

Oral History Does Make a Difference:

William v. British Columbia et al.

These materials were prepared by Gary S. Campo, of Woodward & Company, Victoria, BC for the Continuing Legal Education Society of British Columbia, February 21, 2008. The Author wishes to acknowledge the Tsilhqot'in Nation and the entire Tsilhqot'in legal team, as this paper is largely based on the Plaintiffs Final Argument.

The Plaintiffs' Final and Reply Arguments are available on the Woodward & Company website at www.woodwardandcompany.com.

Oral History Does Make a Difference

*William v. British Columbia et al*¹

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

I. INTRODUCTION

A. Purpose

The purpose of this paper is to use the recent *William* decision to illustrate that oral history² is a source of information that provides a more complete understanding of the issues and legal tests involved in Aboriginal rights litigation and is often the only evidence available for Courts to consider. Oral history not only illuminates historic events, but it provides context and an Aboriginal perspective to those events. Without oral history, the laws, cultures, traditions, religions, identities, land occupation, land use patterns, and histories of Aboriginal groups can too easily be misinterpreted, to the extent that these groups may mistakenly be held not to meet the legal tests required to prove Aboriginal rights claims. Therefore, I propose to use the *William* case to illustrate that oral history enables the Courts to understand and take into account the Aboriginal perspective and ultimately enables the court to make a proper assessment of Aboriginal claims.

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, injunction applications, 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. 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. The Court delivered its decision on November 20, 2007.

² Some academics, including Dr. Alexander von Gernet, distinguish between "oral history" and "oral tradition". Oral history has been defined as the recollections of individuals who were eyewitnesses or had personal experience with events occurring within their lifetime; and oral tradition has been defined as past events transmitted by word of mouth over at least one generation. For the purposes of this paper, the author does not make any distinction and uses the term "oral history" interchangeably to reflect both definitions above.

II. THE SUPREME COURT OF CANADA SET THE STAGE

A. Touchstone Principles of Aboriginal Law

1. Reconciliation

The Supreme Court of Canada has stated that the key fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions.³ The doctrine of Aboriginal rights must be interpreted in light of this promise of reconciliation. It is the means by which the Crown's assertion of sovereignty over Canadian territories is reconciled with the fact that these same lands were already occupied by Aboriginal peoples, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.⁴

2. The Aboriginal Perspective is Required

If the goal of reconciliation is to be achieved, Courts must take into account both the Aboriginal and common law perspective. True reconciliation will place equal weight on both.⁵ In applying common law concepts to Aboriginal rights claims, Courts must be sensitive to the realities of Aboriginal society. To determine Aboriginal entitlement, the Court must look to Aboriginal practices rather than imposing a "European template".⁶ The Aboriginal perspective "grounds the analysis and imbues its every step."⁷

3. Sensitive Application of the Rules of Evidence

Due to the difficulties associated with proving Aboriginal rights claims the Supreme Court of Canada has consistently mandated a "sensitive and generous approach to the evidence tendered to

³ Plaintiff's Final Argument, at paras. 266-268, *William v. British Columbia et al*, 2007 BCSC 1700; *Mikisew Cree First Nation v. Canada Minister of Canadian Heritage*, [2005] 3 S.C.R. 388 at para. 1.

⁴ Plaintiffs Final Argument, para. 268, *William v. British Columbia et al*, 2007 BCSC 1700; *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (SCC), at paras. 26-49, [*Van der Peet*].

⁵ Plaintiffs Final Argument, para. 268, *William v. British Columbia et al*, 2007 BCSC 1700; *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (SCC), at paras. 49-50; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 147, [*Delgamuukw*].

⁶ Plaintiffs Final Argument, para. 268, *William v. British Columbia et al*, 2007 BCSC 1700; *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220 at para. 49, [*Bernard*].

⁷ *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220 at para. 50.

establish Aboriginal rights.”⁸ Lamer C.J. expressed the rationale for this approach in *Van der Peet*:

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.⁹

As this passage suggests, two factors in particular compel a sensitive and generous approach to evidence tendered for Aboriginal rights claims.¹⁰ The first factor arises from the “unique and inherent evidentiary difficulties” inherent in requiring Aboriginal claimants to “demonstrate features of their pre-contact society, across a gulf of centuries and without the aid of written records”.¹¹ Recognizing these difficulties, the Supreme Court of Canada has repeatedly “cautioned that the rights protected under s. 35(1) should not be rendered illusory by imposing an impossible burden of proof on those claiming this protection”¹². Thus, in *Mitchell*, McLachlin C.J. held that Courts should approach the rules of evidence “with a consciousness of the special nature of Aboriginal claims and the evidentiary difficulties in proving [such a claim].”¹³

The second factor shaping the Courts’ approach to evidence in Aboriginal rights claims relates to the “special nature” of these claims.¹⁴ As stated above, Aboriginal rights are grounded as much in the Aboriginal perspective as they are in traditional common law principles. Accordingly, as Lamer C.J. emphasized in *Delgamuukw*, Courts must “**take into account the perspective of the aboriginal people** claiming the right ... while at the same time taking into account the perspective

⁸ Plaintiffs Final Argument, para. 272, *William v. British Columbia et al*, 2007 BCSC 1700; *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220 at para. 68.

⁹ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (SCC), at para. 68. (My Emphasis Added).

¹⁰ Plaintiffs Final Argument, para. 274, *William v. British Columbia et al*, 2007 BCSC 1700.

¹¹ *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, para. 27, [*Mitchell*].

¹² *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, para. 27; *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (SCC), at para. 68; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at paras. 83, 87; *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220 (SCC), at para. 68; *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 408.

¹³ *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, para. 27.

¹⁴ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (SCC), at para. 68.

of the common law”, ideally placing equal weight on each perspective.¹⁵ In his words, “aboriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords **due weight to the perspective of aboriginal peoples.**”¹⁶ This means “adapt[ing] the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts.”¹⁷

Aboriginal rights claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. As McLachlin C.J. cautioned in *Mitchell*, “[t]here is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence.”¹⁸ In that case, she found that the trial judge erred by finding an Aboriginal right in the “absence of even minimally cogent evidence.”¹⁹

However, quoting from *Van der Peet*, she stressed that her holding “should not be read as imposing upon aboriginal claimants the ‘next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community’.”²⁰ She further confirmed that “indisputable evidence is not required to establish an aboriginal right”, nor “must the claim be established on the basis of direct evidence of pre-contact practices, customs and traditions, which is inevitably scarce.”²¹ Either requirement would “preclude in practice any successful claim for the existence” of an Aboriginal right. She clarified that her holding was premised entirely “on the distinction between sensitively applying evidentiary principles and straining these principles beyond reason.”²²

Ultimately, a case-by-case approach to the evidence is demanded.²³ The task of the Courts is to approach the evidence in a sensitive and generous manner, as befits the special nature and inherent

¹⁵ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para 81.

¹⁶ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para 82.

¹⁷ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para 84; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, para. 37.

¹⁸ *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, para. 39.

¹⁹ *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, para. 42.

²⁰ *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, para. 52.

²¹ *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, para. 52.

²² *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, para. 52.

²³ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para 87; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, para. 31.

challenges of Aboriginal rights litigation, while taking care not to strain this evidence beyond what it can reasonably support.

III. APPLICATION OF THE TOUCHSTONE PRINCIPLES TO ORAL HISTORY

A. The Aboriginal Perspective²⁴

The sensitive and generous approach to the evidence in Aboriginal rights claims also applies to the admissibility and weight of oral history evidence.²⁵ The fact that Aboriginal rights are grounded as much in the Aboriginal perspective as they are in the common law means that the Courts must accord “due weight” to the Aboriginal perspective on their practices, customs and traditions and on their relationship with the land.²⁶ In *Delgamuukw*, Lamer C.J. expressed the practical effect of this *sui generis* approach: “[i]n 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.”²⁷

Lamer C.J. acknowledged that “[m]any features of oral histories would count against both their admissibility and their weight as evidence of prior events in a court that took a traditional approach to the rules of evidence”. However, he directed Courts to adapt the rules of evidence to accord the Aboriginal perspective due weight:

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.²⁸

He emphasized that “com[ing] to terms” with oral histories is crucial if the promise of reconciliation embodied in s. 35(1) is to have any real meaning: “... [G]iven that most aboriginal

²⁴ Plaintiffs Final Argument, paras. 287-291, *William v. British Columbia et al*, 2007 BCSC 1700.

²⁵ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para 84; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, para. 28.

²⁶ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 84.

²⁷ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 84.

²⁸ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 87.

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.”²⁹

Such an approach does not mandate the blanket admissibility of oral history evidence. The admissibility and weight of oral history evidence must be determined on a case-by-case basis, according to the principles described below. In making these determinations, however, Courts must approach the oral history evidence in question with an awareness of the special, reconciliatory role of Aboriginal rights and the difficulties inherent in proving events that occurred in the distant past.³⁰

B. Admissibility of Oral History Evidence³¹

Oral histories are admissible as evidence where they are both **useful** and **reasonably reliable**, subject always to the discretion of the trial judge to exclude evidence that is more prejudicial than probative.³² Usefulness asks whether the oral history provides evidence that would not otherwise be available or evidence of the Aboriginal perspective on the right claimed. Reasonable reliability ensures that the witness represents a credible source of the particular people’s history.³³ In *Mitchell*, McLachlin C.J. held that:

“[i]n determining the usefulness and reliability of oral histories, judges are directed to resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts. 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.³⁴

²⁹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at paras. 84, 87; *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 408.

³⁰ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 87; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 (SCC), at para. 31.

³¹ Plaintiffs Final Argument, paras. 292-294, *William v. British Columbia et al*, 2007 BCSC 1700.

³² *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 (SCC), at para. 31.

³³ *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 (SCC), at paras. 32-33; *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220 (SCC), at para. 68.

³⁴ *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 (SCC), at para. 34; *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220 (SCC), at para. 68.

C. Weighing of Oral History Evidence³⁵

As discussed, Lamer C.J. in *Delgamuukw* acknowledged that a number of features of oral histories would deprive them of weight, according to traditional principles of evidence. At the same time, he stressed that the goal of reconciliation can be realized only if such evidence is placed on an “equal footing” with historical documents.³⁶

The Supreme Court of Canada ordered a new trial in *Delgamuukw* in part because the trial judge failed to approach the oral history evidence with these principles in mind. Lamer C.J.’s reasoning on this point is instructive. He noted that the trial judge “framed his ruling on weight in terms of the specific oral histories before him.” “In reality”, however, the trial judge “based his decision on **some general concerns** with the use of oral histories as evidence in aboriginal rights cases.”³⁷

Lamer C.J. cautioned that oral histories should not be rejected based on such “general concerns with the use of oral histories”:

In summary, the trial judge gave no independent weight to these special oral histories because they did not accurately convey historical truth, because knowledge about those oral histories was confined to the communities whose histories they were and because those oral histories were insufficiently detailed. However, as I mentioned earlier, these are features, to a greater or lesser extent, of all oral histories, not just the adaawk and kungax. The implication of the trial judge’s reasoning is that oral histories should never be given any independent weight and are only useful as confirmatory evidence in aboriginal rights litigation. I fear that if this reasoning were followed, the oral histories of aboriginal peoples would be consistently and systematically be undervalued by the Canadian legal system, in contradiction of the express instruction to the contrary in *Van der Peet* that trial courts interpret the evidence of aboriginal peoples in light of the difficulties inherent in adjudicating aboriginal claims.³⁸

As mentioned, the Supreme Court of Canada in *Mitchell* cautioned Courts against straining the flexible approach to oral history evidence. McLachlin C.J. warned that “[w]hile evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or

³⁵ Plaintiffs Final Argument, paras. 295-300, *William v. British Columbia et al*, 2007 BCSC 1700.

³⁶ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 87.

³⁷ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 98.

³⁸ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 98; See also paras. 104-106.

weighed in a manner that fundamentally contravenes the principles of evidence law.”³⁹ The Court counseled a “sensitive application” but not a “complete abandonment” of the rules of evidence.⁴⁰

Fundamentally, however, *Mitchell* confirmed the approach to oral histories set out in *Delgamuukw*. McLachlin C.J. stressed that “[t]he requirement that courts interpret and weigh the evidence with a consciousness of the special nature of aboriginal claims is critical to the meaningful protection of s. 35(1) rights.”⁴¹ She echoed Lamer C.J.’s concern that “the admission of oral histories represents a hollow recognition of the aboriginal perspective where this evidence is then systematically and consistently undervalued or deprived of all independent weight.”⁴²

Accordingly, despite the fact that “[m]any features of oral histories would count against ... their weight as evidence” on a strict application of traditional evidentiary rules, these general features should not preclude Courts from giving such evidence independent weight.⁴³ If oral histories are accepted only to the extent that they are corroborated by the written record, or if they are rejected based on qualities inherent (to a greater or lesser extent) in all oral histories, then they will be “consistently and systematically undervalued,”⁴⁴ contrary to the direction in *Van der Peet*, *Delgamuukw* and *Mitchell*.

D. Types of Oral History Evidence⁴⁵

In *Delgamuukw*, the Supreme Court of Canada considered “various kinds of oral histories”.⁴⁶ There is no one form of oral history. Oral history differs from Aboriginal nation to Aboriginal nation. Even within an Aboriginal group, the oral history of the community may be handed down across generations in a variety of ways, like strands comprising the fabric of their collective past.⁴⁷ Some of these mechanisms of transmission may be highly formalized and structured. However,

³⁹ *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 (SCC), at para. 38.

⁴⁰ *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 (SCC), at para. 39.

⁴¹ *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 (SCC), at para. 37.

⁴² *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 (SCC), at para. 37.

⁴³ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 86.

⁴⁴ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 98.

⁴⁵ Plaintiffs Final Argument, paras. 301-313, *William v. British Columbia et al*, 2007 BCSC 1700.

⁴⁶ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 107.

⁴⁷ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 85, quoting from Canada, Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back, vol. 1 (Ottawa: Supply and Service Canada, 1996) at 33 [“... there are many histories, each characterized in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people”].

many Aboriginal groups rely additionally, or exclusively, on more intricate and subtle systems of passing knowledge and culture from generation to generation. From this perspective, “oral history” cannot be reduced to a single institution or formal system of transmission. Rather, it is something that is lived and breathed, inseparable from day-to-day life, and deeply embedded within the culture. It can only be understood on these terms.

Nightingale P.C.J., of the Saskatchewan Provincial Court, captured the richness and diversity of oral traditions in the following passage from *R. v. Catarat*:

For the Dene of Northwest Saskatchewan, as for many North American Aboriginal Peoples, history has traditionally been something neither studied nor separated from other aspects of life - it is part of what you are. Neither was "history" written; this has been a group of societies in which traditions, customs, history and attitudes are shared orally only. This may take many forms: it may be taught while a grandfather teaches his grandson how and where best to trap; sometimes during a grandmother showing her granddaughter how to sew with moose sinew and weaving history in the process; still other times by the telling of stories in a larger group around a campfire. There are, in Dene culture, many ways of knowing.⁴⁸

As McLachlin C.J.C. held in *Mitchell*, “[o]ral 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.”⁴⁹ If Courts are to “come to terms with the oral histories of aboriginal societies”, as directed by Lamer C.J.C. in *Delgamuukw*,⁵⁰ this must mean, at the very least, coming to terms with the tremendous variety of Aboriginal oral traditions, and the diverse ways in which oral knowledge is passed down through generations.

Merely by virtue of speaking the traditional language, growing up and participating in the culture, and observing one’s elders and listening to their stories, a witness may provide necessary and reliable evidence.⁵¹ Courts have long admitted and relied upon oral history evidence on this basis.

⁴⁸ *R. v. Catarat*, [1998] S.J. No. 601 (Prov. Ct.) at paras. 65-66 (emphasis added) [rev’d (on other grounds) [1999] S.J. No. 612 (Q.B.); aff’d [2001] S.J. No. 213 (C.A.); application for leave to appeal dismissed [2001] S.C.C.A. No. 382 (S.C.C.)].

⁴⁹ *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 (SCC), at para. 34.

⁵⁰ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 84.

⁵¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at paras. 99-101; *R. v. Haines*, [2003] 1 C.N.L.R. 191 (B.C. Prov. Ct.) at para. 117 (emphasis added); see also paras. 100-116; See also: *R. v. Morris*, 2002 BCSC 780, [2002] 4 C.N.L.R. 222, aff’d 2004 BCCA 121, 25 B.C.L.R. (4th) 45, leave to appeal to

Indeed, the Supreme Court of Canada in *Delgamuukw* expressly endorsed this form of oral history evidence. Even the trial judge, who was overturned by the Supreme Court of Canada because of his overly restrictive treatment of oral histories, admitted oral history evidence based on recollections of Aboriginal life:

As to historical facts, there was evidence of dramatic events such as the rock slide at Hagwilget Canyon, which I call general history, as well as personal history. By the latter I mean, for example, what the deceased grandparent of a witness said about his life, or the life of his grandparents or other identified elders in relation to a relevant fact such as the tradition or culture of a House or people or the use and occupation of land. These matters, it seems to me must, as a matter of necessity, be equivalent to a declaration of land use, and must be admissible under the rubric of reputation evidence, or discounted reputation evidence. This kind of evidence must, of course, be weighed and tested for trustworthiness.⁵²

On appeal, the Supreme Court of Canada affirmed the admissibility of such evidence, under the heading “Recollections of Aboriginal Life”, a phrase encompassing testimony about personal and family history, based on the personal knowledge of the witnesses and declarations of the witnesses’ ancestors as to land use.⁵³ As discussed, Lamer C.J. held that the trial judge erred when he discounted this admitted evidence on the grounds that it was general in nature and could only establish occupation stretching back for a century or so.⁵⁴ Pursuant to the principle set out in *Van der Peet*, even if such oral history evidence could not conclusively establish pre-sovereignty occupation of the territory, it was still relevant to demonstrate that current occupation had its origins prior to sovereignty.⁵⁵

In other words, the Supreme Court of Canada in *Delgamuukw* expressly endorsed the admissibility and weighing of oral history evidence arising not only from formalized cultural institutions, but also from the personal knowledge and observations of witnesses raised in the traditional culture, with the attendant opportunity to observe traditional activities and to learn about the prior use and occupation of the land from their elders. This holding is consistent with the Court’s earlier

Supreme Court of Canada granted, 2004 CarswellBC 2628 (S.C.C.); *R. v. Jacobs*, [1998] B.C.J. No. 3144 (S.C.) at para. 8.

⁵² *Delgamuukw v. British Columbia*, (1991), 79 D.L.R. (4th) 185 (S.C.) at 255 (emphasis added).

⁵³ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 99.

⁵⁴ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 100.

⁵⁵ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 101.

recognition, in *R. v. Côté*, that “[i]n the aboriginal tradition, societal practices and customs are passed from one generation to the next by means of oral description and actual demonstration.”⁵⁶

McLachlin C.J., for the majority of the Court in *Mitchell*, affirmed the Court’s treatment of oral histories in *Delgamuukw*, which she summarized as ensuring the “meaningful consideration of various forms of oral history.”⁵⁷ Courts applying the principles set out by the Chief Justice in *Mitchell* have continued to admit oral history evidence in the form of personal recollections of members of the claimant group about family history and land use. For example, in *R. v. Haines*, the British Columbia Provincial Court applied the *Mitchell* criteria of necessity and reliability to oral history evidence offered in support of an Aboriginal right to fish for food. In the result, the Provincial Court judge admitted all of the oral history evidence, in terms that recognize the informal passage of knowledge and tradition between generations through observation, demonstration and instruction:

I find that the evidence of the witnesses as to their fishing traditions is reliable and necessary to the determination of the issues involved in this trial. I find that all of the Nisga’a witnesses were in the best position to provide evidence of the Nisga’a fishing tradition and practices. They were each taught by other Nisga’a fishermen in the usual way of being schooled by their uncles or other knowledgeable fishermen.⁵⁸

There is no particular form that oral history must take, nor any particular protocols or systems that must be present, for it to qualify as evidence in Aboriginal rights litigation. Oral traditions are as diverse as the Aboriginal groups that foster them. The admissibility and weight of oral histories must be assessed on a case-by-case basis, and in each case the Court must strive to interpret the evidence in a sensitive and generous manner, alive to the importance of hearing the Aboriginal perspective on matters of profound importance to their communities, but careful not to strain the evidence beyond reason.

At the same time, the Court must resist “facile assumptions” that favour certain modes of transmission simply because they approximate more closely the Eurocentric methods of gathering

⁵⁶ *R. v. Côté*, [1996] 3 S.C.R. 139 (SCC), at para. 56.

⁵⁷ *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 (SCC), at paras.29-31.

⁵⁸ *R. v. Haines*, [2003] 1 C.N.L.R. 191 (B.C. Prov. Ct.) at para. 117 (emphasis added); see also paras. 100-116; See also: *R. v. Morris*, 2002 BCSC 780, [2002] 4 C.N.L.R. 222, aff’d 2004 BCCA 121, 25 B.C.L.R. (4th) 45, leave to appeal to Supreme Court of Canada granted, 2004 CarswellBC 2628 (S.C.C.).

and passing along knowledge.⁵⁹ In each case, the Court must determine, based on all relevant factors, including, but not limited to, the knowledge of the oral historian, the sources of his or her knowledge, demeanour on the stand, the authenticity and richness of the account, and the extent to which it confirms or contradicts other evidence in the case, what conclusions the evidence reasonably supports.⁶⁰

I have now provided the Plaintiffs' interpretation of the Supreme Court of Canada's guiding principles for Aboriginal rights claims and oral history evidence, and now wish to turn to the *William* case and share how the opposing parties differed in their analysis and interpretation of these principles.

IV. THE CROWNS' POSITION ON ORAL HISTORY IN THE *WILLIAM* CASE

A. Crown Defendants' Motion on Oral History

The Crown Defendants objected to the admission of oral history evidence in the absence of a preliminary process for each Aboriginal witness, so that the admissibility, reliability and foundation for such evidence could be determined first.⁶¹ Canada submitted that the Aboriginal witnesses should be submitted to a test for admissibility similar to that applied to expert witnesses, and that a *voir dire* was required to determine whether the witness was qualified and the evidence necessary and reliable.⁶² British Columbia submitted that for genealogical and traditional activity evidence a *voir dire* was required to determine whether the evidence was necessary and reasonably reliable. British Columbia further submitted that oral history related to past events required a two-stage process. The first stage required the Court to hear from an expert or witness recognized as having an advanced level of knowledge of oral history with respect to past events, and of the methods applied by the Aboriginal group for preserving and conveying the oral history. The second stage required a *voir dire* to determine whether the oral history evidence was necessary and reasonably reliable.⁶³ The Plaintiffs submitted that the reliability of Tsilhqot'in oral history could

⁵⁹ *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, para. 34; *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220 (SCC), at para. 68.

⁶⁰ Plaintiffs Final Argument, para. 313, *William v. British Columbia et al*, 2007 BCSC 1700.

⁶¹ *William v. British Columbia*, 2004 BCSC 148, at para. 1.

⁶² *William v. British Columbia*, 2004 BCSC 148, at para. 3.

⁶³ *William v. British Columbia*, 2004 BCSC 148, at para. 4.

not be assessed in the abstract, but required a careful assessment of all relevant factors, including the nature of the testimony and the degree to which it was corroborated or contradicted by other evidence in the case.⁶⁴

The Court concluded that a preliminary process to assist in determining the necessity, reliability and general admissibility of an Aboriginal witness' oral history evidence was appropriate, but that a formal *voir dire* was not necessary. Justice Vickers held:

... 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:

- 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.
- 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.
- c) Any other information that might bear on the issue of reliability.⁶⁵

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, and perhaps it goes without saying, the weight of the hearsay evidence is always an issue open for counsel to debate during final arguments.⁶⁶

Essentially, this ruling allowed for the exceptional process of cross-examination of lay witnesses as to whether they met that threshold test of reliability in order to give oral history evidence. All Tsilhqot'in witnesses that testified in the case met the threshold of reliability and admissibility and their oral history was heard, and at the end of the day, weighed against the entire body of evidence and assessed on a balance of probabilities.

⁶⁴ *William v. British Columbia*, 2004 BCSC 148, at para. 5.

⁶⁵ *William v. British Columbia*, 2004 BCSC 148, at para. 28.

⁶⁶ *William v. British Columbia*, 2004 BCSC 148, at para. 29.

B. British Columbia Provincial Crown Position

During the trial proper the Provincial Crown did not submit an expert opinion regarding oral history, and seemed to rely heavily on the Federal Crown for evidence on the subject. The Federal Crown's only witness of substance, Dr. von Gernet, was an anthropologist brought in specifically to address the issue of oral history.

British Columbia stated in final argument that "Dr. Von Gernet's approach to the analysis of oral tradition as proof of facts is, when understood correctly, appropriate⁶⁷ ... and that oral traditions, just like written documents, require analysis and evaluation."⁶⁸ On the face of it, this position appears innocuous; however, as will be discussed below, it may be objectionable and untenable at law, should the analysis and evaluation aspect of the position require that oral history be corroborated.

British Columbia summarized Dr. von Gernet's main conclusion as: "the oral tradition evidence adduced in the *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."⁶⁹ **The key words are "taken by itself"**. In other words, the oral history could not establish occupation sufficient for Aboriginal title, without the corroboration of written or archaeological evidence. The Plaintiffs argued that the oral history did indeed provide proof of occupation sufficient to ground Aboriginal title. Interestingly, and unknown to Dr. von Gernet, there was both written and archaeological evidence that supported the view that the Tsilhqot'in sufficiently occupied portions of the claim area to ground Aboriginal title.

C. Federal Crown Position

As stated in the Plaintiffs' final argument, one of the surprises that unfolded in this case was the position taken by the Crown Defendants with respect to the weight to be attached to oral history

⁶⁷ British Columbia Final Argument, Appendix 2, at para. 90, *William v. British Columbia et al*, 2007 BCSC 1700.

⁶⁸ British Columbia Final Argument, Appendix 2, at para. 93, *William v. British Columbia et al*, 2007 BCSC 1700.

⁶⁹ British Columbia's Final Argument, Appendix 2, para. 50, *William v. British Columbia et al*, 2007 BCSC 1700.

evidence.⁷⁰ It appeared to the Plaintiffs that rather than assisting the Court to adopt the “sensitive and generous” approach discussed in the preceding pages, the Crown Defendants relied on Dr. von Gernet’s opinion to resist the use of oral history as if the case law on this subject over the last two decades did not exist.⁷¹

The Plaintiffs were left with the impression that Dr. von Gernet was called for the sole purpose of undermining the weight to be given to oral history evidence generally. Both Canada and Dr. von Gernet refuted this argument, with Canada pointing out to the Court that Dr. von Gernet could implicitly find oral history to be reliable, arguing that he “repeatedly stated in his evidence that oral history can provide evidence of the actual past and... that his caution was only that oral history should not automatically be assumed to contain evidence about the actual past.”⁷² The Crown Defendants, and Dr. von Gernet, took the seemingly harmless position that oral history merely needed to be tested before it could be given any weight.⁷³ However, arguably, the Crown Defendants, and Dr. von Gernet, used the term “tested” merely as a synonym for the phrase “corroborated with documents”, as will be shown below.

To the Plaintiffs, Dr. von Gernet’s approach suggests that oral history can never illuminate historic facts, unless it is corroborated by written or archaeological evidence. Although this approach was consistently denied, it was illustrated during Dr. von Gernet’s cross-examination, in connection with oral history accounts of the first white settler to enter Xeni (the valley of Chief Roger William’s community). The settler was instructed by local Tsilhqot’in Chief ?Achig to leave the valley or be physically removed. Despite hearing three separate oral history accounts concerning this incident, Dr. von Gernet maintained that, even if there were ten more similar accounts, the story was not valid proof of historical facts:

11 Q And I’ll ask you once again, looking at now that
12 third piece of testimony, does that make the oral
13 tradition evidence reliable?
14 A Reliable in the sense of consistency, but not
15 reliable necessarily in the sense of validity, as
16 those terms were defined in both my report and in
17 Mr. Dewhirst’s report.
18 Q So if I can -- if I can paraphrase what you’re

⁷⁰ Plaintiffs Final Argument, paras. 314, *William v. British Columbia et al*, 2007 BCSC 1700.

⁷¹ Plaintiffs Final Argument, paras. 314, *William v. British Columbia et al*, 2007 BCSC 1700.

⁷² Canada’s Final Argument, para. 1026, *William v. British Columbia et al*, 2007 BCSC, 1700.

⁷³ Canada’s Final Argument, paras. 712 and 1020, *William v. British Columbia et al*, 2007 BCSC, 1700.

19 saying, they're reliable in the sense that they're
20 community beliefs, but they don't prove any
21 historic facts. For example, they don't prove
22 that there was a man named Elkins who Chief ?Achig
23 fought with and Chief ?Achig bit his ear and
24 chased him out of the valley?
25 A That's correct.
26 Q So you don't accept -- even though three witnesses
27 come and give that story, to you that shows a
28 commonly held belief in a story but not the
29 historic facts contained in the story?
30 A I think I characterized it in my report as
31 collectivities can maintain falsehoods just as
32 easily as individuals can. And I first learned
33 that from my mentor, Bruce Trigger.
34 Q M'mm-hmm. Right.
35 A And it's only been corroborated through my own
36 experience. And, of course, I'm not saying at all
37 that this story is false. Don't get me wrong.
38 Q No, I understand.
39 A But without further -- you can give me 10 more of
40 these transcripts and I'll have the same answer.
41 Q I think I understand what you're saying now. What
42 you're saying is, unless there's some way to
43 confirm or corroborate in the historic record or
44 some other way archaeologically -- which I doubt
45 there would be archaeologically, but unless
46 there's some way of testing it, one cannot accept
47 it for the truth of the facts it contains?
00083
1 A I think in this case, yes, it would be fair to
2 say.⁷⁴

Dr. von Gernet went on to opine that even if one of the players in the original incident, or a witness to the original incident, passed information of that incident in a continuous chain of transmission to the raconteur, the oral history cannot be accepted to represent the true record; it is still unreliable.⁷⁵ Even if Chief ?Achig himself, the man who instructed the white settler to leave Xení, passed on the story directly to Chief Roger's grandfather, who passed the information directly to Chief Roger, the story could not be accepted as reliable.

Dr. von Gernet also appeared to be advocating an approach that rendered oral history regarding pre-1846 occupation generally unreliable. It was argued that the oral histories adduced by the Tsilhqot'in "simply [did] not lend themselves to proving the historical facts that they [were] put

⁷⁴ Transcripts, Sept. 7, 2006, Dr. A. von Gernet, Cross-Examination, at pg 82, line 11 to pg. 83, line 2, *William v. British Columbia et al*, 2007 BCSC, 1700.

⁷⁵ Transcripts, Sept 7, 2006, Dr. A. von Gernet, Cross-Examination, pg 84, line 42 to pg 85, line 36, *William v. British Columbia et al*, 2007 BCSC 1700.

forward to prove,”⁷⁶ such as occupation of their territory prior to sovereignty in 1846, and that “vague narratives about historic land use may not contain historical accuracies and are not usually amenable to confirmation by reference to the historical or archaeological record”.⁷⁷

However, the oral history submitted by the Plaintiffs was far from vague. It was rich in detail, often corroborated the written and archaeological record and where no corroboration was available, tended to prove occupation on a balance of probabilities. In the Plaintiffs’ view the oral history did lend itself to proving occupation pre-1846 and consideration of this evidence, rather than generally dismissing it, was in line with the guidelines set out by the Supreme Court of Canada.

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.”⁷⁸ Lawyers might refer to this feedback effect as “contamination.”⁷⁹ 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 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. Interestingly, although Dr. von Gernet did not know any of the witnesses personally, nor their attributes, his opinion was that they were susceptible to the feedback effect. He suggested that the unconscious influence could prevail,⁸⁰ even if the witnesses were unilingual Tsilhqot’in speakers and did not read or write English.⁸¹ Yet, during cross-examination, Dr. von Gernet denied that he, himself, suffered from the feedback effect, or suffered

⁷⁶ 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.

⁷⁷ Canada’s Final Argument, at para. 717, *William v. British Columbia et al*, 2007 BCSC, 1700;

⁷⁸ British Columbia’s Final Argument, Appendix 2, at para. 74, *William v. British Columbia et al*, 2007 BCSC, 1700.

⁷⁹ 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.

⁸⁰ Transcripts, Sept. 7, 2006, Dr. A. von Gernet, Cross-Examination, at pg 42, lines 37 to 45, *William v. British Columbia et al*, 2007 BCSC, 1700.

⁸¹ Transcripts, Sept. 6, 2006, Dr. A. von Gernet, Direct Examination, pg 25, line 35 to pg. 26, line 2, *William v. British Columbia et al*, 2007 BCSC, 1700.

from unconscious influence, even though Canada may have “contaminated” Dr. von Gernet by providing predetermined conclusions to him in his retainer letter.⁸²

Canada also advocated an approach that discounted the reliability of oral history based on minor inconsistencies between witnesses. Rather than assessing the picture that emerges from oral histories, how those oral histories, taken together, fit within the other available evidence, and whether they assist in proving the issues and tests associated with proving Aboriginal title and rights, Canada instructed the Court to find fault with oral histories generally, based on minor differences in the details,⁸³ despite the fact that there were mountains of consistent details contained within the oral histories. The Plaintiffs argued that the Court could rely on oral histories to prove an event, or a pattern of behaviour, even where some of the details of that event, or pattern of behaviour, differed slightly. Further, the Court should assess how those oral histories, taken together, fit within the rest of the evidence provided and relate to the issues at hand. In Canada’s final written argument, rather than asking the Court to assess whether or not evidence existed within the oral histories that could illuminate legal issues such as, Tsilhqot’in defence of territory, Tsilhqot’in exclusivity, Tsilhqot’in Nationhood, concerted efforts to retain control over Tsilhqot’in territory, or Tsilhqot’in occupation of a particular area, Canada pointed out that some small details differed. For example, Canada compared witness testimony with respect to the method in which an armed Colonial militia leader was killed while in Tsilhqot’in territory during the 1864 war between the Tsilhqot’in and the Colony. Canada argued:

Mr. Setah’s evidence provided further indication of the inconsistencies and unreliability of Tsilhqot’in oral tradition. Contrast, for example, what he says about the killing of McLean in 1846 [sic] in the following example with an account of the same event by another witness. Mr. Setah said:⁸⁴

...The story goes he was wearing a metal vest. There was a -- on the back of the metal vest there was a hole where there was a hook where it hooks together. It snaps together. The story goes that one of the – one of the warriors snuck up behind him and shot him through the back with a bow and arrow, right where that hole was where the snap goes.

⁸² Transcripts, Sept. 6, 2006, Dr. A. von Gernet, Cross-Examination, at pg 56, line 35 to pg. 59, line 6, *William v. British Columbia et al*, 2007 BCSC, 1700; Transcripts, Sept. 7, 2006, Dr. A. von Gernet, Cross-Examination, at pg 40, line 18 to pg. 43, line 24, *William v. British Columbia et al*, 2007 BCSC, 1700.

⁸³ Canada’s Final Argument, paras. 935-937, *William v. British Columbia et al*, 2007 BCSC 1700.

⁸⁴ Transcripts, Nov 8, 2004, Norman Setah, pg. 41, lines 1-46, *William v. British Columbia et al*, 2007 BCSC, 1700.

Compare with Martin Quilt's version, in which McLean is apparently shot in front, with a gun, with his metal vest off, rather than in back, with a bow and arrow, when his metal vest is on.⁸⁵

Or compare with Francis Setah's version in which McLean is shot above the vest.⁸⁶

Granted, some witnesses were unsure of whether Mr. McLean was shot with a gun or a bow and arrow, or whether it was in the front or the back. However, what is missing from this isolated selection of testimony is the fact that the witnesses agreed on other details, such as where the event occurred, why the event occurred, who participated in the event and what events transpired before and after the event occurred, all of which are elements that assist in determining whether the test for Aboriginal title has been met. Many oral accounts articulated the surrounding circumstances of why Mr. McLean was in Tsilhqot'in territory. It was not "murder". It was a war between the Tsilhqot'in and the Colony, commenced due to incursion into Tsilhqot'in territory without permission. It was a concerted effort by the entire Tsilhqot'in Nation to defend their territory from Colonial forces. The pinpoint location of Mr. McLean's demise was located in the claim area due to the oral history evidence, and to no-one's surprise, the oral history evidence corresponded with a Colonial map that was drafted in 1864, shortly after McLean's death, a map that was hidden away in an archive, a map that none of the witnesses had seen before.

As C.J. McLachlin held in *Mithcell*, 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."⁸⁷ However, Canada appeared to expect the details of oral histories to match identically, and when not identical, painted with a broad brush of unreliability.

Essentially, the Crown Defendants' approach to oral history, which was based entirely on the opinions of Dr. von Gernet, was that oral history must be tested (read in "unreliable without corroboration from written or archaeological evidence"), that it generally does not lend itself to prove historical facts such as whether the Tsilhqot'in occupied the claim area pre-1846, that it

⁸⁵ Transcripts, Deposition, July 9, 2002, Martin Quilt, pg. 865, line 22 to pg 866, line 24, *William v. British Columbia et al*, 2007 BCSC, 1700.

⁸⁶ Transcripts, November 24, 2003, Francis Setah, pg 38, lines 21-38, *William v. British Columbia et al*, 2007 BCSC, 1700.

⁸⁷ *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 (SCC), at para. 34; *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220 (SCC), at para. 68.

generally does not improve in reliability with consistency, that it generally is susceptible to feedback, or contamination and that it generally is unreliable if not identical in detail.

In summary, the implication of Dr. von Gernet’s reasoning is the same as that of the trial judge in *Delgamuukw*, who was overruled on precisely these same points, that oral histories should be rejected based on “general concerns... should never be given any independent weight and are only useful as confirmatory evidence in aboriginal rights litigation.”⁸⁸ As Lamer C.J. stated when he rejected such an approach, “if this reasoning were followed, the oral histories of aboriginal peoples would be consistently and systematically undervalued by the Canadian legal system ...”⁸⁹ In my respectful opinion, the approach advocated by Dr. von Gernet, and both Crown Defendants, was untenable at law.

V. THE PLAINTIFFS’ (Tsilhqot’in) POSITION

A. The Aboriginal Perspective in the Context of Exclusivity

The guiding principles set out by the Supreme Court of Canada mandate that the strict rules of evidence must not render Aboriginal rights claims impossible, the aboriginal perspective must be given equal and due weight and that these principles apply to oral history. A good example of why the Court has consistently upheld these principles is illustrated in the *William* case. The oral histories in the *William* case provided the Aboriginal perspective and provided to the Court the ability to make a more informed assessment of whether the Plaintiffs met the tests required to establish Aboriginal title and rights. If the Tsilhqot’in were forced to prove elements of the test for Aboriginal title and rights based on the written and archaeological record alone, the Court would not have the benefit of the other side of the story; namely the Tsilhqot’in perspective.

In order to illustrate the position that oral history provides the Aboriginal perspective and therefore provides more information to the Court to assist in the assessment of whether the Aboriginal group meets the tests set out for Aboriginal title and rights, I propose to discuss the *William* case in the context of exclusivity, one of the elements required to prove Aboriginal title. As refined in

⁸⁸*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 98.

⁸⁹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 98.

Delgamuukw, proving Aboriginal title requires evidence of exclusive occupation of the claimed land at the time of Crown sovereignty.⁹⁰ With respect to the exclusivity aspect of the Aboriginal title test, the Supreme Court of Canada has held that the claimant Aboriginal group must demonstrate that its ancestors had the intention and capacity to retain exclusive control over the land prior to, and at the date of, sovereignty.⁹¹ The Supreme Court of Canada has also emphasized that the common law notion of “exclusivity” must be imported into the test of Aboriginal title with caution.⁹² Specifically, the assessment of exclusivity must be sensitive “to the realities of aboriginal society.”⁹³ As McLachlin C.J. directed in *Bernard*, “[i]t would be wrong to look for indicia of aboriginal title in deeds or Euro-centric assertions of ownership. Rather, we must look for the equivalent in the aboriginal culture at issue.”⁹⁴ Further, “[t]he evidence, oral and documentary, must be evaluated from the aboriginal perspective. What would a certain practice or event have signified in their world and value system?”⁹⁵

In cautioning the Court with respect to the interpretation of historical documents, eminent legal historian Professor Hamar Foster adhered to the Court’s instruction to evaluate the evidence from the Aboriginal perspective and stated:

Not only did the people who produced [historical] records often have very little knowledge or understanding of the cultures they were describing; many also tended to use language carelessly and to interpret what they saw exclusively in terms of their own culture... This is particularly a problem when the sources do not confine themselves to the descriptive (what aboriginal people did), but purport to be normative (why they did it)...⁹⁶

So when a source states that an Indian “murdered” a colonist [you] must ask – according to whose law? If an Indian *killed* a colonist, that act of homicide may well have been “murder” according to Russian, Spanish, French, British, Canadian or United States law. But what was it according to Indian law?⁹⁷

⁹⁰ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 143.

⁹¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at paras. 155-156; *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220 (SCC), at para. 57.

⁹² *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 156; Plaintiffs’ Final Argument, para. 1039, *William v. British Columbia et al*, 2007 BCSC 1700.

⁹³ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 156.

⁹⁴ *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220 (SCC), at para. 61.

⁹⁵ *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220 (SCC), at para. 69.

⁹⁶ Exhibit 0391, Expert Report of Hamar Foster, January 2005, pgs 4-5, *William v. British Columbia et al*, 2007 BCSC 1700.

⁹⁷ Exhibit 0391, Expert Report of Hamar Foster, January 2005, pg 5, *William v. British Columbia et al*, 2007 BCSC 1700.

B. Tsilhqot'in Law of Trespass

In this context, Tsilhqot'in witnesses testified that, prior to contact, the Tsilhqot'in shared a body of law, described as *Dechen Ts'edilhtan* (the laws set down by the ancestors)⁹⁸, which applied to all Tsilhqot'ins and non-Tsilhqot'ins that entered Tsilhqot'in lands.⁹⁹ According to oral history Tsilhqot'in law required that non-Tsilhqot'ins gain permission to enter Tsilhqot'in lands, or suffer the consequence of death for trespass.¹⁰⁰ Permission to enter Tsilhqot'in land was granted if: (1) you were related to a Tsilhqot'in by birth, marriage or adoption; (2) you were expressly invited, to gather, feast, or trade; or (3) you paid what effectively amounted to a toll or rent. Witnesses described in great detail the exercise of this Tsilhqot'in law, and that it, at least from their perspective, proved Tsilhqot'in intent and capacity (the Plaintiffs provided separate evidence that relative to their neighbours, the Tsilhqot'in were the largest population in the area at the time) to retain control over their territory.

Norman George Setah explained that Tsilhqot'ins "never allowed any other people to go onto the territory"¹⁰¹ and if the Shuswap, Lillooet, Bella Coola, Qaju, or Carriers did enter Tsilhqot'in lands, "they were told to leave" and if they did not want to leave, the Tsilhqot'in would "make war on [them]".¹⁰² Francis William, great grandnephew of war Chief Lhatsas'in,¹⁰³ stated: "[m]y dad told me that Tsilhqot'ins long ago were fierce warriors. He told me Tsilhqot'ins would kill other native people if they tried to come onto Tsilhqot'in land."¹⁰⁴ The Tsilhqot'in witnesses that recounted historical wars and conflicts consistently spoke in terms of Tsilhqot'ins protecting the land against invaders.¹⁰⁵ At the same time, neither the documentary record nor Tsilhqot'in oral

⁹⁸ Plaintiffs' Final Argument, paras. 608-699, *William v. British Columbia et al*, 2007 BCSC 1700.

⁹⁹ Plaintiffs' Final Argument, para. 706, *William v. British Columbia et al*, 2007 BCSC 1700; Transcript, April 19, 2005, Chief Ervin Charleyboy Direct Exam, pg 7, lines 1 to 7, *William v. British Columbia et al*, 2007 BCSC 1700.

¹⁰⁰ Plaintiffs' Final Argument, paras. 1083-1091, *William v. British Columbia et al*, 2007 BCSC 1700.

¹⁰¹ Transcript, December 7, 2004, Norman George Setah Cross Examination, at pg 16, lines 4-5, *William v. British Columbia et al*, 2007 BCSC 1700.

¹⁰² Transcript, December 7, 2004, Norman George Setah Direct-Exam, at pg 4, line 17 to – pg 5, line 19, *William v. British Columbia et al*, 2007 BCSC 1700; See also: Transcript, December 7, 2004, Norman George Setah Cross Exam, at pg 15, line 39 to pg 16, line 31, *William v. British Columbia et al*, 2007 BCSC 1700.

¹⁰³ Exhibit 0441, Expert Report of John Dewhirst, September 2004, at 32, Chart 5, *William v. British Columbia et al*, 2007 BCSC 1700.

¹⁰⁴ Exhibit 0158, Affidavit #2 of Francis Sammy William, April 30, 2004, at para. 61, *William v. British Columbia et al*, 2007 BCSC 1700.

¹⁰⁵ Exhibit 0174, Affidavit #2 of Mabel William, September 3, 2004, paras. 23, 26(i), 32, 35, 52; Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, at para. 165; Exhibit 0437, Affidavit #1 of Patrick Alphonse, April 15, 2005, at paras. 23-29; Exhibit 0439, Affidavit #1 of Cecelia Quilt, May 6, 2005, at para. 53; Transcript, September 10, 2003, Chief Roger William Direct-Exam, at pg 63, line 45 to pg 64,

history disclosed any incidents of warfare between Tsilhqot'in communities.¹⁰⁶ This pattern in itself revealed the operation of deeply embedded and respected legal principles.¹⁰⁷ The late Patrick Alphonse, who was born in 1920, succinctly described these governing principles. He recounted,

My great grandmother Tudud told stories about Tsilhqot'ins fighting wars with other native people when they tried to come inside Tsilhqot'in territory. Tudud never talked about Tsilhqot'ins fighting wars with each other – she said that all Tsilhqot'ins are like one family.¹⁰⁸

These accounts reflect a very small portion of the oral history produced at trial, but the message was loud and clear, the Tsilhqot'in excluded others from their territory. Moreover, this corpus of oral history evidence provided Justice Vickers the knowledge to properly assess whether the Tsilhqot'in met the test of exclusivity. In addition, this oral history assisted Justice Vickers with the task of interpreting the available documentary record. 'But for' the oral history, the Court would have been left with only the documentary record, which was interpreted by the Plaintiffs as confirming the Tsilhqot'in met the test of exclusivity and by the Crown Defendants as confirming the Tsilhqot'in did not meet the test of exclusivity.

C. The Crowns' Interpretation of Documents

1. Tsilhqot'in War of 1864

There are many documents and events that could have been used as an example or background for the following analysis regarding the interpretation of documents with and without the aid of oral history. However, the events of the Tsilhqot'in War (sometimes referred to as the Chilcotin War) were chosen, as it was a prominent event that produced many documents. One of the major events in Tsilhqot'in settler history involved the killing of approximately seventeen Colonial citizens by the Tsilhqot'in in 1864. The Tsilhqot'in War of 1864 was arguably the most significant act of

line 4; Transcript, September 11, 2003, Chief Roger William Direct-Exam, at pg 11, line 39 to pg 12, line 16; Transcript, March 14, 2005, Ubill Hunlin Cross-Exam, at pg 40, lines 12-40; Transcript, April 19, 2005, Ervin Charleyboy Direct-Exam, at pg 16, line 40 to pg 21, line 34; Transcript, July 10, 2002, Martin Quilt Direct-Exam, at pg 112, line 13 to pg 116, line 20 and pg 171, line 9 to pg 172, line 6.

¹⁰⁶ Exhibit 0391, Expert Report of Hamar Foster, January 2005, pg 12; Exhibit 0437, Patrick Alphonse Affidavit #1, April 2005, at para. 27; Exhibit 0176, Robert Lane, "The Chilcotin", 1981, at 407 ["Feuding occurred between Chilcotin but attacks were against specific individuals rather than entire communities"].

¹⁰⁷ Plaintiffs' Final Argument, para. 1091, *William v. British Columbia et al*, 2007 BCSC 1700.

¹⁰⁸ Exhibit 0437, Affidavit #1 Patrick Alphonse, April 15, 2005, para. 27 (emphasis added).

armed resistance by Aboriginal people against Colonial authority in the history of British Columbia.

It began when an entrepreneur, Alfred Waddington, commenced construction of a road intended to extend from Bute Inlet to the Cariboo gold fields. Unfortunately for Mr. Waddington, the planned route traversed through Tsilhqot'in territory. Near the border of Tsilhqot'in territory, where Mr. Waddington's road crew had recently entered without Tsilhqot'in permission, the road crew was ambushed and killed. Subsequent actions of the Tsilhqot'in resulted in the removal of all non-Tsilhqot'ins from their entire territory. As Governor Seymour wrote in his colonial despatch on August 30, 1864:

The Chilcotens who massacred Mr. Waddington's road party at Bute Inlet, as mentioned in my Despatch No.7 20th May, marched into the Interior where joined by other members of the tribe, and succeeding in murdering or expelling every white person from the sea to the upper Fraser...¹⁰⁹

In the year prior to the killings, Mr. Waddington's road crew had discontinued their construction due to winter weather conditions. Prior to returning home for the winter, under the supervision of a Tsilhqot'in man, the road crew stored food and supplies in the rugged canyons that lay just inside Tsilhqot'in territory. Upon the road crew's return the following spring the supplies and food were gone. Shortly after that the road crew was attacked all additional food and supplies were taken. The Tsilhqot'in then "expelled every white person from the sea to the upper Fraser" and took all food and supplies left behind.

Consequently, the Colony organized two armed forces to enter Tsilhqot'in territory to hunt down the "murderers" and "looters". Eventually, the head war Chief, Chief Lhatsas'in, and five other warriors surrendered under the auspices of treaty negotiations, but were subsequently shackled, taken to Quesnel, convicted and hung. Just before being hung, Chief Lhatsas'in was recorded by Reverend Lundin-Brown, a priest who gave the Chief his last rites, as exclaiming, "[w]e meant

¹⁰⁹ Exhibit 0156-1864/08/30.001, Seymour's Despatch No. 25 to Colonial Office, at para 2, *William v. British Columbia et al*, 2007 BCSC 1700; Plaintiffs' Final Argument, para. 179, *William v. British Columbia et al*, 2007 BCSC 1700.

war, not murder!”¹¹⁰ Reverend Lundin-Brown also wrote regarding the earlier incident leading up to the war, wherein the supplies were taken and referred to as theft. A Tsilhqot’in responded to the allegation of theft by stating: **“you were in our country you owed us bread.”**¹¹¹

Whereas the oral history from such witnesses as Chief Ervin Charleyboy asserted that the Colonists were killed in 1864 for trespass, and their supplies taken as payment for entering Tsilhqot’in lands, per the *Dechen Ts’eldilhtan* (ancestral laws)¹¹², the Crown Defendants’ interpretation of the documents surrounding the events of 1864 was in complete contrast to that of the Plaintiffs interpretation, and the oral history. The Crown Defendants suggested that no evidence existed to suggest that the Tsilhqot’in were a nation, let alone a nation that acted in concert to protect its territory and people; that acts of violence that were recorded in the documentary record reflected acts of murder, theft and revenge, not defence of territory.

Granted, at first blush, some of the documents may appear to support such a position, as the language used in some of the documents literally stated, “murder”, “theft” or “revenge”. However, as Professor Foster pointed out, caution should be used when interpreting these documents. According to whose law was it murder, theft or revenge? Those are words founded in colonial law, colonial culture and the colonial perspective. What was the Tsilhqot’in perspective?

There were many documents that supported the Tsilhqot’in oral history and the Tsilhqot’in perspective.¹¹³ However, based on interpretation of documents, the Crown Defendants denied that

¹¹⁰ Exhibit 0408, Doctoral Thesis of Dr. William Turkell, at 287-295; Exhibit 0156-1873/99.00.001, Brown, Klatwsassan and other Reminiscences, at 2036605-6; See also Plaintiffs’ Final Argument, para. 180, *William v. British Columbia et al*, 2007 BCSC 1700.

¹¹¹ Exhibit 0156-1873/00/00.001, Brown, “Klatsassan and Other Reminiscences of Missionary Life”, at p. 2036558; See also Plaintiffs’ Final Argument, para. 177, *William v. British Columbia et al*, 2007 BCSC 1700.

¹¹² Another underlining factor behind the outbreak of war in 1864 was the failure of the white work crew to pay a toll to the Tsilhqot’in for the use of their land, as required by Tsilhqot’in law. According to oral history, the white people were not paying to be on Tsilhqot’in land. (Transcript, April 19, 2005, Chief Ervin Charleyboy Direct- Exam, at 00020, 18-21 and 43-45). According to oral history, flour was taken from the road builders because no tolls had been paid by the road crew for use of Tsilhqot’in land. (Transcript, April 19, 2005, Chief Ervin Charleyboy Direct-Exam, at 00020, 2-30); Exhibit 0432, Affidavit #2 of Elizabeth Jeff, November 13, 2004, para. 50(d).)

¹¹³ Hamar Foster, in his expert report wrote that “the Tsilhqot’in who worked on Waddington’s road would not accept blankets or food as wages. They regarded these items as their due, simply for allowing the road to pass through their territory. In other words, compensation for what would otherwise be trespass was one thing, compensation for working on the road, quite another.” (Exhibit 0391, Expert Report of Hamar Foster, at 30) Documentary evidence also supports the Tsilhqot’in oral history concerning the taking of groceries from the road builders due to their failure to pay tolls. Brown records the words of Chilcotin

the events of 1864 could be construed as defence of territory, even in the face of the oral history, and such documents as Governor Seymour's despatches, one of which seemed to clarify that the events of 1864 were certainly more than murder:

"It suited our purpose to treat officially these successive acts of violence as isolated massacres, but there is no objection to our now avowing that an Indian Insurrection existed, extremely formidable from the inaccessible nature of the country over which it raged. It seemed that the whole Chilicoten tribe was involved in it."¹¹⁴

There was no use any longer shutting my eyes to the fact... we were engaged in a war ... with the greater part of the Chilcoaten nation.¹¹⁵

Where some documents in 1864 recorded "murder", "theft" and "looting", devoid of any cultural information that would assist the Court in determining whether the Tsilhqot'in exclusively occupied their lands in accordance with legal principals, the oral history explained a much deeper understanding of historic facts and highlighted critical evidence for the Court. It explained, on a balance of probabilities, that the Tsilhqot'in did have a set of laws; laws that were in connection with their land base; laws that were founded on the notion of exclusive use, occupation and control

Indians questioned about the missing flour as "**You are in our country; you owe us bread.**" (Exhibit 0156-1873/00/00.001, Brown, "Klatsassan and Other Reminiscences of Missionary Life" at p. 2036558). British Columbia's witness, Dr. Marshall, has indicated that this statement can be interpreted in terms of payment; you owe us bread for the privilege of being in our country. (Transcript, June 4, 2006, Dr. Marshall Cross-Exam, at 00004, 34-37.) Foster opines that the statement "You are in our country; you owe us bread" "represents the straightforward application of a legal principle. The road crew was in their country, cutting the trees, catching their fish, killing their game and probably using and incorporating their traditional trail, which they controlled, into a wagon road. Yet... they paid the Tsilhqot'in nothing for these privileges. So the Tsilhqot'in, some of whom were starving, "stole" some flour as payment, and were told that, as punishment, the smallpox would return. Not just to those who took the flour, or to the equivalent number of their kin, but to all the Tsilhqot'in". (Exhibit 0391, Expert Report of Hamar Foster, January 25, 2005, p. 30). The newspapers reported 'plunder' as one of the possible motives behind the Chilcotin War, and a survivor's account describes the women and children "dividing the provisions". However, taking food from a conquered enemy is part of the Tsilhqot'in laws. Examples of such action are revealed throughout the Chilcotin war; goods were taken from the ferryman's store, from Manning's settlement, from Samandlin (McLean's) camp. This practice is also present in conflicts with other First Nations, for example in an account of a war with the Qaju which was sparked when Qaju hunters ambushed some Tsilhqot'in, three Tsilhqot'in warriors were sent to the coast to kill the Qaju who were involved. When they returned, the Tsilhqot'in warriors told their father they killed them all and ate their food before coming home. The accounts by Europeans that plunder was a cause of the Chilcotin war represents a mis-understanding; attributing as a *cause* what was according to Tsilhqot'in laws an *effect* of the white men building a road into Tsilhqot'in territory. (Exhibit 0156-1864/05/00.001, Daily Chronicle – "Origin of the Massacre", May 1864, at p. 2036328-9; Exhibit 0156-1864/05/13.001, Daily Chronicle – "A Survivor's Account", at p. 2036322

¹¹⁴ Exhibit 0156-1864/09/09.001, Despatch No. 37 from Governor Seymour to Colonial Office, September 9, 1864, at para. 8; See also Plaintiffs' Final Argument, para. 181, *William v. British Columbia et al*, 2007 BCSC 1700.

¹¹⁵ Exhibit 0156-1864/09/09.001, Despatch No. 37 from Governor Frederick Seymour to Colonial Office, Great Britain, 9 September 1864, at para 36.

of those lands; and laws that demonstrated an intent and capacity to retain control of Tsilhqot'in territory.

Interestingly, the government of British Columbia officially apologized in October 1999 for the hanging of the Tsilhqot'in warriors in the aftermath of this conflict, and raised a commemorative plaque at their presumed burial site "to honour those who lost their lives in defence of the territory and the traditional way of life of the Tsilhqot'in".¹¹⁶ The Crown Defendants' denied that it was evidence of Tsilhqot'in defence of territory.

2. Other Tsilhqot'in Conflicts

The Plaintiffs presented considerable evidence about Tsilhqot'in efforts to control their territory. As stated above, this involved documenting the pattern of responses to intruders into Tsilhqot'in territory, and presenting evidence of Tsilhqot'in laws in relation to trespass and land tenure. The Plaintiffs presented no less than fifteen conflicts between Tsilhqot'ins and non-Tsilhqot'in groups that entered Tsilhqot'in territory without permission, many of which were not available in the documentary record.

The documentary record did, however, contain a litany of other examples of Tsilhqot'ins killing non-Tsilhqot'ins who entered their territory, and if one were to view those documents through a Colonial perspective, without the aid of the Tsilhqot'in perspective, the killings may seem like murder, rather than lawful killing under a rule of law and in relation to a land base. Fortunately for the Plaintiffs, the Court did have the benefit of the oral history and the Tsilhqot'in perspective, and was able to view and interpret the documentary record that existed, mindful of the oral history evidence. Undoubtedly, the Court took comfort in reviewing documents and academic works that corroborated the oral history evidence. For instance, one academic wrote:

... the Chilcotins from aboriginal times had a history of warfare and feuding with many surrounding groups... Whereas another group might have developed a pattern of avoidance and retreat in the face of encroachments or threatened conflict with others, the Chilcotins had developed a pattern of warfare in self-defence...¹¹⁷

¹¹⁶ Exhibit 0333, News Release, Ministry of Aboriginal Affairs, October 26, 1999, pp. 103612-13, *William v. British Columbia et al.*, 2007 BCSC 1700; Plaintiffs Final Argument, para. 18, *William v. British Columbia et al.*, 2007 BCSC 1700 [my emphasis added].

¹¹⁷ Hewlett's Thesis, Exhibit 592, pg 139, *William v. British Columbia et al.*, 2007 BCSC 1700.

The point is that oral history is useful and necessary, and provides the Aboriginal perspective, which can help a trier of fact understand whether an Aboriginal claimant group meets the critical tests of Aboriginal rights and title. If the Court were to merely rely on the Colonial perspective, the documents, and the Crown Defendants' interpretation of those documents, it would not be able to consider additional, relevant and arguably persuasive evidence. The Court would not be able to consider Aboriginal practices, customs, laws and traditions. For instance, the Court in the *William* case would be unaware that the Tsilhqot'in historically exercised lawful principles of exclusion in connection to land use and occupancy of their territory, something that goes to the heart of Aboriginal title.

V RULING IN THE *WILLIAM* CASE

A. Ruling in General

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.¹¹⁸

B. Oral History Ruling

1. Reconciliation

Justice Vickers has clearly heard the message from the Supreme Court of Canada. The key fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples.¹¹⁹ Justice Vickers wrote:

The common law recognition of Aboriginal rights and title calls for a reconciliation of Aboriginal people's prior occupation of Canada and the sovereignty of the Crown.¹²⁰

The present Canadian community is now faced with the challenge of acknowledging past wrongs and of building a consensual and lasting reconciliation with Aboriginal people. Trials in a courtroom have the inevitable downside of producing winners and losers. My hope is that this judgment will shine new light on the path of reconciliation that lies ahead.¹²¹

This is not a usual judgment but, rather, part of a larger process of reconciliation between Tsilhqot'in people and the broader Canadian society...¹²²

More importantly, 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.¹²³

¹¹⁸ *William v. British Columbia et al.*, 2007 BCSC 1700 at para. 196.

¹¹⁹ *Mikisew Cree First Nation v. Canada Minister of Canadian Heritage*, [2005] 3 S.C.R. 388 at para. 1.

¹²⁰ *William v. British Columbia et al.*, 2007 BCSC 1700 at para. 512.

¹²¹ *William v. British Columbia et al.*, 2007 BCSC 1700 at para. 7.

¹²² *William v. British Columbia et al.*, 2007 BCSC 1700 at para. 18.

¹²³ *William v. British Columbia et al.*, 2007 BCSC 1700 at para. 20.

Important work lies ahead for the provincial and federal governments and Tsilhqot'in people. In that regard, there will have to be compromises on all sides if a just and lasting reconciliation is to be achieved.¹²⁴

2. Corroboration Helpful, But Not Required

As the Crown Defendants' position on oral history was founded on the evidence of Dr. von Gernet, it is appropriate to include the Court's findings with respect to Dr. von Gernet's approach. Justice Vickers held that "Dr. von Gernet's evidence was that oral history and oral tradition evidence must be assessed by making three distinct inquiries into:

- 1) The context of the performance in which the oral history is related;
- 2) The internal coherence of the oral history; and,
- 3) An external comparison of the oral history with outside sources."¹²⁵

Focusing on the third branch of Dr. von Gernet's approach Justice Vickers held that this approach "calls for some independent corroboration of the oral tradition evidence."¹²⁶ However, Justice Vickers acknowledged that, "rejecting oral tradition evidence because of an absence of corroboration from outside sources would offend the directions of the Supreme Court of Canada. Trial judges are not to impose impossible burdens on Aboriginal claimants."¹²⁷ Justice Vickers went on to hold that:

The goal of reconciliation can only be achieved if oral tradition evidence is placed on an 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. 98.¹²⁸

Recall that the Plaintiffs interpreted the Crown Defendants' position on oral history as advocating an approach that called for corroboration from written or archaeological evidence, and that both Crown Defendants, and Dr. von Gernet, denied this interpretation. Justice Vickers held:

¹²⁴ *William v. British Columbia et al.*, 2007 BCSC 1700 at para. 21.

¹²⁵ *William v. British Columbia et al.*, 2007 BCSC 1700 at para. 151.

¹²⁶ *William v. British Columbia et al.*, 2007 BCSC 1700 at para. 152.

¹²⁷ *William v. British Columbia et al.*, 2007 BCSC 1700 at para. 152.

¹²⁸ *William v. British Columbia et al.*, 2007 BCSC 1700 at para. 152.

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. Corroboration will, of course, increase the ability of the court to assess historical factual accuracy. However, when oral history cannot be corroborated, it may still bear independent weight and the court must do its best to evaluate its strengths and weaknesses. Canada submits that, even where oral tradition is contradicted by documentary evidence, oral tradition evidence may still prevail and assessments must be made to gauge which, on a balance of probabilities, is more plausible. Such an approach is in keeping with the directions set out by the Supreme Court of Canada.¹²⁹

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. His preferred approach, following Vansina, involves the testing of oral tradition evidence produced in court by reference to external sources such as archaeology and documentary history. In the absence of such testing, he would not be prepared to offer an opinion on the weight to be given any particular oral tradition evidence. If such testing did not reveal some corroborative evidence, it is highly unlikely that he would give any weight to the particular oral tradition evidence. 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.¹³⁰

Recall that the Plaintiffs interpreted Dr. von Gernet's approach to stand for the premise that oral history does not lend itself to prove the historical facts that the Plaintiffs were putting it forward to prove, such as Tsilhqot'in occupation of the claim area pre-1846, or Tsilhqot'in defence of the claim area.¹³¹ The court held at paragraph 155:

"Dr. von Gernet assessed the oral tradition evidence submitted in this case... [and reached] two conclusions at pp. 91-92:

Many, but by no means all, of the Tsilhqot'in personal narratives or oral traditions are rich in detail and internally consistent with each other. Here, as in many other cases, some elements of the traditions may be used either independently or in concert with other evidence to reconstruct the lifeways of people in the past, at least in the short term. The problem is that, while they may be reliable in some respects (such as a record of certain traditional fishing or hunting practices), in this instance, they are not a reasonably reliable historical record of the actual use of particular locations at or prior to 1846.

...

¹²⁹ *William v. British Columbia et al.*, 2007 BCSC 1700 at para. 153.

¹³⁰ *William v. British Columbia et al.*, 2007 BCSC 1700 at para. 154.

¹³¹ 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.

In general, the traditions relating to the “Chilcotin War” are not unlike other Aboriginal traditions about specific nineteenth-century events, in that they likely contain at least some independent information about what actually happened, together with modern inferences about why things happened. Once again the problem is the use to which they are now being put. Having examined the Tsilhqot’in oral traditions about this war, it is my opinion that this corpus does not strongly support a theory that the Tsilhqot’in people of 1864 intended to maintain exclusive use and occupancy of the Claim Area, particularly since the story-tellers (including the Plaintiff himself) cite alternate motivations.

At paragraph 156, Justice Vickers reiterated his earlier conclusion that Dr. von Gernet “would not give oral tradition evidence any weight without some corroboration from an outside source... [and] this approach is not supported by the jurisprudence”. Further, and with respect to whether oral history lends itself to proving historical facts regarding Tsilhqot’in occupation of the claim area pre-1846, or defence of territory, the Court held:

When I consider the oral tradition evidence about the Tsilhqot’in War, I believe it does give some support to a theory that the Tsilhqot’in people of 1864 intended to maintain some control over the use and occupation of Tsilhqot’in territory by others. I am called upon to weigh that evidence along with all the other evidence I heard concerning the causes of that historic conflict.¹³²

... 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 1846.¹³³

Recall that the Plaintiffs argued that oral history differs from Aboriginal nation to Aboriginal nation and that even within an Aboriginal group, the oral history of the community may be handed down across generations in a variety of ways, like strands comprising the fabric of their collective past.¹³⁴ Some of these mechanisms of transmission may be highly formalized and structured, but many Aboriginal groups rely additionally, or exclusively, on more intricate and subtle systems of passing knowledge and culture from generation to generation. From this perspective, “oral history” cannot be reduced to a single institution or formal system of transmission.

¹³² *William v. British Columbia et al*, 2007 BCSC, 1700 at para. 156.

¹³³ *William v. British Columbia et al*, 2007 BCSC, 1700 at para. 168.

¹³⁴ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), at para. 85.

Justice Vickers held that oral history may be handed down in a variety of ways,¹³⁵ that witnesses had differences of opinion with respect to some aspects of oral history transmission protocols, but that, “such formalities of story telling do not detract from the weight to be given to the oral histories and traditions.”¹³⁶

Recall that the Plaintiffs argued that the Court should assess the picture that emerges from oral histories, how those oral histories, taken together, fit within the other available evidence, and whether they assist in proving the issues and tests associated with proving Aboriginal title and rights, rather than the minor details, and that the Court should be wary of devaluing the evidence based on minor differences between oral accounts. In assessing oral accounts of Tsilhqot’in myths and legends, which included some differing details, Justice Vickers held that “it is not details that need close examination... it is the underlying theme or lesson that provides consistency to the legend.”¹³⁷

Finally, perhaps the following two passages best sum up the Courts assessment and ruling on the use of oral history in the *William* case:

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.¹³⁸

...

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.¹³⁹

¹³⁵ *William v. British Columbia et al*, 2007 BCSC, 1700 at para. 166.

¹³⁶ *William v. British Columbia et al*, 2007 BCSC, 1700 at para. 167.

¹³⁷ *William v. British Columbia et al*, 2007 BCSC, 1700 at para. 178.

¹³⁸ *William v. British Columbia et al*, 2007 BCSC, 1700 at para. 154.

¹³⁹ *William v. British Columbia et al*, 2007 BCSC, 1700 at para. 196.

III. CONCLUSION

Like all peoples, the Tsilhqot'in are inseparable from their history. The historical record in this case was, however, written not by the Tsilhqot'in, but by Europeans and, subsequently, Euro-Canadians. One must accordingly look to the Tsilhqot'ins' oral history to balance and complete the picture.¹⁴⁰ The Court must take into account the Aboriginal perspective and hear the other side of the story.

Just claims should not be defeated by impossible tests. Oral history must be given independent weight, not just admitted and then consistently and systematically undervalued. To judge history based on only one perspective, the non-Aboriginal perspective, is another form of colonization. It is one side subordinating the other. Chief Justice Lamar was suggesting that equal weight should be placed on oral history because, *inter alia*, Aboriginal title is not founded on the common law or Aboriginal law, but a combination of both.¹⁴¹ Reconciliation is a bridge between the two and recognizing and giving weight to both perspectives and histories is imperative in moving forward.

Thus, the voices of the elders should be heard. They do make a difference.

¹⁴⁰Plaintiff's Final Argument, at para. 136, *William v. British Columbia et al*, 2007 BCSC, 1700.

¹⁴¹*R. v. Van der Peet*, [1996] 2 S.C.R. 507 (SCC), at para. 50; *William v. British Columbia et al*, 2007 BCSC, 1700, para. 1156.