

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

Michael Barry

University of Calgary

Spatial Data Serving People:
Land Governance and the Environment – Building the Capacity
7th FIG Regional Conference
Hanoi Vietnam 1
9-22 October 2009

- Cadastral systems (registration, survey and mapping) need to be more inclusive
 - Terra nullius concept rejected in modern society
 - 300 million indigenous people in 70 countries around the world; 1 billion people in slums
 - Urban systems draw on both western and customary practices
 - Conventional cadastral / titling /registration systems too simplistic - Dr Mohamed el Sioufi alluded to the political nature of land governance.
 - Tension between systems that are easy to use and ones that are genuinely useful – by useful I emphasize fairness and equity. Many wars revolve around access to land and natural resources.
- Technology enables modelling of complex social relationships
- Oral evidence can be captured using video or sound recordings

- Courts deal with facts; hearsay given little weight or inadmissible by 'triers of fact'
- Oral tradition evidence is complex and the nuances of myth and fact are difficult to model for courts that are used to judging on the basis of concrete facts
- Torrens argued that the register should mirror the situation on the ground.
- How do we do this for societies where the connection to the land is based on oral tradition?
- First Nations Land Claims cases in Canada provide some guidance.
- Three cases, Van der Peet, Delgamuukw and Tsilhq'otin and South Africa's Land Restitution Act

Elandskloof

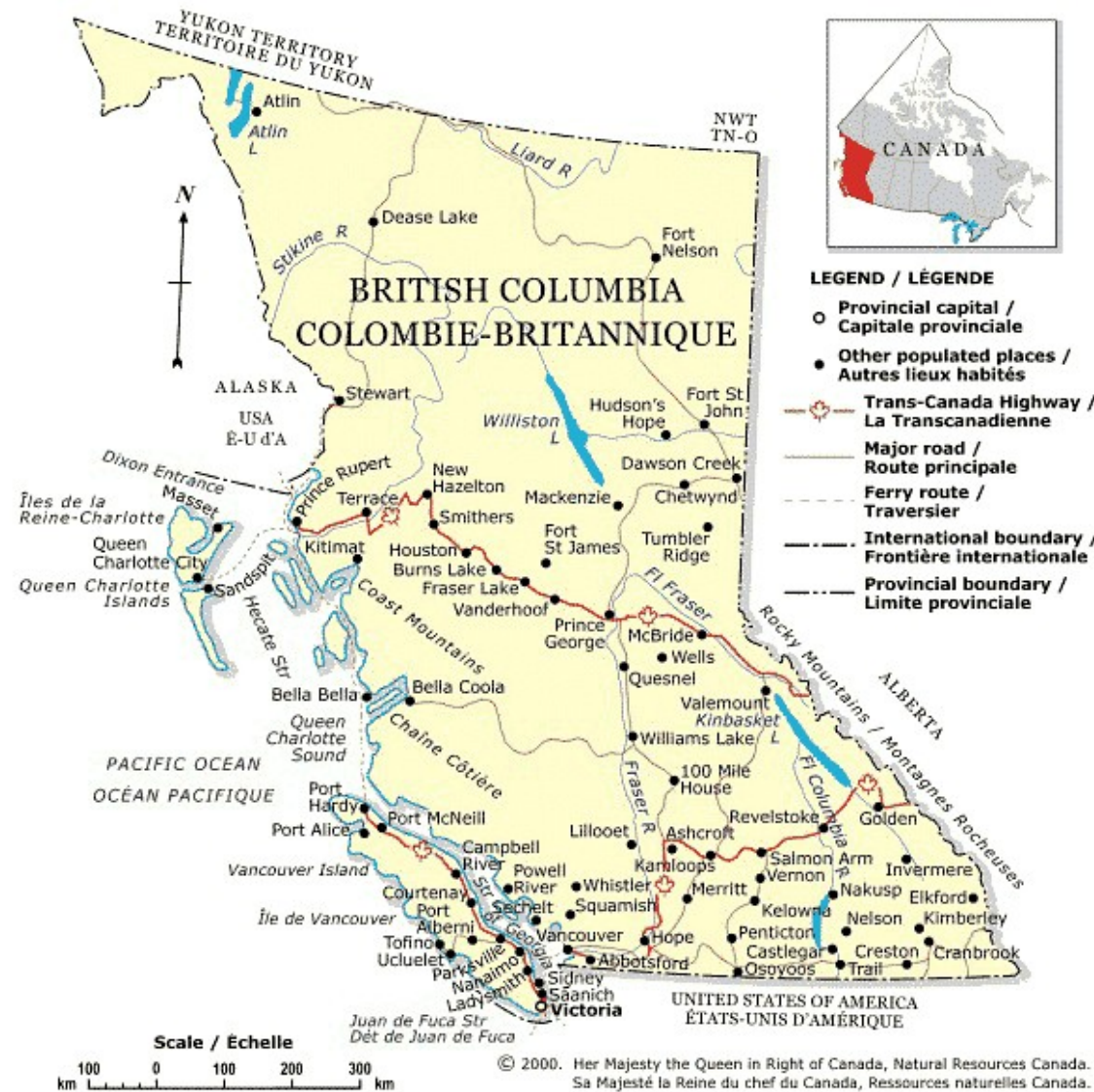
Department of Geomatics Engineering

Schulich School of Engineering
University of Calgary



- The Land Claims Court may admit any evidence, including oral evidence, which it considers relevant; this includes:
 - hearsay evidence;
 - expert evidence regarding the historical and anthropological facts
- Court shall give appropriate weight to this evidence

Position Yourself Ahead of the Crowd



- Case involved an Aboriginal right to sell fish
- Courts must take into account the perspective of aboriginal peoples themselves.
- In order to be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question.
- 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

- Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims.
- Aboriginal rights must be adjudicated on a specific rather than general basis
- Courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples.

- Trial court - Aboriginal rights constitute only a personal and usufructuary right (St Catherine's Milling 1888)
- Supreme Court of Canada confirmed the *sui generis* concept
- Common law principles of evidence must be adapted to accommodate oral tradition
- Extract legal meaning from oral histories which interweave history, legend, mythology, politics, and moral obligations
- Oral history evidence must be admitted and placed on an equal footing with conventional forms of evidence
- 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.

- Sought aboriginal rights and title over six sites in British Columbia.
- Oral history is what the witness has personally observed in his or her life.
- Oral tradition evidence describes “verbal messages from the past beyond the present generation.”
- Pre-trial examination: Admissibility:
 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;

- Who will be called at the trial to relate such evidence, and the reasons they are being called to testify.
- Witness Pre Trial examination:
 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.

- 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
- Where oral tradition and history is contradicted by documentary evidence which was created by settler communities, the oral tradition may prevail.
- Written historical accounts are biased, often a snapshot, and therefore should be afforded no greater weight than oral tradition.

- 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.
- Reputation of the persons who are intending to provide oral tradition evidence should be established
- Challenge is to collect, store and manage this oral tradition and history evidence.

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.

Should metadata of videos and other recordings of oral tradition include information about the status of the storyteller?