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# Aboriginal Oral History Evidence and Canadian Law

### Abstract

The establishment of distant historical facts and the articulation of aboriginal understandings of such facts are both vital to the legal cases of First Nations that confront the Canadian government with specific land claims as well as rights claims. This has made the appearance of oral history testimony a practical necessity for aboriginal claimants. Not only does oral history contain the aboriginal understanding of the past, it also refers to distant historical events for which little or no documentary evidence exists. Such testimony, however, has brought to the fore deep anxieties on the part of the Canadian judiciary regarding the rules of evidence and the value of oral accounts of history.

The Canadian judiciary has made significant efforts to be fair and open towards oral history testimony, taking into consideration the unique difficulties of proving aboriginal rights and title cases, most notably in the 1997 Supreme Court decision, *Delgamuukw*. However, despite such efforts, the need to stretch oral histories to the limits of their reliability, the prevalence of suspicion and distrust between Native and non-Native parties, and the textual 'bias' of the Western styles of doing history have led to the undermining of oral history evidence in court. What emerges from this survey of the history of the legal reception of aboriginal oral history testimony in Canada is a sharper sense of the psychological and cultural damage that can result when folk tradition becomes an instrument of economic, legal and political interests.

### Résumé

Dans les affaires juridiques où la population des Natifs oppose au gouvernement canadien des revendications de territoires spécifiques ainsi que des droits, il est primordial à la fois d'établir certains faits historiquement lointains mais aussi d'énoncer la compréhension que la population indienne a de ces mêmes faits. Par ailleurs, de telles réclamations ont mis les revendicateurs natifs devant la nécessité de formuler un témoignage oral de leur histoire. Non seulement l'histoire orale comprend la version native du passé, mais elle se réfère à des faits historiques lointains pour lesquels peu ou aucune source de documents existe. Un tel témoignage historiographique, cependant, a animé de très profondes angoisses de la part du système judiciaire canadien concernant les règles des indices et la validité des sources orales.

Le système judiciaire canadien a fait des efforts significatifs pour être juste et ouvert vis-à-vis de l'historiographie orale, en prenant en considération les difficultés spécifiques que les Natifs rencontrent pour apporter des preuves à ces revendications de droits et de titres de propriété, notamment lors de la décision de la Cour Suprême de 1997, *Delgamuukw*. Pourtant malgré de tels efforts, le devoir d'étendre les récits oraux aux limites de leur fiabilité, la prépondérance de la suspicion et de la méfiance entre les Natifs et les non-Natifs, et le penchant théorique de l'historiographie occidentale a montré le discrédit des preuves orales à la cour. Les conclusions du travail de recherches sur la réception par les tribunaux de l'historiographie des Natifs au Canada est une connaissance plus profonde des dégâts psychologiques et culturels qui peuvent résulter quand les traditions populaires deviennent un instrument au service d'intérêts économiques, juridiques et politiques.

I think that to be in this kind of work and not to have an optimistic personality would probably take one into the depths of despair. At the same time, you have to balance optimism with reality. People occasionally ask me, “How can you come back so energetically week after week and have a lot of positive things to say?” On the other hand, I’m also the messenger of not always pleasant stories—about technology, about corporations getting bigger and militarism getting worse. People ask, “How can you stay so cheerful?” and I say, “Well, although things are getting worse, we are getting clearer about their getting worse. And I think it’s this clarity that will help us change direction.” It’s not going to be changed by pure brute force, and I don’t believe it’s going to be changed by moral coercion. It’s going to happen by working on new ways to solve problems, and on new institutions to solve those problems with. (John Mohawk, 1997, Sec: Question Period)

In his first experience in court, one Cree hunter from James Bay, Québec, remarked “the white man writes down what he thinks is important, the Indians remember what is important” (Richardson, 41). The observation was telling. This Cree hunter was one of many whom, in 1973, had left home and come south to Montréal to try and save their traditional hunting territory from massive disruption by hydroelectric development. In what was their first visit to a big city, one of the most baffling sights for these men was the courtroom and especially its lawyers, scrambling to write down every last word of what the aboriginals said.

The hunter’s statement was not a criticism of the strength of Canadian people’s memory. Clearly, it would be very difficult for even the most attentive lawyer to remember everything important said in a court of law. Instead, the hunter was alluding to a difference between the way First Nations and Canadian people practice history. Western history has become a university discipline, a matter of scholarly debate grounded in careful analysis (and analysis of analysis) of written, documentary evidence. Canadian First Nations history, like that of many indigenous societies all over the world, on the other hand, is traditionally oral. Oral history is passed on from generation to generation through stories and songs, through the telling and retelling of ancient tales.

Indigenous peoples of Canada – as well as many in the United States, Australia and New Zealand – have maintained and developed their oral traditions. One clear testament to that vitality is the recent courtroom phenomena of oral history testimony. Despite roughly five hundred years of European contact and cultural domination, the widespread development of written forms of aboriginal languages, and systematic efforts by modern anthropologists to document aboriginal histories, oral history has survived and is now being introduced into the courtroom as important case evidence.

Why is this happening? In Canada at least, there are two main reasons. Firstly, oral histories contain the aboriginal understanding of important historical events, and First Nations look to oral history in order to articulate and give evidence for that understanding. When the incentive to expand westward grew strong for 19th century Canada, the newly sovereign federal government wanted to avoid the bloody confrontations with Native Peoples that characterized the westward expansion of the United States. The government therefore opted to negotiate treaties which, for many Native groups, represented the only hopeful way out of a troublesome situation. In exchange for immense tracts of land, Native Peoples were confined to relatively small reserves, where they were offered protections such as tax exemptions,



schools, annuities, farming equipment, ammunition, relief in times of famine, and hunting and fishing rights. As government negotiators were in a position to use the vulnerability (and illiteracy) of First Nations to their advantage, however, they sometimes failed to put down in writing all that they verbally promised at the time of signing. Oral history is often the only remaining source of information about what was actually promised during treaty negotiations and so, with increasing frequency, First Nations are approaching the courts in search of justice with oral history evidence in hand.

The second major reason for the advent of oral history evidence in Canada is that Canadian law has, perhaps inadvertently, made aboriginal rights and land title cases difficult to decide without it. The most recent precedent for the proof of aboriginal rights was set forth in the Supreme Court ruling on *R. v. Van der Peet* in 1996, and is summarized by Stuart Rush as follows:

[The group must prove the existence of:] (i) A modern practice, tradition or custom (for example fishing salmon for trade) (ii) Continuity of the practice, tradition or custom from a pre-contact practice, tradition or custom to the present; (iii) The practice, tradition or custom must have been integral, core or central to the people's culture (iv) The people's society must have been distinctive. (Rush, Sect. II A, my emphasis)

To legally prove a community's right to continue a traditional aboriginal practice (such as hunting, trapping, or logging) involves, among other things, demonstrating that such activities were integral to the community's 'distinct culture' at the time of first contact (that is to say, in the 16th century!). Since there are few existing documents that specify in detail the practices of aboriginals five hundred years ago, aboriginal oral history is often the only viable and relevant evidential candidate. The test for the proof of aboriginal land title, in its most recently articulated form, was set forward by Chief Justice Lamer in the 1997 Supreme Court ruling in *Delgamuukw v. British Columbia* and is the following:

The land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive. (*Delgamuukw: The Supreme Court of Canada Decision on Aboriginal Title*, Para. 143)<sup>1</sup>

To prove the validity of aboriginal title to contested land, the court must agree that the group in question was socially organized and significantly attached to that land prior to Canadian sovereignty (1867). Here again, relevant and sufficiently specific historical documentation is generally scarce even for that date, and oral history is therefore often key evidence.

The fact that it is oral histories that harbour so much important evidence regarding aboriginal history puts aboriginal peoples in a very peculiar position when they are expected to speak

1) Before the ruling of C.J. Lamer, the criteria for proof of title was set forward in the *Baker Lake* decision of 1980, and included the extra clause that the plaintiffs prove the pre-sovereignty existence of an 'organized society', which means a society with "an organized system of landholding and a system of social rules and customs distinct to the band" (*Baker Lake v. Min. of Indian Affairs and Northern Development (Can.)* (1979), 107 D.L.R. (3d) 513 at 542 (Fed. T.D.)).

about their past in a court of law. To present evidence in a Canadian or American court means that western standards of evidence must be met, and since those standards are designed for written and documentary evidence, aboriginal histories are at a unique disadvantage. As Antonia Mills points out, “Westerners, including anthropologists, usually do not accept Native accounts as valid history because they are based on different premises than are Western canons of evidence” (Mills 1994, Pg. 73). The tendency for Westerners is to interpret aboriginal histories as allegory rather than historical fact.

In the first case made famous for its treatment of oral history evidence, *R. v. Delgamuukw*, it was the question of land title that was at issue. There, Chief Justice McEachern heard sixty-six oral history testimonies called *adaawk* and *kungax*. Normally performed at community gatherings or feasts called *potlatches*, the *adaawk* and *kungax* – mythological songs and stories about ancestors, ownerships, and trails between territories – were meant to establish that the Gitksan and Wet’suwet’en peoples of British Columbia were in fact socially organized and the exclusive occupants of the relevant land at the time of Canadian sovereignty. This evidence was the most important in the case.

In C. J. McEachern’s final ruling of 1991, he refused to accept oral history testimony as direct evidence of fact. He argued that, along with being at times inconsistent about important matters, it was too deeply embedded in ‘belief’ and blurred the distinction between ‘mythology’ and ‘real’ matters (McEachern, 46). In his eyes, oral history ought, with rare exception, to be understood as hearsay evidence. In Canadian law, hearsay evidence is only admissible to prove the fact of something having been said by a third party who can no longer be called upon for cross-examination; it cannot be direct evidence as to the truth of a matter. Since oral history is often passed on by remembering and relating what someone’s great-grandfather or grandmother (for example) said, it falls by default into this lower category of evidence.

McEachern’s decision has been derided by anthropologists and other analysts ever since its proclamation. Among his critics are scholars such as Clay McLeod and Bruce G. Miller who argue that “the law of evidence has been used to oppress First Nations” (McLeod, 1280) and that “[McEachern’s] judgment is part of the ‘dominant discourse’ which, relying on the ‘common sense’ of the layman, is by definition ethnocentric, over-simplified, and logically flawed” (Miller, 65). Robin Ridington argues that McEachern is not an “unintelligent man; He is merely the prisoner of his own culture’s colonial ideology” (Ridington, 217). All of these points have their merit. But Ridington speaks more to the heart of the matter. We are all ‘prisoners’ of our own culture in some sense. And to its credit, the Canadian judiciary has, over the last decade, made efforts to take stock of this and to correct for it.

In 1997 the Supreme Court of Canada violently overturned McEachern’s decision. It specified firstly that a court should approach the rules of evidence flexibly, with a consciousness of the special nature of aboriginal rights and title claims: especially the peculiar difficulty of proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. Secondly, the Supreme Court insisted that judges should, in considering the weight of oral history evidence, resist “facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions” (*Delgamuukw: The Supreme Court of Canada Decision on Aboriginal Title*, Para. 34). Without a doubt, these are admirably progressive views to be established in a Supreme Court. But what



has this meant for the admission of oral history evidence in practice? Has the Supreme Court placed aboriginal oral history on the same evidential footing as European-style documentary history? Is it obliged to do so?

The mandate of flexibility and cultural sensitivity given to judges with regards to oral history has only made their jobs more difficult and vastly complex. After all, perhaps nowhere are the procedural, rigid, and sceptical dimensions of western culture more emphasized than in the courtroom. Western courts are supposed to be sanctuaries of common sense and rigorous rationality, where claims and their supporting evidence are tirelessly probed until established beyond reasonable doubt. What then, is an everyday judge supposed to make of folkloric testimonies that tell of human-animal body transfers or how the universe originated from a tiny blood clot when deciding on the status of specific aboriginal rights and land claims? Such evidence can present the judiciary with questions as complex and philosophical as that of the historical reality of Biblical narratives. McEachern's judgment should not be seen as that of an evil law enforcer, but as the natural outcome of a clash of cultures.

The Canadian judiciary has managed to simplify its job somewhat, providing itself with two criteria for the acceptance of oral history evidence. In a 2001 decision, *Mitchell v. MNR*, the court ruled that admissible oral history evidence must be both useful (this, presumably, would exclude purely supernatural content) and reliable. On the face of it, this appears to be a reasonable strategy. After all, documentary evidence should also be useful and reliable if accepted in court. But do the standards of reliability and usefulness work too strongly against oral history evidence? Is the bar set too high? These questions are still in the process of being answered; the battle to rescue aboriginal oral history from the hearsay rule must be fought anew in every case.

In 2002, *Benoit v. Canada*, the Cree and Dene people approached the Federal Court claiming that the Canadian government had, for one hundred years, failed to uphold a promise of tax exemption made to them and other Native signatories of Treaty 8. Although the text of Treaty 8 itself makes no mention of any tax exemption, the Aboriginal parties argued that it was verbally promised to them by negotiators in 1899, and should therefore be upheld by law. To back up their claim, the Cree and Dene appealed to both documentary and oral history evidence. While the Federal judge agreed that a promise of tax exemption was indeed part of the Aboriginal understanding of the treaty – and that, in order to uphold the honour of the Crown, the exemption should be respected as a treaty right – his decision was quickly overruled in the Court of Appeal. There it was argued that oral history evidence had been given undue weight, that in fact it failed to meet a 'community standard' test of reliability that should have been more rigorously applied. Whereas in *Delgamuukw* the oral history evidence was offered by individuals specially designated by the community and passed on in rituals where its veracity could be publicly scrutinized, here oral history was passed on from one random individual to another in an informal manner. Without such checks and balances in place, the court deemed the oral history evidence equal to hearsay, and the case was ruled in favour of the Crown.

In a more recent Supreme Court case, *Bernard and Marshall* (2005), oral history was used to prove that commercial logging, or something like it, was an essential aspect of Mi'kmaq society in 1760. While the court emphasized admissibility, flexibility and sensitivity to the aboriginal perspective in these matters, the oral history evidence heard in the case was deemed

unreliable and inconsistent. This is partly a result of the historical distances involved; the farther back one wants to go with oral traditions the more strained they become. Paradoxically, the legal structure that makes oral history evidence useful – and sometimes necessary – also makes it unreliable. The emerging picture is that, for one reason or another, oral history evidence tends to be discredited in court, and is generally unable to satisfy the conditions of usefulness and reliability.

The tendency of judges to devalue oral history evidence is not only a result of a clash of cultures. There are some very sensible and grounded reasons for being suspicious of oral history evidence. Stuart Rush put the point well in his research on the status of such evidence:

The courts are reluctant to use oral history [because] oral history is considered by many judges to be self-serving. Those judges consider it to be hearsay given by a party with an interest in the outcome of the litigation...The implications of treating it like other evidence are enormous. Thus, it is the type of evidence that courts are not accustomed to accepting without a somewhat greater degree of confidence in the evidence. (Rush, 2003, sect. IX)

Alexander Von Gernet, who has served as an expert witness in many cases and whose testimony in *Benoit* helped to devalue oral history evidence and swing the case in favour of the government, reports to the Canadian Department of Indian Affairs:

Many oral traditions do not remain consistent over time and are either inadvertently or deliberately changed to meet new needs. Aside from the fallibility of human memory and inter-individual transmission, the factor that most contributes to the changing expression of any given oral tradition is the social and political context of the ‘present’ in which it is narrated. (Von Gernet, 1996, 5.3.6.)

The central difficulty with oral history evidence is that it is a living form of evidence that takes on what we would think of as the role of dead evidence. Oral history is not like a document dating to the 17th century. Constantly changing, oral traditions survive by being being told and retold, often in different ways. And unless the courts are working with transcripts of oral history interviews conducted beforehand (which, in fact, is often the case), a people’s history can be made or re-made by the words of an elder in court. The central anxiety that creeps up on all of us then, is, “What if they are making this up?”

In an interview broadcasted on McGill University’s student radio (CKUT) in October of 2004, a man who had spent 14 years in various US prisons very lucidly explained that the hardest thing about doing time in prison was not the threat of physical violence or isolation but the special kind of abuse that comes with denying inmates trust, authority, or say in any matter whatsoever: what he called the loss of the ability to be right. If a guard decided that an inmate had spat gum, he explained, then that inmate had indeed spat gum, period. Stripped of the power to be believed or to demand that his beliefs be respected – an authority, however minimal, that we take for granted in everyday life – the man struggled to remind himself that he was more than a ghost: he struggled to maintain a sense of dignity and integrity, or even a sense of who he was.



The peculiar, fascinating, and unfortunate thing about introducing oral history evidence into the courtroom is not that it might not be believed, but the looming threat that, like the beliefs of this prison inmate, it cannot be believed. Whether it is for good reasons or bad reasons, the suspicion that courts routinely throw at oral history evidence damages aboriginal people's sense of who they are, of their worth as a people. Canadian aboriginals are surrounded by a dominant culture that cannot fully recognize, even when willing, the value of oral history as they themselves would recognize it. And the practice of placing their ancient traditions and customs on the examination stand, only for them to be probed and scrutinized by non-Native judges, is certainly humiliating. In a personal confession regarding the Delgamuukw case mentioned above, an old Native woman remarked to aboriginal rights lawyer Paul Williams: "We told that judge things we don't even tell our own grandchildren. We made ourselves naked in front of him. And he did not believe us."<sup>2</sup>

After more than thirty years of legal battles, on 17 July 2007, the Cree people of James Bay finally came to an agreement with the federal government. The deal, which includes Cree rights for self-governance, is praised by both sides as a model for future aboriginal-state negotiations. Still, this agreement arrives amidst a growing backlog of almost 900 unsettled land claims and a National Day of Action, this past 29 June 2007, when First Nations from all across Canada publicly demonstrated for their causes, grievances and frustrations. Much more work remains to be done. One can only hope that aboriginal oral history is given due weight in the future settlement of these claims. The deeper and more long-term hope, however, is that oral history will be returned to its rightful place in aboriginal societies and taken off the examination stand. To this end, the negotiating table, where legal procedures can be left behind and a much more nuanced and fluid notion of history adopted, may be a more useful and reliable ally than the courtroom.

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2) This turned out to be a crucial criterion in the Delgamuukw case: the existence of an "organized society" pre-sovereignty was one of the crucial requirements that Chief Justice McEachern concluded was not provable by the oral and non-oral history evidence submitted in the trial. The requirements for proof of aboriginal title are clearly set out on page 225-226 of his Reasons For Judgment, and reiterate the criteria set forth in the Baker Lake case.



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