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Civil Litigation

Court must balance rules of evidence while recognizing Indigenous traditions, B.C. judge rules

By **Ian Burns**

(January 17, 2019, 11:26 AM EST) -- In a ruling being characterized as a first in Canada, a B.C. Supreme Court judge has ruled an Indigenous elder can present evidence as part of a panel during depositions in a land claims case, which the First Nation's counsel is describing as "righting a historical wrong" and providing a method for evidence to be as reliable and meaningful as possible.

The plaintiffs in the case, Stk'emlupsemc te Secwepemc Nation (SSN) are claiming Aboriginal rights and title to 1.25 million hectares of land near Kamloops, B.C. The land in question includes the Ajax mine project, which is owned by KGHM Ajax Mining Inc., a defendant in the case along with the provincial and federal governments.

SSN was seeking to depose certain elders with the assistance of a word speller to translate from the Secwepemc language to English, and to depose the elders as a panel in accordance with their traditional customs and practices. There are no certified translators for the Secwepemc language in British Columbia and many words cannot be directly translated into English, so the role of a word speller is to provide a translation and to help the English speaker understand the meaning of the elder's story.

SSN also submitted the taking of group evidence "will right a historical wrong," and that requiring evidence to be individual in nature is contrary to the historical way Indigenous peoples give their history and pass it on to their descendants. SSN noted panel evidence also takes place at various tribunals and boards in Canada, such as the National Energy Board.

Justice Patrice Abrioux of the B.C. Supreme Court wrote the court must balance the rules of evidence and procedure which have developed over many years while recognizing the unique traditional manner that Indigenous peoples give their evidence. He cited cases such as *Tsilhqot'in Nation v. British Columbia* 2004 BCSC 348 and *Mitchell v. Canada (Minister of National Revenue - M.N.R.)* 2001 SCC 33 on the admissibility of oral history and traditions in court.

"I have concluded that it is a natural and logical development [flowing from those cases] to permit, when justified by the circumstances, panel evidence in Aboriginal rights and title proceedings," he wrote. "Specifically, there is no principled reason, in my view, why the same flexibility pertaining to the giving of evidence should not also apply to questions of procedure."

Justice Abrioux noted he reached that conclusion despite their being no specific provision in the British Columbia *Supreme Court Civil Rules* which provides for group or panel evidence, and that he was advised by counsel that the issue of panel or "collective" evidence has yet to be considered by a Canadian court.

"However, there is no rule of evidence or procedure or statutory provision which specifically excludes this form of evidence," he wrote, adding the Federal Court of Canada's *Guidelines for Aboriginal Law Proceedings* provide that a panel format for oral history testimony may be appropriate in certain circumstances.

The province and KGHM were not opposed to the use of the word spellers in the case but asked

for an order limiting their role to translating words verbatim without embellishment. But they added the rules of court do not provide for panel evidence and refer to the deposition of "the person" to be examined, and not "persons" or a "panel of persons."

Merle Alexander, Miller Titerle & Co.

The federal government, while emphasizing that panel evidence is a significant departure from one of the foundational aspects of the law of evidence, submitted that "if this exceptional request is to be granted, it should be carefully considered on a witness by witness basis, and appropriate limitations must be set out."

As a result, Justice Abrioux ordered interpreters/word spellers be permitted to be present at depositions in order to reproduce the witnesses' message in the closest natural equivalent to the listener's language without embellishment. He denied a blanket protocol on panel evidence to apply to future witnesses in the proceedings, but allowed elder Dolores Jules to provide deposition evidence as part of a panel. He ruled the evidence of the other members of the panel should be limited to assisting in telling the oral history in accordance with their communities' traditions and providing translation and word spelling as needed (*Ignace v. British Columbia (Attorney General)* 2019 BCSC 10, issued Jan. 7).

Sarah Hansen of Miller Thomson LLP, counsel for SSN, said overall she was pleased with the decision "but we will continue to push for the Canadian courts to recognize the Secwepemc way of telling its oral histories and traditions."

"In Secwepemc culture, the way you present oral history evidence is as a collective. These are histories that are being passed on from generation to generation," she said. "We felt, and our client felt, they would be prejudiced in giving their evidence if they couldn't do it collectively in some cases. It's important to reflect what that traditional way of telling stories is — we're really trying to right this historical wrong that we felt has happened throughout all of these Aboriginal title claims."

Hansen said it was important to make this step because the system currently works against First Nations in their attempts to present evidence in a way that is more closely aligned with their traditions.

"It's not fair and it doesn't recognize the nature of the evidence itself being oral history evidence being passed down as a collective," she said, adding she felt the ruling can provide a template for the taking of evidence in future land claims cases. "They want our evidence to be as reliable and meaningful as possible, so we should be allowed to present in the way we traditionally would — because the converse of that is it is not as reliable as it should be and could be subject to an even greater challenge."

Merle Alexander, co-leader of the First Nations Economic Development group at Miller Titerle & Co. in Victoria, said he felt the decision will help to provide guidelines for oral history evidence and the role of interpreters.

"There's definitely a substantive value being placed on the oral history evidence and I think courts are trying to ensure that equal value is placed on the Indigenous legal perspective," he said. "I think procedurally it will help Indigenous and non-Indigenous parties in preparing these types of cases because they are not going away. There's going to be more bodies dealing with oral history evidence that need some instruction on how to treat that evidence and how to treat interpreters."

Alexander said Justice Abrioux is "probably right" by saying the issue of collective evidence hasn't been addressed in Canadian law but noted Indigenous oral history evidence is inevitably collective in its form and cumulative in its result.

"So it seems like a bit of a technical point," he said. "I haven't really identified something as being particularly controversial about how elders participate in the process. But it's unique in that you have a sophisticated party trying to determine in advance how their Indigenous evidence is going to be dealt with, and they're trying to scope out some strong ground rules in their favour."

Signa Daum Shanks, Osgoode Hall Law School

Signa Daum Shanks, an associate professor at Osgoode Hall Law School who teaches Indigenous legal issues, said what is being contemplated might seem unique due to the terms of what the litigators introduced, but contemplating how evidence is presented is a regular occurrence in administrative law. And she said she was frustrated by the idea of lawyers bringing up the idea that the word spellers' translations may be an embellishment and that it is something that must be addressed.

"If we have flexibility with non-Indigenous languages, how come we can't have that with Indigenous ones?" she said. "I think this is another circumstance where we have the Crown putting these extra high standards on an argument where it doesn't have those standards on other parties or subjects. If we have a scientist in another case saying something in scientific terms and a lawyer asks what that means, we would not consider that an embellishment."

Alexander said there is "probably" a bit of a higher standard being applied but it's coming from a state of ignorance of the language.

"It's more about the uncommonality of that language being heard in Canadian courts," he said. "Maybe in time the norms around that will lessen, but it probably has more to do with its novel nature at this point."

Counsel for the defendants declined comment on the case.