William v. British Columbia et al.:
Challenges, Successes and Lessons Learned in the Context of Oral History

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CONTENTS

I. INTRODUCTION

A. Purpose

The purpose of this paper is to outline the history of the recent *William* decision, summarize the general legal principles established by the decision and discuss the successes, challenges and lessons learned with respect to the case. However, as there are a multitude of issues that can be discussed with respect to the *William* decision, oral history has been chosen as the topic for the context of this paper.

B. History of the *William* Case

Chief Roger William, the Plaintiff in the *William* case, is the Chief of the Xeni Gwet'in First Nation, which is one of six communities that comprise the Tsilhqot'in Nation. Between the late 1980's and 1990's the Province of British Columbia purported to authorize logging companies to clear-cut Xeni Gwet'in lands. The Xeni Gwet'in and other Tsilhqot'in communities used various methods to prevent the logging, including roadblocks, negotiations, creating and asserting a Declaration of ownership over the lands and finally the launching of two separate court actions based on Aboriginal title and an Aboriginal right to hunt and trap, which also included two injunction applications. Eventually, Chief Roger William consolidated the two actions and the trial began in 2002. In this action, Chief Roger William and the Tsilhqot'in Nation made, *inter alia*, a claim for Tsilhqot'in Aboriginal title and rights and much of the evidence before the Court came by way of oral history.

II. GENERAL RULING IN THE *WILLIAM* CASE

The British Columbia Supreme Court decision in the *William* case was delivered on November 20, 2007. Although the case undoubtedly stands for many principles, some of the main points are as follows:

1) The Court stated that the Tsilhqot'in proved Aboriginal title to approximately 50% of the claim area, but fell short of granting a declaration of title on a technicality.
2) The Court declared Tsilhqot'in Aboriginal hunting & trapping rights throughout the entire claim area, including a right to capture and use wild horses.
3) The Court declared that the Tsilhqot'in have an Aboriginal right to trade furs and pelts for a moderate livelihood.
4) The Court held that British Columbia infringed Tsilhqot'in Aboriginal rights without justification and appeared to modify the justification test. Baseline studies are now required: British Columbia must do an inventory of the animals and conduct a needs assessment to see what the Aboriginal group needs, and plan accordingly.
5) The Court held that British Columbia has no jurisdiction on Aboriginal title lands, has no jurisdiction to extinguish Aboriginal title and did not extinguish Aboriginal title by issuing fee simple grants.
6) The Court held that British Columbia's *Forest Act* and *Limitation Act* do not apply on Aboriginal title lands.
7) The Court held that Aboriginal title lands fall within federal jurisdiction under Section 91(24) of the *Constitution Act* and that Canada has unacceptably denied and avoided its constitutional responsibility to protect these lands.

8) And relevant to this discussion, the Court held that oral history was reliable, could stand alone, without the corroboration of documents and should be given equal weight.[1]

III. ORAL HISTORY IN THE *WILLIAM* CASE

A. General Challenges

1. Trust

The Tsilhqot'in have a long history of distrust towards outsiders. Some of their first experiences with outsiders include individuals knowingly selling small pox infected blankets to Tsilhqot'in communities back in the early 1860's. In 1864, during a war with the Colony, government officials arguably made false promises to induce Tsilhqot'in warriors and chiefs to surrender and treaty. Instead of treaty negotiations the Tsilhqot'in warriors and chiefs were tried and hung. Government promises of setting aside large areas of land for the Tsilhqot'in were made in the 1870's and then revoked. To date, these specific claims remain unresolved.

Legal counsel for First Nations must overcome the challenge of earning trust within the communities in order to access well-guarded oral histories that are required to prove Aboriginal title and rights. Trust is earned through respect, recognition and honesty, characteristics that must be demonstrated. Counsel will want to build relationships through interaction. When invited, Counsel should attend gatherings, feasts, ceremonies, band meetings, funerals, family and community campsites, medicine walks, school activities and any other setting that assists in building relationships and trust.

Legal counsel will want to build trust by explaining their purpose. What is the information going to be used for and by whom? Elders will want to know.

In an effort to build trust, counsel will want to consider whether there are any protocols regarding oral history transmission. What cultural taboos exist? Are particular oral histories gender specific? Are particular oral histories more sensitive or confidential than others? What is an accepted method of obtaining oral histories? What honoraria are expected, if any? Will elders understand that the government will use honoraria against First Nations in court?

Finally, legal counsel must recognize that enough trust must be established so that witnesses feel safe, to the extent that they feel their information will not be criticized. Remember that witnesses may have experienced a lifetime of ridicule and shame for their beliefs. Residential schools tried to teach First Nation students to loathe their culture, language customs, beliefs and religion. The very thing that is required to prove Aboriginal title and rights, for example, origin stories, traditional laws, ceremonies and rituals, traditional customs and beliefs, may have been ridiculed by mainstream society and deemed "from the devil" by priests in the residential school system. Be mindful of this when approaching witnesses. In the *William* case, some witnesses were reluctant to testify because the robes worn in court reminded them of their bad experiences in residential school.

2. Logistics

There are many logistical challenges to obtaining and presenting oral history evidence to a court. Arranging and conducting interviews with witnesses can be extremely challenging. Can the witnesses easily be contacted? Do they have telephones? Do they speak English? Conducting

[1] *William v. British Columbia et al.,* 2007 BCSC 1700 at para. 196.

interviews can equally be challenging. After many arrangements have been made for a key witness, interviews scheduled and rescheduled, after a long costly trip to a remote community has been undertaken… why isn't the witness home?

Legal counsel must have a keen sense of the traditional practices of the First Nation as they can affect witness availability. Be aware of seasonal round practices. Most lawyers at Woodward & Company *now* have a keen sense of when and where the salmon arrive and when and where the deer migrate. If a witness is not home in late July, chances are they are camping and fishing for Spring Salmon at the Chilko River. If a witness is not home in October, chances are that he or she is out hunting deer. So be aware of seasonal practices.

Legal counsel must have a keen sense of the general health of a witness. When does the witness have doctors' appointments? How far away is the nearest doctor? In Tsilhqot'in territory, some elders must travel at least three hours each way to see a doctor. And for many elders, appointments crop up unexpectedly.

Other logistical problems include arranging accurate translation. Tsilhqot'in is a well-preserved language and almost everyone over the age of fifty speaks Tsilhqot'in as a first language.

3. Cost

One of the challenges facing an Aboriginal group attempting to establish an Aboriginal rights claim is the high cost of litigation generally. The cost associated with compiling and presenting oral histories to a court is no different. There is a cost associated with all aspects of gathering oral history evidence, including, but not limited to, the cost for legal counsel to travel to, and stay within, the community, the cost to conduct interviews and the cost for translators and spellers.

In the *William* case, for every witness brought to trial to testify there were usually two Tsilhqot'in translators and spellers required. A translator (and speller for affidavits) was required in the field to obtain witness information and to prepare the witness for trial, and a separate second translator (and speller for affidavits) was required in Court to translate (and spell) for the witness because the Crowns opposed the use of the preparatory translator or speller in Court.

4. Delays

In the *William* case, there were several motions, perhaps as many as ten, brought by the Crowns, which in essence were attempts to terminate or delay the trial. The trial itself last nearly five years. In the meantime, Tsilhqot'in elders were disappearing at an alarming rate. The Plaintiffs completed one deposition of an elder, which was used at trial and a second was cancelled due to the death of another witness. Another witness had to stop testifying due to illness. She unfortunately passed away prior to completing her testimony.

The legal significance of oral histories cannot be understated. Therefore, legal counsel and First Nations must be fully aware of the disappearing resource and take steps to preserve such evidence.

B. Particular Challenges

1.Leading Questions Not Permitted

The legal test for proving Aboriginal title requires evidence of exclusive occupation of the claimed land at the time of Crown sovereignty.[2] A sample of the types of evidence that a Court might be assessing with respect to whether a First Nation has met the legal tests to prove Aboriginal title includes, but is not limited to, evidence regarding the character and nature of the land, the technology used by the Aboriginal claimant group, the population that occupied and used the claimed lands. In addition, a Court will be interested in assessing whether the claimant group exclusively occupied the claimed lands, whether there is a defined territory, with borders that were defended, whether and to what extent overlaps existed with neighbouring First Nations, whether the lands were used intensely enough to ground Aboriginal title, to what uses the lands were put, whether and to what extent a trail and transportation network existed on the claimed lands, whether the claimant group represents the descendants of the original inhabitants and title holders of the claimed lands, and whether and to what extent the claimant group is connected to the claimed lands.

However, one challenge that faces witnesses in revealing such evidence to the Court is the Court process itself. The Court does not permit leading questions by the witnesses' lawyers. For example, in the *William* case, lawyers for the Tsilhqot'in were not able to ask whether a witness could tell a story about use in a particular area. For instance, "Did you hunt in the claim area?" Did your ancestors hunt in the claim area? Although Tsilhqot'in culture demands, out of respect, that direct questions be put to elders, it was impossible to do so in the courtroom. This was one of the most difficult challenges to overcome as a Plaintiffs lawyer.

C. Challenges Due to the Crowns' Positions on Oral History

1. Oral History Motion

The Crown objected to the use of oral history without a preliminary inquiry into the admissibility and reliability of the oral history and its source. The Crown brought a motion requesting a formal *voir dire* type preliminary process. The Court held that an informal preliminary process was appropriate and Justice Vickers set out certain criteria that must be met in order to hold witnesses reliable. In the *William* case, the court looked at the age of the witness, whether the witness was brought up traditionally and within the territory, whether the witness spoke his or her own language, whether the witness went to school or could read or write, whether the witness was reputable within the community, and whether the witnesses' oral history teachers were traditional and reputable.

Therefore, when preparing for an Aboriginal rights claim, legal counsel and First Nations should look for not only good oral history evidence, but good witnesses as well, witnesses who can meet the necessary criteria set out in the *William* case.

2. Corroboration Required

The governments of Canada and British Columbia (the "Crowns") appeared to be advancing a position that required the oral histories of elders be corroborated by written or archaeological evidence; a position rejected by the Supreme Court of Canada. The Crowns founded this position on the opinion of Dr. von Gernet, an expert anthropologist brought in by Canada specifically to address the issue of oral history. Justice Vickers held that Dr. von Gernet's approach calls for

[2] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 (SCC), at para. 143.

independent corroboration of the oral tradition evidence[3] and that, "rejecting oral tradition evidence because of an absence of corroboration from outside sources would offend the directions of the Supreme Court of Canada."[4] Justice Vickers went on to hold that:

> Canada says it is not their position, nor the position of Dr. von Gernet, that oral tradition evidence can only be given weight when it is corroborated by documentary or archaeological evidence…[5]
>
> Despite what Canada has argued, 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…
>
> This approach is not legally sound. 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.[6]

3. No Time Depth for Occupation

Based on Dr. von Gernet's approach, the Crowns took the position that oral histories fail to illustrate time depth and do not lend themselves to prove historical facts, such as Tsilhqot'in occupation of the claim area pre-1846.[7] The Plaintiffs argued that not only could time depth of occupation be deciphered through an analysis of genealogical information, but also through the oral history evidence that demonstrated that Tsilhqot'ins are able to measure time depth in terms of generations and historical events and different word definitions, such as the "undidanx", "yedanx" and "sedanx". Tsilhqot'in witnesses explained that the word "undidanx" reflected a more recent time period between roughly the late 1800's to the late 1900's, a time period that might loosely reflect an era of witnesses' grandparents. Witnesses explained that the preceding time period was defined by the word "yedanx", which reflected the time period between approximately the early 1800's to the late 1800's, a time period that might loosely reflect the era of the witnesses' great or great, great grandparents. The word "sedanx" was identified as the time period that preceded the "yedanx", which reflected a time when Tsilhqot'in ancestors were alive, a time period that roughly reflects the era prior to the time of the witnesses' grandparents' grandparents.

4. Feedback Contaminates.

Dr. von Gernet also opined that the oral history evidence of the Tsilhqot'in witnesses, elders and leaders, including Chief Roger William, was generally unreliable due to the "feedback effect," which is when "written sources become incorporated into oral traditions."[8] Lawyers might refer to this feedback effect as "contamination."[9] It was argued that the Tsilhqot'in witnesses could not differentiate between oral history and information contained in books, or from a source that had

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[3] *William v. British Columbia et al.,* 2007 BCSC 1700 at para. 152.
[4] *William v. British Columbia et al.,* 2007 BCSC 1700 at para. 152.
[5] *William v. British Columbia et al.,* 2007 BCSC 1700 at para. 153.
[6] *William v. British Columbia et al.,* 2007 BCSC 1700 at para. 154.
[7] Canada's Final Argument, at para. 717, *William v. British Columbia et al*, 2007 BCSC, 1700; British Columbia's Final Argument, Appendix 2, at paras. 60-62, *William v. British Columbia et al*, 2007 BCSC, 1700.
[8] British Columbia's Final Argument, Appendix 2, at para. 74, *William v. British Columbia et al*, 2007 BCSC, 1700.
[9] Transcripts, Sept. 6, 2006, Dr. A. von Gernet, Cross-Examination, at pg 53, lines 7 to 12, *William v. British Columbia et al*, 2007 BCSC, 1700.

read about the subject matter. Although the Plaintiffs agreed that the influence of outside sources could affect weight, there was evidence from the witnesses that illustrated their ability to discern between oral history and books.

Therefore, legal counsel will want to sort out directly on the stand where an elder heard a story originally and whether he or she can distinguish it from any "contaminating" materials. It is probably better to meet this issue head on and clarify up front whether there has been any influence that might be colourable as interfering.[10]

D. Successes

1. Entire Body of Oral History Evidence Taken into Account

As stated above, despite the Crowns' arguments that corroboration and testing is required in order to render oral histories reliable, the Court held that the elders' voices were important; their entire evidence would be considered and could stand on its own without corroboration. In assessing the use of oral history in the *William* case, Justice Vickers held:

> I am satisfied that all of the witnesses who related oral tradition and oral history evidence at trial did so to the best of their abilities. The central theme and lessons of the legends remained consistent. I propose to take this entire body of evidence into account and to the extent that I am able, consider it from the Aboriginal perspective. 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.[11]

2. Oral History can Prove Occupation at a Particular Time

With respect to whether oral histories lend themselves to proving time depth and historical facts regarding Tsilhqot'in occupation of the claim area pre-1846, the Court held:

… Contrary to the view he [Dr. von Gernet] expressed, I find that some oral tradition evidence of Tsilhqot'in people does assist in the construction of a reasonably reliable historical record of the actual use of some portions of the Claim Area at or prior to 1846.[12]

E. Lessons Learned

1. Reconciliation

The Courts are willing to look beyond the Crowns' outdated arguments and recognize that reconciliation requires that the Aboriginal perspective be heard. Clearly, Justice Vickers has heard the message from the Supreme Court of Canada that the fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of the interests of Aboriginal peoples and non-

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[10] The First Square Inch of Court Recognized Aboriginal Title in British Columbia?: What *Tsilhqot'in Nation v. The Queen*[10] May Mean for Claims Research, David Robbins and Drew Mildon, Woodward & Company, pg. 14
[11] *William v. British Columbia et al*, 2007 BCSC, 1700 at para. 196.
[12] *William v. British Columbia et al*, 2007 BCSC, 1700 at para. 168.

Aboriginal peoples.[13] Justice Vickers confirmed the principle set out by the Supreme Court of Canada and held:

> The goal of reconciliation can only be achieved if oral tradition evidence is placed on equal footing with historical documents. Oral tradition evidence "would be consistently and systemically undervalued" if it were never given any independent weight but only used and relied upon where there was confirmatory evidence: see ***Delgamuukw*** (S.C.C.) at para. 98.[14]

In the context of reconciliation, Justice Vickers acknowledged the wisdom contained in oral histories and the need for decolonization when he concluded:

> … this judgment features Tsilhqot'in people as they strive to assert their place as First Peoples within the fabric of Canada's multi-cultural society. The richness of their language, the story of their long history on this continent, the wisdom of their oral traditions and the strength and depth of their characters are a significant contribution to our society. Tsilhqot'in people have survived despite centuries of colonization. The central question is whether Canadians can meet the challenges of decolonization.[15]

IV. CONCLUSION

Compiling and presenting oral history evidence that accurately represents the commonly held beliefs and voice of a community, to prove an Aboriginal right, is inherently difficult from more than one aspect. Not only is it a challenge to overcome the positions of the Crowns and the process of the Court, but it is also a challenge to overcome the challenges that stem from within a First Nation community itself.

The pursuit of oral history evidence requires the careful consideration of culture, tradition, customs, laws, religion and protocols of a community. Respect of these issues facilitates trust, which can open the door to a wealth of knowledge that, as seen in the *William* case, can assist a court in finding, that an Aboriginal right has been proven.

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[13] *William v. British Columbia et al.,* 2007 BCSC 1700 at para. 512; *Mikisew Cree First Nation v. Canada Minister of Canadian Heritage*, [2005] 3 S.C.R. 388 at para. 1.
[14] *William v. British Columbia et al.,* 2007 BCSC 1700 at para. 152.
[15] *William v. British Columbia et al.,* 2007 BCSC 1700 at para. 20.