
IMPLEMENTING DELGAMUUK'W

Biography of Peter Grant

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Thank you, Mr. Chair. I want to thank the Union of B.C. Indian Chiefs for inviting me here. I know they have been engaged in the struggle -- I have heard the last part of Chief [Arthur] Manuel's talk -- for longer than I have, and have really taken leadership positions. And I want to thank the Coast Salish. I also want to thank my fellow panelists, two of whom I was part of getting them to be at that stage where Professor [Douglas] Elias, I believe, said cutting your throat would be easier. They're not only smiling, they were actually friendly to me outside of the conference, even though I dragged Antonia Mills and Arthur Ray as a part of the legal team that did that.

Now, I want to say some points that may be controversial and I want to go back to Delgamuuk'w and talk a bit about it. First of all, it is like a reunion seeing Don Ryan again, who of course was instrumental in the case, and I understand Neil Sterritt is speaking. These were two people that were really instrumental in the case from the beginning. But I want to say -- and one point I understand that Don has said -- if you are in negotiations, you do not need legal counsel. I tend to agree with what is going on in this province right now, having had the wonderful experience of sitting listening to government negotiators with no mandates, spin it out and find out, "well should we have an evening dinner for the community or should we play baseball together?" That is no exaggeration. That is happening in some of these treaty talks because the public image is so critical, and that goes back to what Dara [Culhane] was saying at the beginning of this panel. However, if you're engaging in research for treaty negotiations for the kind of negotiations that Doug Elias was speaking about, or anything else that you believe that negotiations may stop, you may be in court. If you want to be adequately prepared, consult your legal counsel -- and I know that most First Nations have legal counsel they consult with, Union of B.C. Indian Chiefs. Consult with them at that time and I will tell you why: you may end up having to do the job twice and, as Chief Manuel said, you don't even have the resources to do it once. As earlier speakers on this panel said, you have to do the best job. Why should First Nations accept second-rate research when no private industry, no multi-national, no government would accept it? It is not good enough. So one of the standards is: if we have to go to the wall, will this research carry us, will it take us there? And that's critical. I am not saying that you should have, if you're in negotiations, a lawyer on the team all the time or any of that. Those are political decisions that you will make depending on the circumstances. But if you believe that government or those third parties are not going to come to a deal and this research maybe critical, then by all means consult. Strategize as though you may face yourself in a court room.

Secondly, the other point I wanted to make is that -- and I believe Chief Manuel stated this in his talk -- is that you have to have research of who you are, of your territory for whatever process you are engaging in. I heard it very well spoken by Chief Manuel -- and I hadn't really heard it crystallized in that way -- because I have always been frustrated by this treaty negotiation process where, "don't worry about who you are, we'll accept that, we'll accept a little circle on the map or," as he said, "the rectangle and we will get on with talking about something." The reason they're going to get on with talking about something is because they will talk to you about anything except your rights. They are going to talk about a contract. "We are making a deal here: you're going to get so much cash, you're going to get so much land, and you could run your own affairs and we're going to get everything else." That is the process I've seen happen in the treaty negotiations right now. It's a land and cash deal, and governments want to deal with this, not in the context of Delgamuuk'w, not in the context of your rights, but in the context of "let's make a deal." If you get the right circle, I guess on the spin of it, you get more land or less land.

Now, I just wanted to that say about a year ago at the first Delgamuuk'w conference, which was in Victoria -- I was invited by UVIC [University of Victoria] to speak there -- I spoke about a year ago, and I said what is revolutionary about Delgamuuk'w is that the Crown in right of British Columbia has been clearly told by the highest court it's time to address long standing issues of aboriginal title in B.C. and to stop denying aboriginal title exists in B.C. Unless the Crown recognizes this directive from the Supreme Court, the economic and political uncertainties as a result of aboriginal title will continue in this province. I also commented on how aboriginal title is no longer difficult to prove. One of the tests, one of the tasks that we set out to prove in Delgamuuk'w on the instructions of the Gitksan and Wet'suwet'en, was that the proper way to prove who has title and the proper way to prove your rights is through the voices of the people. Now, two levels of

court didn't get it, the Supreme Court of Canada did and, of course, it has elevated oral history. And I want to talk about different levels of oral history in that way. It is not as hard as it was before Delgamuuk'w. I am not saying that it doesn't take a different focus of research, but at least now we know what has to be shown. And that kind of material should be shown to governments in treaty or in bilateral negotiations or to third parties because, again, as Doug Elias talked about in the example, if you have that data put together it's going to make them back off. I think of the story a number of Elders told me years ago -- and I am sure many of you have heard this story -- about when the white man came and the missionaries came and gave us bibles and told us to close our eyes and pray, and when we opened our eyes all of our land was gone. I mean, it still rings true. Well, it's changed now. We're not giving out the bibles. The government says, "look, we have got a deal for you: what we are going to do is have the treaty commission [British Columbia Treaty Commission], we are going to have you guys come to the table and negotiate treaties," but what's happening on your land while that's happening? Now, I am saying this from some groups -- I am not saying it's happening everywhere -- but what is happening is, and we are going to give a five year development plan, streamline forest practice codes, mineral development plans and guess what, when you walk out of that treaty negotiation room you might have nothing left on your "land." But if you start to talk about your land and the critical component of it, it gets the government negotiators very nervous because they have no mandate to talk about your rights. So you have to really push that, that you're not there like the Historical Society of Sicamous, because you have an interest; you're there because it's your land and your rights.

The other point that I wanted to consider is what has happened in the last year. We have the Nisga'a treaty, we have the Sechelt people that went to court and then came back to the table and, of course, they have a tentative agreement in principle. The Nisga'a treaty, of course, was initialed after Delgamuuk'w, but it is recognized by the Nisga'a and by everybody that it was not based upon Delgamuuk'w; it was based upon their many, many years of negotiations. What else do we have going on? What we have going at the federal court is a decision known as *Macovick v. Minister of Heritage*. Last summer Associate Chief Justice Rouchard has decided that Canada has a duty, having entered into treaty negotiations, to negotiate in good faith. We have, in British Columbia, the government of British Columbia and the government of Canada saying, "that was different, that was under the comprehensive claims policy where the First Nation had to prove, to get into the policy, that they had a basis of aboriginal rights" -- the 1986 policy that Chief Manuel referred to. They had to prove that they had a basis for negotiating that. They have argued in court, both governments, in British Columbia it is different. You don't have to prove anything, you just draw a circle on the map and we are there to talk to you. So what you have happening is that, when you enter into the treaty room, Canada and British Columbia have blatantly stated they have no duty to negotiate in good faith, and their fiduciary duty to you, that's a coat that they hang up at the door; that they don't have to bring that fiduciary duty into the treaty negotiation room. It's hard bargaining, you know. It's "let's make a deal." And if you are really well prepared you get a good deal; if you are not so well prepared, you won't get a good deal, but it's freely entered into.

Many First Nations in British Columbia threaten to go back to court -- of course, it's an intimidating process in British Columbia because of the length of Delgamuuk'w. There is a dialogue between the First Nations Summit, Canada, and British Columbia about the meaning of Delgamuuk'w -- I have not been invited to participate in that and some of you and some of the leaders may have. But what has happened in that process, as I understand from talking to some of the leaders, is that the province is saying, "we'll give more cash, more land; let's talk about a treaty, let's not talk about Delgamuuk'w." They want Delgamuuk'w to disappear, and Delgamuuk'w will disappear unless the First Nations in British Columbia and Canada say it isn't going to disappear. Because you can have the best victory in the world, but, as they say, use it or lose it.

I just wanted to talk about some of the evidentiary rules in terms of research, if you accept the thesis that I say: that you should in your research use the standard of Delgamuuk'w. First of all, there is the oral evidence. In terms of that, the Chief Justice in Delgamuuk'w in paragraph 80 and 81 said the courts must not undervalue the evidence presented by aboriginal claimants simply because the evidence does not conform precisely with evidentiary standards that would apply, for example, in a private torts case. Accordingly, a court must take into account the perspective of the aboriginal people claiming the right, while at the same time taking in the perspective of common law. So there is a balancing, as was said by the earlier speakers. So that perspective and the development of what your aboriginal perspective is, or the aboriginal perspective of the First Nations, is critical, and that is going to be the next level of test.

I should say what else has happened, another point that has happened since Delgamuuk'w. A few weeks ago, some of you may have seen -- I think it was in the *Globe and Mail* -- a detailed interview with Chief Justice Lamer of the Supreme Court of Canada. He was asked where the court's going in the next ten years. Two issues, he says, are critical: equality rights under the Charter [of Rights] is going to be a big issue, and aboriginal rights. He said Delgamuuk'w is only the first salvo. He, notwithstanding what Delgamuuk'w says about negotiations, he in this public interview stated he recognizes, and the

Supreme Court of Canada recognizes, that governments are not going to sit down necessarily and resolve it all, even though the courts would prefer this. So he sees that as a critical issue, and these evidentiary issues are going to be part of that. Now, he said at paragraph 87, "notwithstanding the challenges created by use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this evidence can be accommodated and placed on equal footing with the types of historical evidence the courts are familiar with, which largely consist of historical documents." This is not to denigrate the historical research; it's not to say that it is less important, as Arthur Ray has said. That research is important, and of course as the Hudson's Bay [Company] records, there is the coastal traders, the first contacts, the journals that people have. But sometimes it's going to be piecemeal. What I am saying is that you have got to defend and prepare your negotiation as though you are in court and prepare with this kind of oral evidence.

The North Coast peoples in terms of oral history have good fortune -- Nisga'a, Tsimshian, Gitksan and, I believe, Haida -- in that 1915 to 1955 William Bainan researched and interviewed many, many Elders and there is a huge archive, and he presented most of that to Marius Barbeau and it's in the Museum of Civilization. But what about today? Many of the Elders who testified at Delgamuuk'w have now passed on. For the Gitksan and for the Wet'suwet'en, they have their evidence preserved. But, of course, are we in a situation where the oral history is going to slowly disappear and then, a hundred years from now, your rights are going to be less? Well I wanted to quote from Professor Ray's book, *I Have Lived Here Since the World Began*, where in the preface he refers to recent oral history research among the Mi'kmaq, which shows us that aboriginal perspectives can still be obtained even from among the first groups to greet the European newcomers.

You know, when you talk about the earlier stages of anthropology at the turn of the century, it was called "salvage anthropology" and what it was about was, these civilizations are going to disappear -- this was colonialism at its peak -- these civilizations are going to disappear, let's save what we can. You hear that all the time and you continue to hear it. I am concerned that people will say, especially non-aboriginal people, especially governments, especially those who don't understand you, "oh, the oral histories are going to disappear," or "the oral histories have disappeared." What I have learned from the Gitksan-Wet'suwet'en in Delgamuuk'w is all of these -- the true myths -- are these statements, because the survival of a people such as the First Nations in this country is amazing and the resilience to continue to carry on these traditions. It may be in different ways, it may be through testimony and other matters.

But I wanted to also point out that I spoke to a group, the F.S.I.N. [Federated Saskatchewan Indian Nations], on Delgamuuk'w in the summer. If you want to know who is excited in this country about Delgamuuk'w and oral history, it is the treaty tribes of the Prairies. They see a huge opening from that court decision as to how they are going to use their own oral histories about what happened during the time of the treaties, and they are driving that forward in a very aggressive manner in looking at their treaties.

What I wanted to say again is that there was a reputation evidence that was utilized. When I talked about oral histories, you have the traditional oral histories, but the Supreme Court also talked about contemporary statements; that is, statements of today and about what was told and what was passed down, and statements today about the reputation in the community. The trial judge, of course, rejected all that because -- and I call it the Shelford defense, after Cyril Shelford, a former minister of the province who testified in the case; he was a Socred [Social Credit Party] minister in the 1950s and 1960s -- and Cyril Shelford testified that when he grew up at Itsew Lake none of the Wet'suwet'en told him the real names for these lakes and not one of them told him that they had a land claim to these lakes. Instead, he would go out with his friends as a little boy and they would make up the name for a little lake. If you know that area -- well, pre-flooding -- it would have thousands of lakes, so they would go hiking up in the hills and there would be a little lake and they would call it, you know, First Sight Lake or Moose Lake or something like that, and he said it was very exciting. Isn't that similar to what Captain Cook and Captain Vancouver did when they first came here? It is part of human nature. I go hiking, I climb to the top of the mountain, and I always have the feeling like I was the first person there. Of course, it's part of our psyche, but it has got nothing to do with the reality. The Supreme Court said it is completely consistent that a First Nation may talk about those names only in their feast hall, as the Gitksan and Wet'suwet'en did, or only amongst their own peoples, and that does not reject that evidence -- and that is very critical. I thought that Antonia Mills was going to mention this when she mentioned one of the difficulties. One of the issues is for the Gitksan and Wet'suwet'en -- and I am sure for any of you -- when do we disclose our secrets, when do we tell this on the record? That's a critical task you will face in the research role that you have.

The other evidence -- geez, this is just like being in the Supreme Court of Canada, eh, they give you these little lights, too. I think I was given the same amount of time as I was to argue Delgamuuk'w, so I am sorry if I am speaking fast. It seems like I get fifteen minutes. In the Supreme Court I got fifteen minutes; I always get fifteen minutes: say what you can in fifteen minutes. Try to compress 387 days into fifteen minutes -- it's a task -- and not offend any of the experts. You had to

mention each and every one of them in the fifteen minutes, somehow, plus all the Elders. It was really hard. Other areas of evidence that is critical.... I would like to just go to the one point about experts, because I think that is a critical point. A number of the persons who have spoken to you have talked about this: the trouble is, it is adversarial. You are an advocate. Courts are getting increasingly resistant generally to experts because they have got too many hired guns in all areas of law, so it is getting very, very difficult. What Professor Ray has said to you is true: the expert should utilize his expertise in his field to present and to help you prepare the best material that you can. Now, as I say, if you are using it for negotiations, put the research or the expert to the same standard. The difficulty is this, and the Supreme Court did not overturn the findings of experts by the trial judge, saying the credibility of witnesses is still in the hands of the trial judge, which was very unfortunate in that case. But, of course, it is still open for review. The point is this is the challenge you have. You may have a researcher, such as one of these persons on the panel, working with you, as Doug Elias worked on a specific research project for negotiations -- working within the community, working with the people, being an advocate. That can become risky when the person has to testify, if that person does have to testify. So you may well want a researcher that is doing that intense work with you, but somebody else who has an affinity and understanding of where you want to go. They have to have that, but somebody else would actually testify. The expert must appear neutral and objective. The Delgamuuk'w case, I shall say -- I don't know if any of those in opposition to me are here -- but the Delgamuuk'w case, I think that they would agree, was notorious for its bitterness. I will say this myself, being immersed in a three year trial, when no stone was left unturned: it was very bitter. As a result of that bitterness, it was hard to buffer the experts from that, especially the personal attacks on those experts. But it was very critical, it *is* very critical, that your experts be focused on their task. In preparing your expert, if you're looking that your negotiations may fall down and you're looking for something else, again, at that point, the expert must work with the lawyers. They must work closely with the lawyers because of the anticipation of what's going to come at them. As Murray Adams warned Skip Ray, it's like nothing you've experienced in your life, trust me. It's a consolation. I practiced law for twenty-two years and Delgamuuk'w was nothing I had ever experienced in my life either, and I had been in court most of the time.

But I strongly recommend, in conclusion, that what you do is you utilize your research budget preparing evidence of who you are and your resources, and this can be tied to be what you want to do in the future. For example, right now there is an issue at a table -- and people have consulted me -- one of the things they were doing is building their plan for what they wanted to do in the future on their territory. Makes a lot of sense. But combine that with the historical evidence of what in fact they did do -- that is, they utilized the timber or the minerals or whatever it is -- and it becomes very difficult for government to ignore it. But the government does not want you to go back to history. As they say, these are about the future. Don't buy that. Detail your own histories, as well, and put them on the table to the government, because then they will know if they want to challenge you or, if they don't get serious, you are ready to go. I want to thank you very much again for your time.