

Standards for Oral Tradition Evidence: Guidelines From First Nations Land Claims in Canada

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SUMMARY

Conventional land registration systems have served to underpin particular forms of land tenure since ancient Babylon and perhaps before that. However, there are a number of tenure forms which are ill served by the systems that have evolved from these early systems. For example, 1 billion people live in slums in urban areas where tenure systems often draw on both customary and western tenure practices and some 300 million First Peoples live in different countries around the world. Insecure tenure is a major issue for these communities and often result in conflicts and tensions when they try and defend their rights. Nowadays, we have the technology to capture oral tradition and oral history evidence. However, the courts in Canada have struggled to handle evidence which draws on stories that incorporate myth, legend and fact. The common law itself has had to evolve in order to adjudicate Aboriginal land claims fairly and so recognize the unique, *sui generis*, nature of these rights. A number of Canadian cases in the last twenty years have also developed guiding principles for how oral tradition and oral history evidence should be presented and examined. This in turn provides guidance on how this type of data should be stored and documented. The challenge is to include this data in a land information system in a manner which will be acceptable to the courts.

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INTRODUCTION

A number of social systems are poorly served by conventional cadastral systems. Historically, cadastral systems have been rooted in individualised western forms of tenure and these systems fail to represent the complexity of many customary systems adequately. The challenge is significant, as tenure security is fundamental to social and political stability. Worldwide, some 1.1 billion people live in slums (GLTN 2009). In many instances, societies in these urban systems draw on both western and customary practices in the organization of their land tenure systems (Augustinus, Lemmen *et al* 2006, Durand-Lasserve and Clerc 1996). In addition, there are some 300 million indigenous people in 70 countries around the world. These are people who have retained social, cultural, economic and political characteristics that are distinct from those of the societies which are dominant in their region (UNHCHR 2003).

Historical evidence of systems to record land rights go back as far as Babylon clay tablets circa 1700 B.C., and there are suggestions that formal systems to record rights go back a lot further (Lyons 1931). Land tenure record systems have evolved in the past 150 years to streamline and simplify the process of registration and land rights recording, but through development has largely excluded alternative forms of records.

Modern information, communication and remote sensing technology enable the storage of vast amounts of data and the modelling of complex social relationships. Thus there is an opportunity to provide a far more accurate and fair representation of the relationships between people and the land and the social, political and economic relationships which lie beneath these people – land relationships.

Effective cadastral systems, in which by broad definition I include both land survey systems and land registration systems (see Barry and Fourie 2002), should be used in the manner that their designers intended them to be used. That is if the design accurately reflects the tenure system on the ground. Davis (1989), proposing the Technology Acceptance Model (TAM), argues that information systems will be accepted and used on the basis of their simplicity (ease-of-use) and how useful their users perceive them to be (usefulness). The context for the TAM is management information systems (MIS) in corporations. Cadastral systems, which are in many ways a form of MIS, tend to serve far more complex situations than corporate business and TAM is simplistic as a model for these complex situations. However, the two factors, (1) ease-of-use and (2) usefulness, have tended to drive the design of many cadastral systems.

The simpler the system, the easier it should be to use, and the greater the likelihood that the system will actually be used. The Torrens system of registration and its underlying principles have arguably been a major influence on land registration around the world. Together, the insurance and curtain principles should make this a simple system for officials to implement and use, as, in theory at least, according to the curtain principle only the most recent title is valid and the historical chain of title need not be examined in the event of a dispute. Thus, to establish what are the rights in a particular property and who holds particular rights, only the most recent documents need be examined. There is no need to examine a set of deeds reflecting a series of transactions in that property over time to extrapolate what constitutes the bundle of rights and to whom they have been assigned. The insurance principle implies that anyone who is disadvantaged by the curtain principle, which should facilitate a simple system, should be properly compensated.

Cadastral systems should also be useful as per the second factor in TAM which influences system effectiveness. Cadastral systems should suit the circumstances which they are supposed to serve (Dowson and Sheppard 1952) and in terms of Torrens principles they should mirror the legal rights, restrictions and obligations of a tenure system as they are practised on the ground. A greater emphasis on simplicity (the curtain principle especially) at the expense of the mirror principle implies that usefulness is often traded off against ease-of-use.

In recent years there has been an increasing realisation that simple, easy to use, cadastral systems are not useful in reflecting the interests in land in complex situations fairly and equitably. They can in fact do the opposite and create insecurity, especially if the focus on simplicity effectively extinguishes *de facto* rights in land (Durand-Lasserve and Selod 2007, Barry 1999, Augustinus and Barry 2006). As a simple example, registering a piece of land in the name of one person, e.g. the head of the house, can extinguish the rights of the rest of the family. If the people whom a cadastral system is supposed to serve do not perceive it to be useful in representing their tenure system, it is unlikely to be used in the manner its designers envisaged and so it may be rendered ineffective. However, the danger of not registering land can also result in people who have used it customarily hunting and gathering may lose those interests. The State may regard it as unoccupied and therefore available for disposal and development.

Part of the “mirror challenge” is to incorporate all forms of evidence relating to land interests and rights; and official maps and text documents are not likely to do this in complex situations. Handling oral tradition and oral history evidence has proved to be a major challenge for the courts, and it also poses a challenge for the way in which such evidence can be authenticated and stored in order to improve the completeness of the set of evidence relating to claims to land.

This paper outlines some of the principles underlying the collection and presentation of oral history and oral tradition evidence that have emanated from First Nations land claims cases in Canada in recent years. The paper covers the parts of three cases, Van der Peet, Delgamuukw and Tsilhq’otin, which deal with oral tradition evidence and how it should be tested for

authenticity and interpreted by the courts. It commences by describing some international statute law in a land restitution context, the part of South Africa's Land Restitution Act which deals with oral evidence, rather than Aboriginal land rights. The relevant parts of the law reports relating to the Canadian cases, Van der Peet, Delgamuukw and Tsilhq'otin are then described. Following this is an analysis of the challenges faced in representing this form of evidence in land information systems.

RECENT DEVELOPMENTS

Internationally, unconventional forms of evidence have gained acceptance in land restitution claims and claims for declarations of rights; forms of evidence which the courts in western countries might dismiss as hearsay in trials unrelated to land restitution.

For example South Africa's Restitution of Land Rights Act 22 of 1994, which was intended to grant relief to people who had lost land under the apartheid regime between 1948 and 1994 and prior to that through other racially based policy and law between 1913 and 1948 states the following:

Admissibility of Evidence

30. (1) The (Land Claims) Court may admit any evidence, including oral evidence, which it considers relevant and cogent to the matter being heard by it, whether or not such evidence would be admissible in any other court of law.
- (2) Without derogating from the generality of the foregoing subsection, it shall be competent for any party before the Court to adduce-
- (a) hearsay evidence regarding the circumstances surrounding the dispossession of the land right or rights in question and the rules governing the allocation and occupation of land within the claimant community concerned at the time of such dispossession; and
 - (b) expert evidence regarding the historical and anthropological facts relevant to any particular claim.
- (3) The Court shall give such weight to any evidence adduced in terms of subsections (1) and (2) as it deems appropriate.

Statutory support for the acceptance of unconventional evidence forms in land claims demonstrates that there is a commitment from 'progressive' political systems to place equity and fairness at the top of the agenda. Vulnerable groups are afforded the legal power to be heard in their own language and in a manner that emphasises their perspective of the tenure system, rather than a western notion of evidence. However, much work is required on the principles and standards by which these forms of evidence may be validated and authenticated, and how different forms of evidence are to be weighted. Canadian First Nations land claims cases contribute significantly to these principles and standards.

THE QUEEN v VAN DER PEET

Judgement in the Van der Peet case was delivered in the Supreme Court of Canada in 1996. The case revolved around an aboriginal right to sell fish which had been caught under an aboriginal fishing licence (The Queen v. Van der Peet 1996). In the majority judgment, Chief Justice Lamer suggested ten factors that the courts should consider in order to take the correct approach to evidence presented in determining the existence of an aboriginal right.

1. *Courts must take into account the perspective of aboriginal peoples themselves.* At the same time the perspective should be articulated in a manner that is in harmony (“cognizable”) with the existing Canadian legal and constitutional structure (para 49). This represents a shift away from a reliance on western common law principles and western views of land tenure claims and the principle had been established in early Aboriginal land claims cases.
2. *Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right.* The characterization of the claim is important because it will establish the kind of evidence that is needed to support that claim (para 51).
3. *In order to be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question.* “A practical way of thinking about this problem is to ask whether, without this practice, custom or tradition, the culture in question would be fundamentally altered or other than what it is. One must ask whether or not a practice, custom or tradition is a defining feature of the culture in question” (para 58-59).
4. *The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact (with Europeans).* The practices, customs and traditions may evolve to something different to those which existed prior to the arrival of the European settlers. However, they must be rooted in those practices, customs and traditions, albeit that they need not have been practiced continuously since contact with the Europeans (para 62, 64, 65).
5. *Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims.* In determining whether there is sufficient evidence for a successful claim, a court should approach and interpret the evidence “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” (para 68).

6. *Claims to aboriginal rights must be adjudicated on a specific rather than general basis.* The existence of an aboriginal right will be specific to each aboriginal community and will be determined on a case-by-case basis (para 69).
7. *For a practice, custom or tradition to constitute an aboriginal right it must be of independent significance to the aboriginal culture in which it exists.* The practice, custom or tradition must be independently significant to the aboriginal community claiming the right. It cannot be incidental to the society and must have an integral significance. Incidental practices cannot “piggy-back” on integral practices in order to be protected (para 70).
8. *The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct.* A band does not have to show that they are unique in that they fish in order to sell their catch. The claimants should be able to show that fishing to sell was characteristic of their culture, and therefore distinctive (para 72).
9. *The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence.* It is not acceptable that practice is solely a response to the arrival of Europeans. It will however be acceptable if the practice adapted in response to the arrival of Europeans and their arrival cannot be used to deprive aboriginal peoples of their claims. (para 73).
10. *Courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples.* (para 74)

(The Queen v. Van der Peet 1996, Sangster and Barry 2009).

Thus the Van der Peet case, drawing on principles established in earlier cases, established a framework for how the courts should deal with aboriginal land claims and how aspects of these claims should be accepted or rejected by the courts. However, it does not guide us in how the actual data relating to oral tradition should be presented to the courts, nor the manner in which the evidence should be authenticated.

DELGAMUUKW

The Delgamuukw case commenced in 1984 when the Gitksan and Wet’suwet’en First Nation groups instituted an action against the province of British Columbia (BC), seeking “ownership of and jurisdiction over” 58 000 square kilometres of land in northern BC. They claimed these lands as their traditional territory. They had never signed a treaty or land claim agreement, and therefore argued that they had never ceded title over those lands (Gitksan Chiefs’ Office N.D).

The first case began in 1987 in the British Columbia Supreme Court, and concluded by dismissing the claim for aboriginal ownership rights in 1991. The Supreme Court trial judge, Justice McEachern, held that aboriginal rights exist “at the pleasure of the Crown,” and these were extinguished at the time of colonization. Furthermore, Aboriginal rights constitute only a personal and usufructuary right to the land as set out in 1888 by the Privy Council in the St Catherine’s Milling case (*Delgamuukw v. British Columbia* 1993, *Delgamuukw v. British Columbia* 1997, *St. Catherine’s Milling and Lumber Co. v. The Queen* 1888, *Broten et al* 2007).

The case was first appealed to the British Columbia Court of Appeal and then to the Supreme Court of Canada. The Supreme Court of Canada did not grant the aboriginal title sought by the First Nations. Instead, the judgement called for a re-assessment of the facts based on the correct standard of interpretation of the aboriginal oral histories (*Delgamuukw v. British Columbia* 1997, *Broten et al* 2007).

Both Van der Peet (1996) and *Delgamuukw* (1997) confirmed the *sui generis* concept of aboriginal rights and emphasised the changing nature of Aboriginal land rights. The *Guerin* case first established that Aboriginal land rights are *sui generis*; i.e. they are unique, rather than usufructuary. The usufruct notion emanated from the St Catherine’s Milling case (*Guerin v. The Queen* 1984). The *sui generis* concept holds that Aboriginal land rights are not defined or established in terms of western common law concepts, nor are Aboriginal land rights frozen to cultural practices as they existed at the time that Britain declared sovereignty over various parts of Canada. An interpretation of the *sui generis* concept is that the law accepts that aspects of western common law may apply as cultural practices have been influenced by western cultural practices and law. The emphasis should be on how Aboriginal cultural practices have evolved due to a range of different influences, including western legal influences, the actions of the colonists and the evolving nature of society in general.

The *Delgamuukw* decision contributes significantly in its definition of what constitutes aboriginal title, and how it is to be proven in court. The Court affirmed the Van der Peet decision that common law principles of evidence be adapted to accommodate oral histories. Notwithstanding the difficulties of extracting legal meaning from oral histories which interweave history, legend, mythology, politics, and moral obligations, and that this kind of testimony conflicts with the general rules against the admissibility of hearsay evidence, oral history evidence must be admitted and placed on an equal footing with conventional forms of evidence such as historical documents. Oral evidence in the *Delgamuukw* case included sacred oral tradition and performances about ancestors, histories, and territories and spiritual songs, dances, or performances which tie the First Nations to their land. In addition, personal and informal recollections of aboriginal life, and territorial affidavits of use and ownership of the land by deceased persons were considered (*Delgamuukw v. British Columbia* 1997, *Broten et al* 2007).

TSILHQOT'IN NATION V. BRITISH COLUMBIA

Final judgement in the Tsilhqot'in Nation v. British Columbia case was delivered in the British Columbia Supreme Court in November 2007. The Tsilhqot'in Nation sought aboriginal rights and title over six sites in British Columbia. Although the claim was unsuccessful, the judge covered a range of issues in his judgement which provide guidance for how future trial court cases should be heard. One of these was evidentiary issues relating to Aboriginal land claims and how they should be handled at trial where the evidence is actually presented. As mentioned above, the Supreme Court of Canada hears cases on appeal, and witnesses do not present evidence there.

As the Tsilhqot'in did not keep written records, the plaintiff relied upon oral evidence to present their case, along with testimony by expert witnesses who included cultural anthropologists, ethnohistorians, archaeologists, cartologists, historical geographers, and an expert who is both an ethnobotanist and ethnoecologist. The nature of the evidence accords with what is set out in section 30 of the South African Restitution of Land Rights Act described above.

Drawing on Vansina (1985) the court distinguished between oral history and oral tradition evidence, both of which were presented at the trial. The court accepted oral history as what the witness has personally observed in his or her life, whereas oral tradition evidence describes “verbal messages from the past beyond the present generation.” (Tsilhqot'in 2007).

As per Van der Peet (1996), the court gave consideration to the aboriginal perspective when evaluating historical evidence. The judge noted the difficulties in trying to establish an objective truth when dealing with evidence in which legend, mythology, politics and moral obligation are interwoven. Conventionally, courts employ a positivist or scientific analysis, and these methodologies are ill suited to evidence of this nature. The major difficulty for the the western trained legal practitioner arises in evaluating the reliability of the evidence.

Justice Vickers firstly indicated that a general outline of the traditions of the aboriginal group submitting oral history and oral tradition evidence would help provide context to the court, facilitating the assessment of the usefulness, necessity and reliability of the testimony to be presented. In this regard, the following should be examined as part of an action:

1. How the oral history, stories, legends, customs and traditions are preserved.
2. Who is entitled to relate such things and whether there is a hierarchy in that regard;
3. The community practice with respect to safeguarding the integrity of its oral history, stories, legends and traditions;

4. Who will be called at the trial to relate such evidence, and the reasons they are being called to testify.
(Tsilhqot'in 2007, MacLaren *et al*, *in litt*)

Oral tradition is passed down from one generation to the next. However, in some societies, members of that society are only entitled to hear certain stories once they have reached a particular status in the society. Some stories will never be told to an outsider and only to select members of a band (e.g. stories about medicinal practices) (Barry and Khan 2005). Thus a particular person may be entitled to relate certain stories at trial. Some stories, however, may not be told in the court room at all.

Following this initial inquiry, before any oral history or oral tradition is formally presented at trial, potential witnesses must demonstrate that they are reliable. Vickers indicated that "there should be a preliminary examination of the witness" and an associated cross-examination by opposing counsel concerning the following:

1. 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;
2. General evidence of the sources of knowledge of the witness, his or her relationship to those sources, and the general reputation of the source;
3. Any other information that might bear on the issue of reliability.

Subsequent to the scrutiny of the witness, arguments on the admissibility of the evidence itself would be heard. The strength of this process lies in the knowledge provided to the court prior to hearing the evidence to facilitate an informed decision with respect to the usefulness, necessity and reliability of the evidence itself (Tsilhqot'in 2007, MacLaren *et al*, *in litt*).

Lastly, following the presentation of evidence, arguments on the weight that should be accorded the particular testimony if it is deemed admissible would be heard (William v. British Columbia 2004, MacLaren *et al*, *in litt*). As established by Delgamuukw (1997), oral tradition and oral history evidence should be placed on an equal footing with other forms of evidence and weighted on this basis.

Oral Evidence

Justice Vickers then applied these principles in the Tsilhqot'in trial judgment. Oral tradition should be the principal source of information as this is of primary importance in establishing the Aboriginal perspective of the case. Myths and legends are significant forms of evidence as story telling often references local geography. Legends do not show that the Tsilhqot'in used the claim

area since the beginning of time. However, legends can show “territorial familiarity of Tsilhqot’in people stretching back several generations...” (Tsilhqot’in 2007, MacLaren *et al*, *in litt*).

Vickers provides guidance on how oral evidence should be placed on an equal footing with conventional forms of documentary evidence presented by government agencies. Where oral tradition and history is contradicted by documentary evidence which was created by settler communities, the oral tradition may prevail. Contradictions should be gauged on the balance of probabilities as to which evidence is more plausible. Indeed, documentary evidence often reflects disrespect for Aboriginal people, which imputes a bias in the evidence. Secondly, the manner in which much of the documentary evidence presented at trial was established lacked the rigour that a conventional western court should expect. For example, how many people were interviewed in deducing a written description of particular cultural practices? Did the author take literary licence in recording the events? Was the written record merely the author’s construction of his own version of history (Tsilhqot’in 2007)?

Vickers efforts with respect to oral history and oral tradition evidence are particularly noteworthy in light of the vast number of historical documents available to the non-Aboriginal parties in presenting their position. The judgment notes Western Canada as “the repository of the most complete records of first contact between Europeans and Aboriginal peoples anywhere in the world,” and demonstrates this abundance by the wealth of historical documents examined at trial, including journals of early B.C. explorers, Hudson Bay Company men, missionary priests and surveyors. Nevertheless, despite the overwhelming amount of recorded evidence, Vickers dismisses the “Eurocentric tendency to look for and rely on the written word” attempting instead to “at all times ... give equal weight to the oral history and oral tradition evidence.” (Tsilhqot’in 2007, MacLaren *et al*, *in litt*).

Based on the processes and considerations outlined above therefore, Vickers concluded:

“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, archaeological and historical records. I understand my task is to be fair and to try to avoid an ethnocentric view of the evidence.” (Tsilhqot’in 2007, MacLaren *et al*, *in litt*).

ANALYSIS AND CONCLUSIONS

The South African Restitution of Land Rights Act points to an international acceptance of oral tradition and oral history evidence and hearsay evidence in general in land claims involving indigenous communities. What that statute has not set out is how the courts should handle this type of evidence. The Van der Peet, Delgamuukw and Tsilhqot'in cases, along with a number of other First Peoples land claims cases in Canada and elsewhere, have set guidelines as to how courts, tribunals, mediators and other similar institutions should handle forms of evidence which are very different from the types of evidence that western courts will generally admit.

The beliefs and attitudes of the trial judges to the nature of the evidence may also have a major influence on a trial outcome. The three Delgamuukw law reports demonstrate attitudes ranging from acceptance to outright rejection of myth and legend as contributing to a body of evidence.

The Van der Peet case established a framework for what could be claimed as aboriginal rights and title and the basis on which these claims may be argued in court. Tsilhqot'in has built on Van der Peet and a number of subsequent cases, including Delgamuukw, to establish the methodology that should be applied when hearing oral tradition evidence. An important point of departure is the situational context, the historical and current nature of land occupation. The social, political and economic relationships which give rise to that occupation should be understood before the trial proper commences. A body of evidence needs to be presented which provides this context. At the same time, the reputation of the persons who are intending to provide oral tradition evidence should be established. Do they have the social status and legitimacy to tell the stories? Further, the reliability of these potential witnesses should be established in order to see if the courts will admit their testimony as evidence.

In part, the challenge is to collect, store and manage this oral tradition and history evidence. Given the figures for indigenous peoples and slum dwellers around the world, it is a challenge that needs to be addressed if the level of fairness and equity in land occupation and access to land is to be improved. To an extent, this challenge is being addressed. The International Fund for Agricultural Development (IFAD) reports that participatory mapping has been applied in a number of cases around the world (Corbett 2009). The author has observed that some bands in Western Canada are using videos of their elders telling relevant stories and storing these in their land administration databases. This is important as many of the stories are being lost when the elders die and with them parts of the oral tradition. It follows from the methodology advocated in Tsilhqot'in that these recordings need to be authenticated at the social level as part of this record. Does the person telling the story have the status to tell the story? And then, how do we develop a method of establishing their reliability as a witness and the reliability of the story as part of the record? Land information system designers need to develop models and procedures that reflect and support the changes in legal practice as well as mirror practices on the ground that have largely been excluded from conventional LISs.

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