

2000

Legalizing Oral History: Proving Aboriginal Claims in Canadian Courts

Kent McNeil

Osgoode Hall Law School of York University, kmcneil@osgoode.yorku.ca

Lori Ann Roness

Source Publication:

Journal of the West. Volume 39, Number 3 (2000), p. 66-74.

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/scholarly_works



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Recommended Citation

McNeil, Kent, and Lori Ann Roness. "Legalizing Oral History: Proving Aboriginal Claims in Canadian Courts." *Journal of the West* 39.3 (2000): 66-74.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.



Indians fishing, Moricetown, British Columbia, 1901. While the information accompanying these photographs in the archives does not specify whether the persons in them are Gitksan or Wet'suwet'en, they probably are, as the photographs were taken within the territories of those nations.

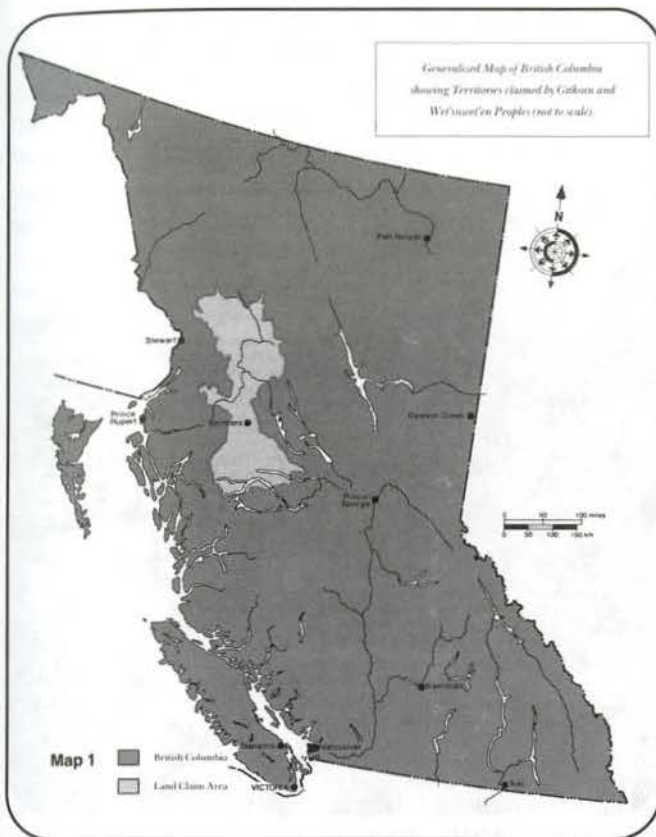
B.C. Archives: E-08385.

Legalizing Oral History: Proving Aboriginal Claims in Canadian Courts

Lori Ann Rones and Kent McNeil

LARGE AREAS OF Canada are still subject to land claims by the Aboriginal peoples, who include the Indian, Inuit, and Métis. These claims arise mainly in regions where land-surrender treaties were not signed in the past, notably in British Columbia, Quebec, the Atlantic Provinces, and the North. Most of them get resolved through negotiation and agreement, but a few end up in court. When that happens, the onus is on the Aboriginal peoples to prove their claims in accordance with the requirements of the Canadian legal system. This article will examine some of the difficulties Aboriginal peoples encounter when they rely on their oral histories for this purpose.

Convincing a Canadian court of the existence of an Aboriginal right can be a formidable task, largely because Aboriginal rights are derived from use and occupation of lands by the Aboriginal peoples as organized societies prior to the colonization of North America by Europeans. So proof of Aboriginal rights, and of Aboriginal title to land in particular, requires evidence of this use and occupation. Because the onus of proof is on the Aboriginal peoples, they have to establish their prior use and occupation on a balance of probabilities, *i.e.*, by producing evidence sufficient to convince a court that it is more probable than not that they used and occupied the claimed lands at the requisite time. Depending on the



Map of British Columbia showing Territory claimed by the Gitksan and Wet'suwet'en Nations (not to scale), reproduced from *Delgamuukw v. British Columbia, Reasons for Judgment of Chief Justice Allan McEachern*, March 8, 1991, page 6.

location of the claim, in some cases this can involve proving use and occupation almost 400 years ago.

Compounding the difficulty of proving use and occupation so long ago is the fact that pre-contact Aboriginal societies in what is now Canada were generally non-literate. They did not keep written records, so they cannot provide a court with the kind of documentation judges are used to seeing in cases involving title to land. Instead, they have to rely on other evidence. This can include post-contact written records, such as journal entries and accounts by European explorers and traders, and testimony by experts, such as archaeologists and anthropologists. However, where written records do exist, they often do not contain adequate information on Aboriginal use and occupation of land and tend to be tainted by the European perspective of the persons who produced them. Archaeological and anthropological evidence, while less likely to be biased, can also be quite inadequate. So most Aboriginal claimants are obliged to rely heavily on oral accounts of their history maintained by elders and other persons who are responsible for safeguarding and transmitting this knowledge from generation to generation. Unless these oral histories are admitted in court and given adequate weight by judges in Aboriginal rights cases, few Aboriginal claims will succeed.

The Supreme Court of Canada has acknowledged the difficulty of proving Aboriginal claims and has directed that impossible burdens of proof should not be placed on



Indians drying cooked berries, Moricetown, British Columbia, ca. 1900.

Aboriginal claimants. For example, in *Simon v. The Queen*, a case involving hunting rights stemming from a 1752 treaty signed in Nova Scotia between the Micmac Indians and the British Crown, Chief Justice Brian Dickson, for a unanimous Court, said this:

The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present-day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this Treaty.¹

Similarly, in *R. v. Van der Peet*, Chief Justice Antonio Lamer cautioned that, in determining whether a claim to an Aboriginal right has been proven (in that case a fishing right),

... 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.²

One of the rules of evidence that has presented particular difficulty in the context of Aboriginal claims is the hearsay rule. Briefly stated, the rule excludes second-hand evidence, as when a person testifies about what another person has said. That testimony is only admissible as evidence that the statements were made by the other person, not as evidence of their truth. For example, if John testified in court that Mary told him that she had seen Bill steal a car, that testimony would only be admissible as proof that Mary actually told him that. It would be inadmissible as proof that Bill had stolen the car. The main reasons for the rule are that hearsay can be unreliable and that it is not the best obtainable evidence. As the person who made the statement did not do so under oath, and is not subject to cross-examination, those means of ensuring truthfulness are unavailable to the court. So for Mary's eyewitness account to be admissible, as a general rule Mary would have to appear in court and give testimony herself, as that would provide the best evidence of what she saw.³

As the oral histories of Aboriginal peoples are passed on from generation to generation, from the perspective of the rules of evidence applied by Canadian courts they are largely hearsay. The actual witnesses of most of the recounted events are dead, and thus are unavailable to give direct evidence themselves. However, in situations



Indian women packers, Moricetown, British Columbia, ca. 1900.
B.C. Archives A-0606

of this kind, the courts have created exceptions to the hearsay rule by admitting second-hand accounts of statements by deceased persons in certain circumstances. The broad criteria for admissibility under these exceptions are necessity and the probability of trustworthiness. The necessity requirement is met by the fact that the person who actually witnessed the event is dead, and no one else is available to give evidence that is as good. The trustworthiness element depends on the context. Among other things, a court looks at when the statement was made (if after litigation was initiated, it is suspect), and considers whether the deceased person had any reason, such as an interest in the matter, to be untruthful. Both necessity and trustworthiness are determined by the application of common sense and experience by the trial judge.

Declarations by deceased persons can be admitted under two specific exceptions to the hearsay rule when they relate to either reputation or pedigree. Reputation can involve, among other things, community acknowledgement of the existence of public or general rights, *i.e.* rights held by the entire populace or a particular segment of it. Pedigree relates to declarations about family genealogy and history, such as relationships and dates of births, marriages, and deaths.

While the oral histories of the Aboriginal peoples are undoubtedly hearsay, they can be admitted as declarations of deceased persons under recognized exceptions to the hearsay rule. As Aboriginal rights to land are

communal in nature, they generally come within the categories of public or general rights that can be proven by declarations of reputation. Moreover, as kinship is integral to the social structures and distribution of entitlements within many Aboriginal communities, the pedigree exception can be relied upon as well in appropriate circumstances.

This brings us to *Delgamuukw v. British Columbia*,⁴ a landmark Aboriginal title case that was decided by the Supreme Court of Canada in December 1997. The trial in that case, which began ten years earlier, was the longest and most complex in Canadian history, requiring 318 days for presentation of evidence, and a further 56 days for the lawyers to make their legal arguments. It involved a claim by the Gitksan (spelled Gitksan in the judgments) and Wet'suwet'en Nations to ownership and jurisdiction over their traditional territories, encompassing about 22,000 square miles in north-central British Columbia (see map). The ownership claim in particular depended on proof that the Gitksan and Wet'suwet'en had been in occupation of the claimed territories prior to British colonization of the region in the 19th century.⁵

The issue of admissibility of oral histories as evidence was addressed by the trial judge, Allan McEachern, who was then the Chief Justice of the Supreme Court of British Columbia, in a preliminary judgment released in 1987.⁶ He decided that testimony relating to

the oral histories of the Gitksan and Wet'suwet'en was generally admissible under hearsay rule exceptions relating to declarations of deceased persons, so long as it involved events that occurred before living memory. In the absence of proof that direct evidence by living witnesses was not available, more recent oral history consisting of second-hand accounts would not be admissible. But McEachern also struggled with more profound issues of what amounts to "history," and whether all aspects of oral history qualify as such. In this context, he drew a distinction between historical "facts" and "anecdotes," e.g., where the evidence related to legendary events such as the destruction of a village "by a huge supernatural grizzly bear that had been angered by maidens using the spines of fish as items of personal decoration."⁷

Chief Justice McEachern did not purport to resolve these complex issues in his preliminary judgment on admissibility. However, he did say that he preferred "to lean towards admissibility," and thus expressed his willingness to listen to the oral histories generally, with the qualification that "questionable evidence will be received subject to a later determination of admissibility."⁸ And he naturally reserved judgment on what might actually be proved by the evidence, as that would depend on the evidence itself and the weight he attached to it.

At the end of the long trial, Chief Justice McEachern produced a book-length judgment in which he dismissed virtually all the claims that the Gitksan and Wet'suwet'en had made. In this article, however, our focus is not on the substance of his judgment, but on his treatment of the oral histories.⁹ McEachern devoted one part of his judgment to what he called "Some Comments on Evidence." In those comments, he expressed his frustration at the impossibility of separating "what European-based culture would call mythology and 'real' matters."¹⁰ Contrary to his earlier hope, by the time he wrote his judgment he had come to the conclusion that this distinction was "overly simplistic."¹¹ He also had to face the fact that many of the social and other scientists who gave evidence as experts relied in part on oral histories

to buttress the scarce evidence which exists about the social order and identity of the occupants of the territory prior to and in the early period after contact.¹²

However, he did not change the view he had expressed in his earlier judgment on the admissibility of the oral histories as declarations of deceased persons, "subject to objection and weight."¹³

We saw earlier that trustworthiness is an underlying requirement for admissibility of declarations of deceased persons. But while Chief Justice McEachern did decide that the oral histories were generally admissible, he did not really find them to be trustworthy. He relied, for example, on a work by a leading Canadian ethnohis-



Totem pole, Kispiox, British Columbia, 1899. Photographer V. H. Dupont. National Archives of Canada, PA-117168

torian, where the author, Professor Bruce Trigger, cautioned:

The scientific study of oral traditions is obviously an exacting task and requires a careful evaluation of the reliability of sources, the identification of stereotyped motifs that may distort historical evidence, the checking of the stories told by one group against comparable information supplied by others, and, finally, the checking of these stories against independent sources of information such as archaeological evidence.

*Used in this way, oral traditions may supply valuable information about the not too distant past. Used uncritically, however, they can be a source of much confusion and misunderstanding in prehistoric studies.*¹⁴ [McEachern's emphasis]

McEachern was concerned as well about the way culture was interwoven with the oral histories. He observed that "Indian culture also pervades the evidence at this trial for nearly every word of testimony, given by expert and lay witnesses, has both a factual and a cultural perspective."¹⁵ He found as well that

the fact that the plaintiffs' claim has been so much discussed for so many years, and the further fact that so much of the evidence was assembled communally in anticipation of litigation, or even during this litigation, is a fact which must be taken into account.¹⁶

For these reasons, McEachern concluded that the oral histories, unless collaborated, generally could not be relied upon to establish historical fact. His position is summed up in the following passage:

When I come to consider events long past, I am driven to conclude, on all the evidence, that much of the plaintiffs' historical evidence is not literally true. For example, I do not accept the proposition that these peoples have been present on this land from the beginning of time. Serious questions arise about many of the matters about which the witnesses have testified and I must assess the totality of the evidence *in accordance with legal, not cultural principles*.

I am satisfied that the lay witnesses honestly believed everything they said was true and accurate. It was obvious to me, however, that very often they were recounting matters of faith which have become fact to them. If I do not accept their evidence it will seldom be because I think they are untruthful, but rather because *I have a different view of what is fact and what is belief*.¹⁷ [emphasis added]



Indian carrying bundle of skins, Kispiox, British Columbia, 1899. Photographer V. H. Dupont. National Archives of Canada, PA-117169



Native girls in boat on Skeena River, Kitwauga, British Columbia, 1915. Photographer William James Topley. National Archives of Canada, PA-011227

However, when it came to considering the evidence presented by non-Aboriginal historians, Chief Justice McEachern took a very different approach. In reference to them, he said this:

Generally speaking, *I accept just about everything they put before me because they were largely collectors of archival, historical documents.* In most cases they provided much useful information with minimal editorial comment. Their marvelous collections largely spoke for themselves.¹⁸ [*emphasis added*]

McEachern's bias in favor of the written word is clearly evident in this passage. It appears in other parts of his judgment as well. For example, he gave much more credence to written reports prepared for the Hudson's Bay Company by William Brown, who established the Company's first post in the region on Babine Lake in 1822, than he gave to the Gitksan and Wet'suwet'en's oral histories. McEachern referred to Brown's reports as "a rich source of historical information about the people he encountered both at his fort and on his travels," and added: "I have no hesitation accepting the information contained in them."¹⁹ While discounting the reliability of the oral histories because they contained cultural elements, he displayed little awareness that the observations recorded in Brown's reports might have been just as influenced by the trader's cultural perspective.

Chief Justice McEachern's judgment was appealed to the British Columbia Court of Appeal, where certain aspects of it were overturned and others affirmed.²⁰ The case then went to the Supreme Court of Canada. Instead of ruling on the substantive issues, that Court laid down some broad principles of law relating to Aboriginal land rights, and ordered a new trial. One reason the Supreme Court declined to decide the substantive issues was that the way the case had originally been pleaded and the way it was finally argued were different. But the Court gave another reason as well that relates directly to our discussion, namely, that McEachern's treatment of the oral histories was so misguided that his factual findings could not stand. Writing the leading judgment, Antonio Lamer, the Chief Justice of Canada, put it this way:

The trial judge, after refusing to admit, or giving no independent weight to these oral histories, reached the conclusion that the appellants had not demonstrated the requisite degree of occupation for "ownership." Had the trial judge assessed the oral histories correctly, his conclusions on these issues of fact might have been very different.²¹

So how did McEachern go wrong? According to Chief Justice Lamer, he did not pay sufficient attention to the perspective of the Gitksan and Wet'suwet'en in applying the rules of evidence and in interpreting the



Indians, Hazelton, British Columbia, 1907-1912.

National Archives of Canada, PA-095750

evidence presented by them. Relying on his own decision in *Van der Peet*, and in particular on the passage from that judgment quoted earlier in this article,²² Lamer said that the *sui generis* nature of Aboriginal rights and the "evidentiary difficulties inherent in adjudicating aboriginal claims . . . demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples," while preserving "the Canadian legal and constitutional structure."²³ In practical terms, according due weight to Aboriginal perspectives "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."²⁴

At the same time, Chief Justice Lamer acknowledged some of the difficulties and challenges presented by use of oral histories in a court of law. Not only are they largely hearsay, but they also have a "broad social role not only 'as a repository of historical knowledge for a culture,' but also as an expression of 'the values and mores of [that] culture.'"²⁵ Lamer also quoted from an earlier Supreme Court decision where Justice Brian



Indian totem pole, Hazelton, British Columbia, 1910.
National Archives of Canada, PA-095506

Dickson (later Chief Justice of Canada) had said that “[c]laims to aboriginal title are woven with history, legend, politics and moral obligations.”²⁶ As Lamer noted,

[t]he difficulty with these features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial — the determination of the historical truth.²⁷

But notwithstanding these difficulties, Lamer stated that

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

At this point, it is worth recalling that Chief Justice McEachern was aware of the need to separate the historical facts imbedded in oral histories from what he called mythological and cultural elements. But after 318 days of hearing evidence, he confessed that he was unable to do so, as he found the distinction itself to be “overly simplistic.”²⁹ As neither the Gitksan and

Wet’suwet’en witnesses nor the scientists who gave expert evidence made this distinction, McEachern realized that he was incapable of telling the difference. However, as we have seen, this difficulty led him to discount the value of the oral histories, unless corroborated by other evidence, because he found them to be unreliable. On appeal, Chief Justice Lamer criticized him for this:

Although he [McEachern] had earlier recognized, when making his ruling on admissibility, that it was impossible to make an easy distinction between the mythological and “real” aspects of these oral histories, he discounted the *adaawk* and *kungax* [*special forms of Gitksan and Wet’suwet’en oral history*] because they were not “literally true,” confounded “what is fact and what is belief,” “included some material which might be classified as mythology,” and projected a “romantic view” of the history of the appellants.³⁰

Lamer also noted that McEachern had questioned the validity and utility of those oral histories because they were “confined to the communities whose histories they were and because those oral histories were insufficiently detailed.”³¹ Instead of discounting them for these reasons, Lamer instructed that the oral histories should have been placed on an “equal footing” with other kinds of historical evidence.³² But how exactly are trial judges to do this if they cannot distinguish between historical fact on the one hand, and legend, myth, and cultural values on the other? Or was Chief Justice Lamer suggesting that oral histories could be placed on an equal footing without distinguishing these various elements?

Unfortunately, Lamer did not answer these questions. Summarizing his views on this matter, he simply said this:

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 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.³³

With respect, these general directions are unlikely to be of much assistance to trial judges who want to give equal weight to oral histories but are unsure how to do so.³⁴

At the root of the problem are fundamental differences between the world views of Aboriginal societies

and of Anglo-Canadian society, both generally and in the legal context. At the outset of the *Delgamuukw* case, the Gitksan and Wet'suwet'en recognized this, and attempted to explain it to Chief Justice McEachern in the opening address of their lawyers to the court. One of the challenges facing the court, the lawyers said, was to avoid the "natural tendency . . . to look at Indian societies using a model of the world that derives from Western concepts of the nature of the world and society."³⁵ In a passage that deserves to be quoted at length, they described some of the fundamental differences:

The Western world view sees the essential and primary interactions as being those between human beings. To the Gitksan and Wet'suwet'en, human beings are part of an interacting continuum which includes animals and spirits. Animals and fish are viewed as members of societies who have intelligence and power, and can influence the course of events in terms of their interrelationship with human beings. In Western society causality is viewed as direct and linear. That is to say, that an event has the ability to cause or produce another event as time moves forward. To the Gitksan and Wet'suwet'en, time is not linear but cyclical. The events of the "past" are not simply history but are something that directly effects [*sic*] the present and the future.³⁶

They went on to explain how, in the Gitksan and Wet'suwet'en cosmologies, failure by humans to show due respect for the bones of animals can prevent those animals from being reincarnated and returning to offer themselves to humans, causing a loss of vital sources of food. They continued:

It is important to reflect on how such a view of causality would be rendered conceptually from within a Western framework. Such a view would not be regarded as "scientific" and such attribution of events to the powers of animals or spirits would be characterized as mythical. Both of these adjectives imply that what Indian people believe is not real or, at least, if it is real for them, it represents primitive mentality, pre-scientific thinking, which is to say, magic. On either basis, *Indian reality is denied or devalued. Their history is not real history but mythology.*³⁷ [*emphasis added*]

This takes us to the crux of the problem. From some of the passages in McEachern's judgment quoted above, it is apparent that he did regard most of the oral histories of the Gitksan and Wet'suwet'en as mythology. In spite of the lawyers' warnings, he does not seem to have been able to escape what they called the "natural tendency" to view the evidence of the Gitksan and Wet'suwet'en through the lens of his own culture. But is it ever possi-

ble to escape the confines of one's culture entirely, when such fundamental concepts as time, causality, history, and even the content of reality itself, are involved? After years of training, anthropologists may come closer to accomplishing this than most of us, but should we really be expecting judges to do so? And even if they could accomplish it, how would they then come to a decision? Is there really some way of balancing Aboriginal and Euro-Canadian perspectives, as Chief Justice Lamer suggested, when those perspectives reflect radically different world views?

These are complex and difficult questions, which we do not purport to be able to answer here. Part of the problem stems from the fact that Aboriginal peoples who seek adjudicated solutions to their Aboriginal claims are obliged to go to Canadian courts, which have to apply Canadian law. That law reflects the world views of Euro-Canadians, not of Aboriginal peoples. So no matter how sympathetic the judges may be and how willing they are to take account of Aboriginal perspectives, at the end of the day their decisions must be made in a manner that, in Chief Justice Lamer's words, "does not strain 'the Canadian legal and constitutional structure.'"³⁸ To a large extent, their hands are tied by the role they are obliged to play.

At the beginning of this article, we observed that most Aboriginal land claims are in fact resolved by negotiation and agreement, rather than by the courts. In negotiations, the parties are not limited by the confines of Canadian law and can thus take account of divergent realities and perspectives in reaching mutually agreeable compromises. So in the context of negotiations, oral histories can be used without having to distinguish between their historical and cultural elements. However, negotiations depend on willing participants. In British Columbia, until 1990, the provincial government steadfastly refused to negotiate Aboriginal land claims because it did not acknowledge the existence of Aboriginal title. So prior to that time, the Gitksan and Wet'suwet'en had little choice but to go to court. Also, even where non-Aboriginal governments do participate in negotiations, they clearly have the advantage of superior resources and bargaining power. This is one reason the courts, while not the best forum for resolving Aboriginal claims, still have an important role to play. By affirming the existence of Aboriginal rights and drawing some parameters within which negotiations can take place, the courts have pushed non-Aboriginal governments toward negotiations and have helped to level the playing field.

So the Gitksan and Wet'suwet'en are now presented with the difficult choice of either re-litigating their claims or entering into negotiations. Should they go back to court, they will face the costs of another lengthy trial, where they will again have to rely on their oral histories to prove their Aboriginal title. While Chief Justice Lamer has indicated that trial judges have "to come to

terms with the oral histories of aboriginal societies” and accord “due weight to the perspective of aboriginal peoples,”³⁹ it remains to be seen how this will be done in the context of a Canadian courtroom.

ACKNOWLEDGMENT

We would like to thank Professors Diane Martin and Jill Martin for their very helpful comments on a draft of this article.

NOTES

1. [1985] 2 S.C.R. 387, 408. Chief Justice Dickson made this statement in the context of an allegation by the prosecuting attorney, which Dickson rejected, that the accused had not shown that he was a descendant of the Micmacs who originally signed the Treaty.
2. [1996] 2 S.C.R. 507, 559.
3. On the hearsay rule generally, see John Henry Wigmore, *Evidence in Trials at Common Law*, 10 vols. (Boston, MA: Little, Brown and Company, 1940-1988), vols. 5 (1974) and 6 (1976) revised by James H. Chadbourn; John Sopinka, Sidney N. Lederman, and Alan W. Bryant, *The Law of Evidence in Canada* (Toronto, Ontario: Butterworths, 1992), 155-306; John William Strong, *McCormick on Evidence*, 4th ed., 2 vols. (St. Paul, MN: West Publishing Co., 1992), vol. 2, 90-380; Colin Tapper, *Cross and Tapper on Evidence*, 8th ed. (London, U.K.: Butterworths, 1995), 563-746.
4. (1991), 79 D.L.R. (4th) 185 (B.C.S.C.); (1993), 104 D.L.R. (4th) 470 (B.C.C.A.); [1997] 3 S.C.R. 1010 (S.C.C.).
5. Although the actual date of British acquisition of sovereignty over British Columbia is a matter of some doubt, McEachern's conclusion at trial that this occurred not later than the Oregon Boundary Treaty of 1846 was not disputed on appeal: see [1997] 3 S.C.R. 1010, 1099.
6. *Delgamuukw v. British Columbia* (1987), 40 D.L.R. (4th) 685.
7. *Ibid.*, 695. Note that he also distinguished between historical fact and legal fact; for him, the former involves facts whose accuracy and relevance to other historical facts and theories has been accepted by historians of good repute and restated by them in their writings, whereas the latter involves facts that have been “admitted into evidence and interpreted by a court” for the purposes of litigation: *ibid.*, 689-690.
8. *Ibid.*, 692-693.
9. For discussion of other issues raised by the judgment, see Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books, 1992).
10. *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185, 243-244.
11. *Ibid.*, 244.
12. *Ibid.*
13. *Ibid.*, 244-245.
14. Bruce G. Trigger, *Time and Traditions, Essays in Archaeological Interpretation* (Edinburgh, Scotland: Edinburgh University Press, 1978), 126, quoted *ibid.*, 246.
15. *Ibid.*, 247.
16. *Ibid.*, 248.
17. *Ibid.*, 247-248.
18. *Ibid.*, 251.
19. *Ibid.*, 278.
20. *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470. For critical commentary on the parts of the decision relating to Aboriginal land rights, see Kent McNeil, “The Meaning of Aboriginal Title,” in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver, B.C.: University of British Columbia Press, 1997), 135-154.
21. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1079. Chief Justice Lamer's judgment was concurred in by Justices Cory, Major, and McLachlin. Justice La Forest delivered a concurring opinion for himself and Justice L'Heureux-Dubé.
22. See text accompanying note 2 above.
23. [1997] 3 S.C.R. 1010, 1065-1066.
24. *Ibid.*, 1067.
25. *Ibid.*, 1068, quoting from Clay McLeod, “The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past,” *Alberta Law Review*, 30 (1992):1276, 1279.
26. *Kruger v. The Queen*, [1978] 1 S.C.R. 104, 109, quoted [1997] 3 S.C.R. 1010, 1068.
27. [1997] 3 S.C.R. 1010, 1068-1069.
28. *Ibid.*, 1069.
29. See text accompanying note 11 above.
30. [1997] 3 S.C.R. 1010, 1073.
31. *Ibid.*, 1074.
32. *Ibid.*, 1069.
33. *Ibid.*, 1074. Note that, in fairness to McEachern, Lamer pointed out that he had delivered his judgment in *Delgamuukw* before *Van der Peet* was decided.
34. For guidance on how oral histories can be used by historians, see the articles in Donald L. Fixico, ed., *Rethinking American Indian History* (Albuquerque: University of New Mexico Press, 1997), especially Angela Cavender Wilson, “Power of the Spoken Word: Native Oral Traditions in American Indian History,” 101-116.
35. “The Address of the Gitksan and Wet'suwet'en Hereditary Chiefs to Chief Justice McEachern of the Supreme Court of British Columbia,” *Canadian Native Law Reporter*, 1 (1988): 17, 24.
36. *Ibid.*
37. *Ibid.*, 25.
38. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1066, quoting *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 550.
39. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1066-1067.

Lori Ann Roness recently completed a Master's degree in Environmental Studies with a concentration in First Nations' self-determination and development. She is currently a research consultant in the field of Aboriginal issues.

