is more familiar.

In his ruling in *Delgamuukw*, Chief Justice Lamer ruled that oral history is admissible as evidence and that the way lower courts had been approaching oral history was inadequate. (In the initial trial for the Delgamuukw case, Judge MacEachern reportedly fell asleep during some of the oral history testimony. He later dismissed all of this testimony in his final ruling).

In Lamer's Supreme Court judgement he wrote, "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which largely consists of historical documents."

On the surface, this might appear to give oral history the exact same evidentiary weight as written historical records, but this has not been the way that Lamer's words have been interpreted in subsequent decisions. There has been a shift toward including oral histories as evidence, but the weight attributed to this evidence has varied. Lamer's call for an adaptation of the "laws of evidence" to give due consideration to oral history has not yet been sorted out in a consistent way. This means that First Nations with Aboriginal rights claims have been faced with the uncertainty of putting forward their oral history evidence without knowing how, or even if, it will be heard.

The *T'silhqot'in* decision is the best indication so far of the direction the Canadian judiciary appears to be taking in their treatment of oral history evidence. In T'silhqot'in Justice Vickers addressed the uneven way that Courts have handled oral history evidence since *Delgamuukw*. In his decision he states,

"Courts that have favoured written modes of transmission over oral accounts have been criticized for taking an ethnocentric view of the evidence. Certainly the early decisions in this area did little to foster Aboriginal litigants' trust in the court's ability to view the evidence from an Aboriginal perspective. In order to truly hear the oral history and oral tradition evidence presented in these cases, courts must undergo their own process of decolonization."

As the defendant in Aboriginal rights cases, the Crown has often relied on the expertise of an ethnohistorian named Alexander von Gernet and a political scientist named Thomas Flanagan, a former political advisor to Stephen Harper. Both men are also affiliated with the neo-liberal Fraser Institute.

In a paper he wrote on oral history as evidence, around the time when he was acting as an expert witness for the Crown on the *Sampson* case, Flanagan demonstrates the kind of narrow approach that he has consistently advocated before the Court. He writes that "equality means treating all forms of evidence in the same way." But by this he means that oral history should continue to be given equal weight to 'hearsay evidence,' not that oral history is equal to written historical documents.

He is also critical of the idea of creating new rules for how oral history evidence will be heard by the Courts, as advocated by Chief Justice Lamer (as he then was). He writes,

"Advocates of the aboriginal worldview often speak as if oral traditions were intrinsically different from other forms of evidence. . . . In that perspective,

equality would mean "separate but equal," and would demand the suspension of normal historical methods. If the Supreme Court's Delgamuukw decision is interpreted in that spirit, the treaties will be transformed from intelligible, enforceable agreements to unpredictable relationships in which everything is up for renegotiation."

A "suspension of normal historical methods" and a renewed treaty relationship are emerging as exactly the type of changes that Courts will be required to make in upholding Aboriginal and Treaty rights. Flanagan argues that the outdated, ethnocentric standards to which Courts have held oral history testimony should continue to be upheld. The BC Supreme Court has disagreed. Justice Vickers describes the complexity of oral history evidence in his decision. He writes,

"Many of the oral histories and oral traditions I was privileged to hear in this case were woven with history, legend, politics and moral obligations. This form of evidence is a marked departure from the court's usual fare and poses a challenge to the evaluation of the entire body of evidence. Courts generally receive and evaluate evidence in a positivist or scientific manner: a proposition or claim is either supported or refuted by factual evidence, with the aim of determining an objective truth. However, in cases such as this, the "truth" which lies at the heart of the oral history and oral tradition evidence can be much more elusive."

Courts often hear from academics who study oral history. These experts, both for the Crown and for First Nations, face a difficult task trying to put evidence before the judge because it often first requires educating judges about the nature of oral traditions in Aboriginal societies before even beginning to present the oral history evidence itself.

In T'silhqot'in Alexander von Gernet testified for the Crown on the use of oral history evidence. In his capacity as an expert, he testified that oral history is useful to the court, only if it is corroborated with written records. In his view, oral history evidence is only secondary and supplementary to other kinds of evidence. Justice Vickers did not accept von Gernet's view, stating, "I was left with the impression that Dr. von Gernet would be inclined to give no weight to oral tradition evidence in the absence of some corroboration." He adds,

"Trial judges have received specific directions that oral tradition evidence, where appropriate, can be given independent weight. If a court were to follow the path suggested by Dr. von Gernet, it would fall into legal error on the strength of the current jurisprudence. . . If the oral history or oral tradition evidence is sufficient standing on its own to reach a conclusion of fact, I will not hesitate to make that finding. If it cannot be made in that manner, I will

seek corroboration from the anthropological, archeological and historical records. I understand my task is to be fair and to try to avoid an ethnocentric view of the evidence."

The *T'silhqot'in* case appears to be a step in the right direction for putting orally-maintained historical records onto the same footing as written historical records in Canada's courts. The bias of the Court for the written word has put First Nations at a disadvantage in the past because of an underlying ethnocentric assumption that written history is accurate and oral history is not. Justice Vickers has delivered one of the first decisions to address this ethnocentric bias directly.

It is too soon to say that Courts have accepted that oral history is equal to written history, but there are indications that the significance of these oral traditions in court proceedings is changing. Justice Vickers describes the central importance of oral traditions to T'silhqot'in people in this way,

> "Oral traditions and their communication are a vital part of T'silhqot'in society. They
> are told and retold while hunting or fishing, at camp, at gatherings or at home. As Chief
> William testified: "That's the only way that we were T'silhqot'in.""

www.jerchlaw.com
April 3, 2009