
IMPLEMENTING DELGAMUUK'W

Biography of Peter Douglas Elias
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Thank you. I'd like to thank the Union of British Columbia Indian Chiefs and the Coast Salish people for allowing me in their territory, although it is a little odd to be talking about this matter in the Fletcher-Challenge room of the university. But I guess we can move on from there.

I have not been involved, and never was involved, in the Delgamuuk'w decision, although, of course, I have had a great interest in how the entire issue evolved and how it was finally settled recently in the Supreme Court of Canada. In most of my comments, I am going to be comparing my experiences in the mid-1980s with the Kaska-Dene in Yukon and north central British Columbia who were then, and still are, involved in the comprehensive claims process, which I am sure as we all know is somewhat different than either the treaty process or the alternatives that are available now that Chief [Arthur] Manuel spoke of, such as co-management and integrated resource management and programs and that kind of thing. More recently, I've been working with the Shuswap, the Adams Lake-Neskonlith Shuswap. So I feel I have some ability to compare the old model, the old fashioned model of comprehensive claims as it was mandated in the 1986 description of what constituted a claim, and the more contemporary approach that is being taken by the Interior Shuswap, and their approach to integrated resource management, co-management, and that kind of strategy.

As I read it, Delgamuuk'w certainly did alter some of the requirements that are placed on technical researchers like myself. In the past, it seemed that any semi-literate reprobate working for the Hudson's Bay Company could scribble a few barely legible words and this would be taken as positive proof over the words of the most respected and revered Elder in almost any tribe. With respect to Professor [Arthur] Ray, I think that most of my research unfortunately has been in places where Mr. Brown was not there, and a lot of the people that wrote about the Kaska, for example, who are at the extreme frontier of the Hudson's Bay Company, in those days they were not sending their best and brightest out to deal with the Kaska, I can assure you. Some of the personal comments that you read in the Hudson's Bay Company archives and records from those days and in that place are embarrassing, frankly. They are very difficult and very disturbing to read except in the privacy of your own office and research facility. I wouldn't care to talk about this stuff in public, and therefore I won't.

It seems now, however, that oral tradition has been elevated to its rightful place in the demonstration of what is, after all, an aboriginal right -- we're not talking about non-aboriginal rights, we're talking about aboriginal rights and aboriginal title -- and, therefore, this is the source of information that should always have been given much greater respect and credence than they had in the past. I guess the future will tell if there are more court cases that follow Delgamuuk'w, but certainly it seems to me that oral tradition has now finally achieved its rightful place. In the past, and certainly under the comprehensive claims policy, it was necessary for claimants to demonstrate that to this day they occupy each and every square inch of land that they lay a claim to, and if for any reason whatsoever they no longer occupied some of those lands, the Crown could -- and did -- insist that this now became Crown property. For example, today the Shuswap people, they no longer occupy as extensively as they did in the past certain lands at the south end of Salmon Arm on the Shuswap lakes. Well there is a good reason for that: there is the entire town, virtually the small city of Salmon Arm, located there now. I think that any Shuswap daring to carry on a traditional practice such as hunting with a high-powered rifle in that area will be in serious trouble if they did so.

Now it seems that it is no longer so necessary for claimants of aboriginal title to have to scour through their collective memory, through their archival records, to demonstrate that they still occupy each and every inch of land. Rather, as Dara Culhane suggested, the real attention can turn to where it should turn: and that is to the colonial processes of dispossession that drove people off their lands. This is what now must be researched rather than hoping and praying to God you're going to be able to find some Elder, some very old man or woman, who can say that, "yes, I personally have walked over this piece of land to which we lay a claim," which in many cases because of disease, decimation through disease, vast territories, is an impractical test. It would have been virtually impossible to demonstrate in the past, and would be today, and it seems as

though this requirement has changed somewhat as well. In the comprehensive claims of the last decade, if you were trying to demonstrate a traditional practice that you still in effect practiced in your traditional territory, that practice had to be virtually identical to whatever was done by your ancestors at the time of English sovereignty. I am sure we're all familiar with the Bear Island case where it was decided that, yes, Indians can go ahead and make all the arrowheads they like out of valuable minerals in their territory, but they had better not be thinking about doing anything more than that with it. It seems now that the courts will accept the notion that aboriginal peoples' economic use of lands and resources will, shall, and should evolve along with the rest of their culture. So the contemporary traditional practices has to be consistent with what was done in the past, rather than identical to what was done in the past. This is a very major and important change. I personally know very few Indians that still hunt with stone arrowheads and bows and arrows and throwing spears and thrusting spears and all these other neat anthropological oddities. Now we can see that perhaps more contemporary uses will be accepted as consistent with traditional use and, therefore, an expression of continuing occupation of lands. In my opinion that's an advance.

Whereas some of the terms and conditions of what must be researched and what must be brought forward as evidence have changed as a result of Delgamuuk'w and, perhaps to a lesser extent, other recent Supreme Court decisions, the burden of research is still there. Is the burden any lighter than it was before December of 1997? No, I don't think so. In some respects the burden has probably gotten a little heavier. It has changed focus somewhat towards tribal history, oral history, continuation of cultural practice, and the history of colonial expropriation, but none of these topics would be easier matters to research and to discuss and explicate than the matters that had to be discussed under the old comprehensive claims policy. It still looks to me like a great burden of research work is necessary. And I think that Don Ryan and Chief Manuel have made it pretty clear in their perspective that an advanced research protocol is still something that they require, even if they are not necessarily contemplating a treaty-type process. Rather, they are looking at something that is more relevant in terms of a negotiated settlement of conflicting interests in lands and resources. Negotiations, as was pointed out, do occasionally break down and that is the point at which whatever research materials you have gathered will be brought into court and offered as evidence in support of your side of the conflict, of whatever it was that failed to reach conclusion through negotiation. So probably not only is the burden of research still there, it probably has to be done with the same rigour and vigour as was required for Delgamuuk'w when the intention was to take it to court all along. I think that people who are doing research these days in questions of title and right probably should be doing their research with an eye that eventually this research, and the people who did it, will be going to court and will be sitting, as Arthur Ray did, in the hot seat and being mercilessly grilled. I've had the opportunity to read over some parts of his cross-examination, and no thanks. As he said, you want to go into that situation prepared to the maximum and anything less than maximum preparation you probably might as well just slit your own throat and get it over quickly, rather than have four days of torment like he got.

Now that's kind of the downside. The upside is that, so long as the Crown insists on an adversarial kind of approach to settling questions of title and right, research will go forward. And that's not a bad thing because there's a great many management situations -- decision-making situations -- that require exactly the same kinds of information that you will be producing in order to assert a claim, either in a negotiated context or in a techno-legal context in the courts. That same data, information, and knowledge can be put to good use in terms of advancing economic development, political development, and community development objectives. It could be used to help resolve conflicts between competing interests in lands and resources, and this alone, in my opinion, makes it worthwhile to carry on with very rigorous and comprehensive research.

I'd like to give you an example, but I could only speak of briefly right now. The Adams Lake and Neskonlith bands' territory includes Mount Ida -- Claxon -- which is viewed by those people as a sacred area. I am sure that you all recall that last year there were massive forest fires in the interior of British Columbia, including around Salmon Arm. The flanks of Claxon were burned extensively. It was a very hot fire -- by hot fire I mean the organic soil level was to a considerable extent burned out, leaving only the mineral soil. The government's response was as you would expect: they designated the burned-over area for immediate and rapid salvage harvest, to take the burnt timber out before it got attacked by boring insects and worms, which immediately and instantly decreases the value of the timber. Their idea was to cut over the burned out area and essentially subject it to silviculture practices that would return it to a state that was most suited for commercial logging interests. The Adams Lake and Neskonlith people objected strenuously to this. They wanted this Mount Ida/Claxon treated as the sacred area that in fact it is, and they didn't want this kind of rampant commercial silviculture going forward there. They met with representatives of the Ministry of Forests and reminded the M.O.F. of Delgamuuk'w and what's contained in there, in terms of consulting with people if initiatives are being taken in aboriginal title lands. Reluctantly, the Ministry of Forests agreed and said that, yes, we are prepared to entertain an idea, an approach to working on Mount Ida that would take your values and your culture into account, but we need a great deal of

information from you about who are the people that used it, what would they use it for, how intensively and extensively was it used, where are the bounds and metes of the area of special consideration by the Shuswap, and so on. Luckily, at that point the Shuswap had just barely completed the accumulation of their data in the traditional use study and were able to bring all of this forward in a very short time frame -- which probably on one hand surprised the hell out of the government, that here are a couple of bands that were actually able to do this. I suppose they were probably pleased as well that they didn't have to enter into a battle with the Shuswap, because the Shuswap were able to make their case very adequately. The result was an agreement -- a signed, formal, legalistic agreement between the Crown and the Shuswap -- that will see the proper cultural respect paid to the management of Mount Ida and the extensive and significant involvement of the Shuswap in determining how Mount Ida will be dealt with. Now, that only takes up a small part of Shuswap territory and a small part of their interests in their title lands and resources. But for the Adams Lake and Neskonlith people, at least, it has set a precedent for the development for the kinds of processes that Don Ryan was talking about on a much larger scale when it comes to the territories of the Gitksan-Wet'suwet'en.

Now, if any of you would like to have a look at the kinds of evidence that were brought forward in order to promote this initiative, both with the Shuswap and the government, you can either get in touch with myself, wandering around here, or the other people that worked on it -- of course, Chief Manuel, Terry Tobias, Dennis Sheppard, and Russell Diabo -- and we'd be prepared to lay out our maps and this kind of thing and you can have a look at that. Thank you very much.