ABORIGINAL WITNESS EVIDENCE AND THE CROWN IN CHIEF ROGER WILLIAM V. BRITISH COLUMBIA AND CANADA

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I. Introduction

The case of *Chief Roger William v. British Columbia and Canada* is currently at trial in the B.C. Supreme Court in Victoria. Chief William is a representative plaintiff in this action on behalf of the Xeni Gwet'in and Tsilhqot'in (Chilcotin) peoples. The Xeni Gwet'in is an Indian band under the *Indian Act* and one of several bands comprising the Tsilhqot'in people.

The twofold claim in *William* is for infringement of aboriginal rights. One claim is for forestry related infringement of a Xeni Gwet'in aboriginal right to trap within certain lands for trading purposes. The other is for forestry related infringement of Tsilhqot'in aboriginal title to these same lands.

Plaintiff's legal counsel in *William* has prepared and accompanied several Tsilhqot'in elders through the trial process. This brief paper will outline some of the key stances of the Crown when faced with the evidence of these aboriginal witnesses.

II. Preliminary Objections to an Aboriginal Witness' Capacity to Convey Oral History

A. Law

It is basic law that proving any aboriginal right claim involves a deep historical inquiry. Proving an aboriginal right to carry on an activity, such as a Xeni Gwet'in right to trap, requires evidence demonstrating that the activity was practiced prior to European contact (*R. v. Van der Peet*, 2 S.C.R. 507 at para. 60). Similarly, proving an aboriginal right to lands, such as Tsilhqot'in aboriginal title, requires the claimant aboriginal group to establish that it exclusively occupied the lands in question at the time the Crown asserted sovereignty over these lands (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 143-45).

Hence, the Supreme Court of Canada has adapted the law of hearsay evidence in an attempt to "come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past" (*Delgamuukw* at paras. 84-87). The admissibility and weight of oral history evidence is to be assessed on a case-by-case basis (*Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at paras. 27-39). "Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge" (*Mitchell* at para. 31).

In *William*, the Crown objected to the admissibility of all oral history evidence in the absence of a preliminary process that would determine the admissibility of the oral history evidence of each aboriginal witness (*William v. British Columia*, 2004 BCSC 148 at para. 1). The Crown objection essentially focussed upon a need to demonstrate in advance that an aboriginal witness was a reasonably reliable source of oral history. As Vickers J. stated at para. 10:

> [10] Central to the arguments advanced by both defendants are the remarks of McLachlin C.J. in *Mitchell v. M.N.R.*, [2001] S.C.R 911, at para. 33, as follows:
>
> > The second factor that must be considered in determining the admissibility of evidence in aboriginal cases is reliability: does the witness represent a reasonable reliable source of the particular people's history? The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness's ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.
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> In that passage, McLachlin C.J.C. is reminding the reader that there are two dimensions to the issue of reliability. The first is whether the evidence of a particular witness can be relied upon to a sufficient degree to be admitted as evidence at the trial. The second dimension of reliability relates to the weight to be given a witness's evidence once it has been admitted.

The Court concluded that a preliminary process to determine general admissibility of an aboriginal witness' oral history evidence was appropriate in the circumstances:

> [28] Thus, assuming the test of necessity is met by the death of persons involved in the events being testified to, when a witness is called upon to give hearsay evidence counsel should give a brief outline of the nature of the hearsay evidence to be heard. Before the evidence is heard, there should be a preliminary examination of the witness concerning the following:
>
> 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.

[29] 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.

B. Practice

Accordingly, in *William* an aboriginal witness with oral history evidence is subject to a preliminary assessment as to whether he or she meets the threshold reliability requirements for a Tsilhqot'in oral historian. In practice, this has not proven to be too onerous a task for the plaintiff (e.g., *William v. British Columbia*, 2004 BCSC 1022, at paras. 8-9, 23-24). However, a cautious course has necessitated that at this preliminary stage sufficient evidence be offered of the background of both the aboriginal witness and his or her oral history sources. With respect to the witness, this has at times involved eliciting the witness':

- aboriginal ancestry;
- advanced age;
- birthplace;
- oral fluency in the Tsilhqot'in language;
- traditional upbringing, education and adult life (especially within the claimed lands);
- Indian status;
- band membership;
- lack of formal schooling;
- inability to speak English,
- inability to read or write;
- relationship to identified oral history teachers;
- general oral history content; and
- general circumstances in which the oral history was transmitted to the witness.

Regarding the witness' sources for oral history, a prudent approach has likewise at times involved generating evidence of the source's:

- identity;
- rough age at the time of conveyance;
- status as group member, elder, Indian, relative, etc.;
- traditional life experience;
- fluency within the Tsilhqot'in language;

- general reputation amongst the community;
- personal knowledge of the oral history conveyed to the witness or, alternatively, personal source of the oral history conveyed;
- lack of formal education; and
- lack of ability to speak English, read or write.

III. Direct Examination of Aboriginal Witnesses and Crown Objections to Admissibility

A. Threshold Reliability

1. Diagrams of Technology

As mentioned, we know from *Delgamuukw* that the test for proving aboriginal title is whether the claimant aboriginal group exclusively occupied the lands in question at the time the Crown asserted sovereignty over these lands (*Delgamuukw* at paras. 143-45). The Court added at para. 149:

> In considering whether occupation sufficient to ground title is established, 'one must take into account the group's size, manner of life, material resources, and *technological abilities*, and the character of the lands claimed': Brian Slattery, 'Understanding Aboriginal Rights,' at 758. [emphasis added]

In *William*, vivid diagrams of traditional technology such as animal traps, fur clothing, winter housing and weaponry have been adopted during the evidence of aboriginal elders and entered as exhibits. These diagrams have all been made based on the relevant aboriginal witness' instructions to an artist. The foundation for the diagrams has either been the witness' personal knowledge or the oral history instruction passed onto the witness.

Recently, the Crown in *William* has brought an objection to the admissibility and use of such diagrams. The Crown has done so on two grounds. First, with respect to diagrams based solely on oral history teachings, the federal Crown has argued against admissibility on the basis "it is simply not possible to produce a reliable visual representation of something which the witness has never seen" (Memorandum of Argument, Attorney General of Canada, filed September 29, 2004). Second, with respect to diagrams based on a witness' personal knowledge, the federal Crown has said it is not possible to introduce these diagrams to a subsequent aboriginal witness for comment without there being an implicitly leading question put to that witness. Accordingly, the Crown says, any adoption of the diagram by the subsequent witness is inadmissible (Memorandum of Argument, *ibid*.).

As of the date of writing this paper, the Court has reserved its decision on the Crown's objection. That said, it seems unclear why "it is simply not possible to" reproduce with sufficient reliability the visual image created within a witness upon oral history transmission of technological information. Surely it is possible and the real question is the weight to be afforded the diagram after cross-examination. Moreover, it also appears unclear how the Crown can consistently maintain that oral history of traditional technology is admissible when conveyed to the Court orally by *viva voce* evidence or textually by affidavit, but inadmissible when expressed graphically through diagrams. This is especially so given the Supreme Court of Canada has directed lower courts to engage in the difficult process of seeking to fully understand and weigh the perspective of the claimant aboriginal group on the aboriginal rights claimed (e.g., *Delgamuukw* at paras. 82, 84).

Further, with respect to witness adoption of pre-existing diagrams from the evidence of other witnesses, it is a recognized exception to the rule against leading questions that for the purpose of identifying persons or things, the attention of the witness may be directly pointed to them (Paciocco

& Stuesser, *The Law of Evidence* (3rd ed.) (Irwin Law Inc.: Toronto, 2002), at 327. In addition, even if a diagram's adoption results from a leading question, that fact only goes to the weight to be given the evidence, not its admissibility (Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (2nd ed.) (Butterworths: Toronto & Vancouver, 1999) at 913).

2. Mapping Oral History

In the *William* trial, many of the Tsilhqot'in elder witnesses presented to date have not had the ability to read a map. However, some have been able to use maps to help give their evidence. This has included marking Tsilhqot'in place names, Tsilhqot'in footpaths and saddle horse trails, important cultural sites, as well as hunting, trapping, fishing and gathering grounds. Early on, the Crown successfully objected to aboriginal witnesses depicting on maps anything more than what is grounded in his or her personal experience. In other words, oral history of land use, while admissible, is not being depicted in map form where it is unsupported by personal experience.

3. Non-Aboriginal State of Mind

A major event under scrutiny in *William* is the "Chilcotin War" of 1864. It is the plaintiff's position that evidence of the "Chilcotin War" demonstrates exclusivity of Tsilhqot'in occupation.

The "Chilcotin War" involved various interactions between Tsilhqot'ins and settlers. Many of these interactions have been conveyed through oral history to Tsilhqot'in people who have appeared in court as witnesses. B.C. has had some success in objecting to this oral history evidence insofar as it is offered to establish the motives of the Crown militia who responded to Tsilhqot'in killings of several non-aboriginals. For example, in *William v. British Columbia*, 2004 BCSC 1022:

> [17] British Columbia objects to the evidence of Francis Setah given on November 24, 2003, when in discussing the presence of Samandlin (McLean) in the Nagahatlhchoz area, Mr. Setah testified at page 38 of the transcript as follows:
>
> Q. And what was Samandlin doing?
>
> A. I was told that they were up here—they were up here for war with the Tsilhqot'ins.
>
> [18] Counsel for British Columbia argues that this evidence cannot prove the truth of the fact as to why Samandlin was in the area or what his motives were. It is only evidence of what the witness was told and what the Tsilhqot'in people might believe was the purpose of his presence.
>
> ...
>
> [28] [T]he objection made by British Columbia to the evidence of Francis Setah is well founded. His evidence on the reason why Samandlin was in the area is only evidence of what the witness was told and what the Tsilhqot'in people might believe was the purpose of his presence. This evidence is admissible for those limited purposes.

B. Relevance

1. An Aboriginal Group's Shared Creation Stories and Laws

In *William*, Tsilhqot'in elders have recounted various creation stories as a form of oral history. Canada has objected to the admissibility of this oral history on grounds of relevance. In particular, Canada has argued that these stories do not prove a shared set of Tsilhqot'in beliefs, are not tied to the

claimed lands and do not have aboriginal legal content that is useful to the court (*William v. British Columbia* at paras. 3-7). The Court rejected these arguments in the following terms:

> [20] Aboriginal title is a right in land, communal in its nature. It is a collective right, held by all members of an aboriginal nation: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. Thus, in order for the plaintiffs to succeed in this case they must prove that the Tsilhqot'in people are an aboriginal group of people entitled to the use and occupation of the land claimed in this action. The starting point is proof that they are a group of people with shared values, culture and traditions. The telling of legends and stories, shared and repeated through the decades, is one way to demonstrate that a group of people do share values, culture and traditions so that in their shared history they come together and live as an aboriginal nation.
>
> [21] The defendants have refused to admit, and, have placed in issue, this important element of the plaintiffs' case. Thus the plaintiffs must prove that the Tsilhqot'in people, of which the Xeni Gwet'in are a part, are an aboriginal group with shared values, customs and traditions.
>
> [22] Minnie Charleyboy's evidence is admissible tendered as it is to prove shared values, customs and traditions. Counsel are at liberty to argue that little if any weight should be given to this evidence. Others have related similar stories. At the end of this trial it will be necessary for me to determine the weight to be attached to these various stories and legends and decide to what extent they assist in the proof of the claims advanced. But the admissibility of Ms. Charleyboy's evidence to prove important issues in these proceedings cannot be denied. In my view, it does not matter that the stories and legends she told may not have been linked to the claimed land. It is evidence to prove shared values, customs and traditions of a group of aboriginal people, forming an organized society. Other evidence may be called to link this group of people to the land that is the subject of the claims advanced.

2. Land Use Outside the Claim Area

The land subject to the claimed aboriginal rights in *William* is a portion of Tsilhqot'in territory. Not surprisingly, some evidence of aboriginal witnesses includes land uses that are beyond the claim area. It has become a common refrain for the Crown to object to such evidence as irrelevant. This has required the plaintiff's counsel on occasion to articulate the relevance of the evidence. Answers have depended on context, including the evidence being relevant for what is shows of: access to a part of the lands claimed; where trade routes to neighbouring groups are; how the lands claimed were externally controlled; etc. If the Crown held the burden of proving exclusive occupation to the lands claimed, one can undoubtedly imagine how it would be relevant to consider certain events in Victoria and Ottawa.

3. Third Party Infringements

The lands claimed as subject to Tsilhqot'in aboriginal title in *William* are relatively untouched by the reach of settlement and industrial resource extraction. There is, however, some settlement, including a variety of hunting/wilderness lodges that began emerging in the mid-1900s. Aboriginal witnesses have on occasion testified that this settlement has often been undertaken in prime locations that were previously inhabited by Tsilhqot'ins. Consequently, the evidence is that archaeological remnants that would otherwise still be in these locations have been disrupted. In the face of this evidence, B.C. has objected so as to ensure this evidence is not admitted for the purpose of showing a third party infringement when one has not been plead (e.g., *William v. British Columbia* at paras. 19, 29).

C. Opinion

In *William*, the Crown has also objected to aboriginal witness evidence on the grounds that the witness does not have the requisite expertise to express the opinion offered. A particular example is with respect to disruption of the longstanding and widespread Tsilhqot'in practice of gathering roots in the Potato Mountain Range near Chilko Lake. Tsilhqot'in elders have repeatedly said that the practice only declined once various settlers began using the same area as a summer cattle range (pursuant to Ministry of Forests authorizations). The problem, they have said, is that the cattle graze upon the very plants that they were harvesting, thus disrupting the plant reproduction. B.C. has successfully objected to this evidence as inadmissible for the purpose of showing causation between cattle ranching and root plant decline.

IV. Cross-Examination of Aboriginal Witnesses by the Crown

A. Claimant Group

Section 35 of the *Constitution Act, 1982* protects the aboriginal rights of "aboriginal peoples." Hence, theoretically at least, at issue in any aboriginal rights trial is which aboriginal people, if any, is the holder of the rights claimed. In *William*, it is the Crown's position that the Tsilhqot'in do not hold aboriginal title, or indeed any aboriginal rights, as they were not an organized aboriginal group at the requisite time in history. Consequently, in cross-examination aboriginal witnesses in *William* have received questioning that apparently seeks to establish cultural, social, linguistic, religious or any other distinctions between the various bands that comprise the Tsilhqot'in people. Similarly, witnesses have also been subject to cross-examination directed at showing an absence of common Tsilhqot'in practices, customs, traditions, etc.

B. Use and Occupation

It seems clear that to date the Supreme Court of Canada has identified three types of aboriginal rights: aboriginal activity rights, aboriginal activity rights specific to certain lands and aboriginal title to the land itself (*Delgamuukw* at para. 138).

Again, proving either form of activity right involves eliciting evidence of the relevant practices, traditions or customs of the claimant aboriginal group prior to the time of European contact (*R. v. Van der Peet* at 46; *Mitchell v. M.N.R.* at paras. 41-42, 51). Proving aboriginal title requires establish exclusive occupation of the relevant lands at the time of Crown assertion of sovereignty over the lands (*Delgamuukw* at paras. 143-45).

In *William*, the claim is for a Xeni Gwet'in aboriginal right to trap within specific lands and Tsilhqot'in aboriginal title to these same lands. The Crown has thus cross-examined aboriginal witnesses in *William* with questions seemingly directed at establishing that no Tsilhqot'ins, Xeni Gwet'in or otherwise, were in the claim area at the time of either European contact or Crown assertion of sovereignty. These questions appear to be fuelled by a theory the Tsilhqot'ins migrated into the claim area relatively recently. In particular, the Crown's questioning has suggested that processes, such as the maritime and interior fur trade with Europeans, or events, such as the 1862 smallpox, have induced such a migration.

Proving either form of aboriginal activity right also arguably requires proving a reasonable degree of continuity between the relevant pre-contact and current practices of the claimant group (*Van der Peet* at 63). Similarly, it is open for an aboriginal group to prove aboriginal title by showing that present occupation of lands is a continuation of a prior occupation at the time of Crown sovereignty (*Delgamuukw* at paras. 152-54).

Hence, in *William* the Crown has directed cross-examination of aboriginal witnesses at trying to show an absence of continuous use and occupation of the claim area lands. In particular, the Crown has endeavoured to elicit evidence that the Tsilhqot'in have abandoned traditional ways of living on the land in favour of lives based on cattle ranching, employment in the wage economy, Catholicism, reserve residences, the use of baptismal names, etc. Further, it would appear that the Crown is seeking to develop a theory first expressed in an 1899 letter authored by the regional Member of Parliament. That theory has the Xeni Gwet'in abandoning the claim area in favour of another part of Tsilhqot'in territory.

C. Exclusivity

In order to make out a claim for aboriginal title an aboriginal group must demonstrate that at Crown assertion of sovereignty the lands were occupied *exclusively* (*Delgamuukw* at para. 143). This may involve an inquiry into whether the claimant group had the intention and capacity to retain exclusive control over the lands (*Delgamuukw* at paras. 155-56).

Accordingly, the Crown has undertaken cross-examination that looks to establish that the various armed conflicts between the Tsilhqot'in and their aboriginal neighbours have been motivated by intentions other than land protection. Such cross-examination seeks to establish that the conflicts were spawned by motives such as personal revenge and theft of personal property.

The Crown's cross-examination has also sought to demonstrate a presence of other aboriginal persons or peoples, as well as settlers, living within the claim area. Further, the Crown has put hypothetical questions to aboriginal witnesses as to what would have happened if Tsilhqot'ins had come across other aboriginal persons living within the claim area lands at a certain period of time.

D. Weight

The Crown in *William* has also mustered cross-examination questions apparently seeking to diminish the weight of testimony from aboriginal witnesses. Particularly, the Crown has tested oral history testimony for consistency with historical events, early anthropology, archaeology, the oral history of other witnesses and historical documents. It has tested the reputation of an aboriginal witness with other aboriginal witnesses. Where an aboriginal witness has engaged in mapping polygons depicting resource harvesting grounds, the Crown has attempted to undermine the breadth of these grounds.