
IMPLEMENTING DELGAMUUK'W

Biography of Cynthia Callison
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Cynthia Callison is a member of the Tahltan First Nation whose traditional territory is the Stikine River Watershed in northwestern British Columbia and a member of the Crow Clan. She holds a Diploma in Urban Land Economics and a Bachelors Degree in Law both from the University of British Columbia. She was called to the British Columbia Bar in May of 1996 and practices as a partner with the Vancouver law firm of Callison & Hanna and with the Environmental Aboriginal Guardianship through Law and Education (EAGLE) project. She enjoys representing First Nations in aboriginal rights and environmental litigation and negotiation, and thanks the numerous elders who have generously shared their knowledge with her for these cases.

Yes, thank you very much, Elder [Ken] Harris, for sharing your knowledge with us. I would also like to thank the organizers for inviting me to speak and also for my introduction. Finally, I would like to acknowledge all of the chiefs that we have and ladies held in high esteem that are in our presence today.

My paper begins at page ninety-four of your text. I'm going to talk a little bit, because I am a lawyer, about the legal implications of Delgamuuk'w concerning oral traditions. On the first page of my paper, I note that aboriginal rights -- including title -- may be established in a number of ways. The first one is through oral histories, and this includes ancient origin stories and recounted histories of ancestors' use of land. It also includes aboriginal laws which shaped, or continue to shape, the organized society, whose prior occupation is a source of title to the land. Another way is to bring evidence of physical occupation, both past and present, of land. Another way is post-contact practices which demonstrate that they have their roots or beginnings in pre-contact times. Finally, expert evidence which includes archeology, historical, and anthropological evidence.

It's my opinion, which may be shared by other lawyers, that current litigation should combine a mix of both expert testimony and oral evidence from our Elders. Dealing specifically with oral evidence from the Delgamuuk'w decision -- this is at the bottom of the first page, ninety-four -- I note the treatment which should be accorded to oral traditions by the court and decision-makers. Now when I talk about decision-makers, especially in the referral process, we have district managers from the Ministry of Forest who are assessing the likelihood of our aboriginal rights and title, and they should also take into consideration our oral traditions and should accord our oral traditions the same treatment that courts would. The first point is that the court must take into account the perspective of aboriginal people claiming this right. The second, that this demands a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal people. Trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims and must interpret that evidence in the same spirit. This requires the court to come to terms with the oral histories of aboriginal societies and to adapt the laws of evidence in order that oral histories, as proof of oral facts, can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with. Basically, what the Delgamuuk'w decision is asking is for trial judges through cases, through case law, to change the rule of evidence and this will slowly emerge as cases are tried.

Because this process is evolving, I'd like to share with you two examples from my experience in litigation. The first case is one where the only evidence that we brought was through affidavits and it was only from Elders in the community, oral traditions from those Elders. We didn't bring any expert evidence in the first case. Those oral traditions concerned spiritual practices in an area. The judge in that case found -- this was an application for an injunction -- that there was a serious question to be tried with respect to aboriginal rights. So in that particular case, the evidence that we brought from Elders was enough to meet that standard.

The second case that I have been involved with, we brought evidence from four Elders concerning oral histories and post-contact practices, which have their origin in pre-contact. Along with this evidence we brought three experts. One was an archeologist who had completed some fieldwork and had found one cultural object that was approximately 9,000 years old, and she also found culturally modified trees that she could testify about. In addition to her, the other two experts were an ethno-historian and an ethno-musicologist and they basically acted as cultural interpreters. The Elders had told their stories, in particular the origin story, and we had another Elder who currently held a name from one of the first people who had descended to Earth. The experts helped to interpret those stories so that the judge could understand them and could view them from the aboriginal perspective. I must say in that case the judge was very interested, especially in the ethno-

musicologist and his testimony concerning the songs that the people had sung. In that case the judge accepted the nation's origin story and he found that the place was significant to those people.

So those are just two examples of recent cases where the judges have adapted the rules of evidence and have accepted oral traditions as evidence.

The next point, which is on page ninety-five of my paper, concerns the adversarial system, which is a system used by the Canadian courts. The adversarial method requires advocates on each side to present their respective positions with the strongest arguments, and this leads to a distortion of vital testimony. This is true of all evidence. We know that our oral traditions have been appropriated and distorted in the past, and this is just a warning that we don't want this to occur with respect to litigation in aboriginal rights and title litigation for our own nations. I have one example, and that is the example of the Navajo in the United States who were required to show that they had occupied the land for over 10,000 years in order to be recognized as an American tribe. Experts were required to testify that the Navajo didn't have any connection or relation to the Dene people in Canada. According to one lawyer's published article who worked for the Navajo, he felt that this requirement had led to a distortion of their oral traditions. So we need to keep this in mind, especially when we have disagreements over shared or overlapping areas between our own First Nations.

The next point in my paper, which is on page ninety-six, I argue that, once educated, judges and other decision-makers will rely less on experts. I have one recent example from a case that was decided by the B.C. Supreme Court in November 1998. In this case -- I'm going to read you a portion of it -- but where judge criticizes an expert anthropologist for lack of objectivity when she bases her opinion solely on ethnographic and historical records and fails to take into consideration the oral traditions that are still alive within the First Nation. This is within the judge's reasons for judgment: "I cannot leave these topics without stating my serious concerns about the expert's lack of objectivity. She appeared at times to inflate the value of her own experiences to the point of puffery, and was unwilling to concede that any opinion different from hers could have value. Throughout her evidence, but particularly in cross-examination, the expert acted as an advocate for her views, rather than an expert assisting the court. She was dismissive of opposing views and often volunteered non-responsive information in cross-examination to augment her opinions. When challenged, the expert took shelter in the position that there was no evidence that the First Nations used a specific plant, but that she apparently includes the lack of ethnographic and historical records. In doing so, she failed to adequately address the limitation of these records or the significance of the limited historical record that exists." So that is just an example that some judges are beginning to become educated about our oral traditions and aren't willing to discount them, especially when compared to historical and ethnographic records.

I continue in my paper to talk about the fact that, in order to maintain cultural integrity and autonomy, we need to protect oral traditions. I review intellectual property law in Canada and, despite international frameworks and draft declarations which recognize aboriginal societies' rights to ownership, control, and protection of oral traditions, Canada has not implemented any legislation to help us protect them. Current legislation does not protect oral traditions. An examination of copyright law shows that contemporary First Nations artists and writers who publish and distribute works are protected, but history and stories are not protected. Also I know currently some First Nations are upset about the use of their names and words which are appropriated by businesses, and so I talk about trademark law and the fact that it does not protect First Nations' words from appropriation by businesses. There is one example, which is in *Intellectual Property Law*, by David Favier. He gives the example that the Federal Opposition Board for the Registration of Trademarks allowed the registration of a word *Niska*, and he writes it may also find that the Nisga'a people of British Columbia would have preferred to be notified of the registration of a mark like *Niska* for clothing and to have been given a chance to object to it, even though the Board stated that their existence -- meaning the Nishga'a people -- was then relatively unknown to Canadians, so they allowed that trademark to be registered. I do note on page ninety-seven of my paper that the current policy of the Registrar of Companies in British Columbia is to disallow names of First Nations or bands without the consent of the band, but this does not apply to other words. I have heard from a lot of people that they're upset about personal names, clan names, crests, etc. being used by businesses.

Finally, we are left in a position where oral traditions do not fit into legal notions or legislative regimes, and what can we as First Nations people do to protect our oral traditions? Some of the methods of protection include public awareness, education, ethical and moral appeals, contracts, releases, protests, negotiation, litigation, and treaties. I urge you to share your experience with us -- meaning all of us in the room -- to share the experience and methods which have worked for your nation. I also suggest in my paper that nations determine their own laws and assert them. An example of this, with respect to archeology, is contained in your materials, is the Territorial Heritage Conservation Law of the Skeetchestn Indian band at page seventy-two, which was addressed by Lea McNabb yesterday. Another well-known example was the Massett Band,

who may have been the first to prohibit the collection of oral traditions from its members by anthropologists and others through a B.C.R. [Band Council Resolution]. I recognize that you may encounter some difficulties in having people comply with the laws that you assert, but once you have asserted them then it becomes a matter of educating people about those laws.

Just some current things of particular note that I have heard about recently, and that is with respect to bio-diversity prospecting. Apparently, there are pharmaceutical companies which are soliciting oral traditions from members of First Nations with respect to medicinal plant use. Not only are they soliciting information but they are also, I have been told, hiring people to search Masters theses, Ph.D. theses for this type of information.

Also something that has come up recently is the use of traditional use studies, and that traditional use studies should be copyrighted -- not just to the First Nation or band, but to all the members of the band -- and that a notice put on traditional use studies when they are submitted to government that they may not be copied for any purpose.

Finally, the Nisga'a Final Agreement also negotiated the recognition of intellectual property rights for the Nisga'a, and that is important to note for any of you who are in that process.

In conclusion, oral traditions define us as who we are as a people. They are very important for us to maintain our cultural autonomy. In my opinion, it is time for the courts to recognize our oral traditions and to give them weight. And it is also time for us to protect our oral traditions from distortion, appropriation, and commercialization. My final comment is that, to date -- and I am not sure I find very many people who disagree with me -- that the provincial government and the federal government are not implementing Delgamuuk'w. It's up to us as First Nations people to implement it. One of the ways is to present our oral traditions in court and to rely on those oral traditions to prove our aboriginal rights and also to protect our oral traditions -- because they are important to us -- from distortion. Thank you.