
IMPLEMENTING DELGAMUUK'W

Biography of Darwin Hanna

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I would like to refer you to page sixty of the package. I have a paper in there that tells the effect of the Delgamuuk'w decision on archeology. One of the biggest effects of the decision on archeologists, that it's been a growth industry for both lawyers, archeologists, and anthropologists and other professional people. There has been a lot of community involvement to try to implement Delgamuuk'w, which is quite important. I just want to make a disclaimer. I am not an archeologist. I am not trained in the archeology field but a lot my work, when I represent First Nations clients, a lot of the work involves advancing arguments based upon their history -- our history -- with traditions, culture, the way of life. A lot of that information is extracted from archeological methods and, as well, anthropological methods.

Essentially, our land is the way of life for our people. It provides our ever needs, our daily needs, and still does to this day. It is really important for our people, and as we are moving forward into the next millennium, our land is... we need it to advance, grow, and develop. We have known from our ancestors that we have exerted jurisdiction over our territories from time immemorial and our leaders in communities still assert jurisdiction over our lands to this day. Some of our people are involved in the land claims process and some of our people are not involved in the process. For myself, you know, it doesn't matter if you're in or not; the land is there, we have title, and we will have to deal with that title.

You know that after the last century that government has disempowered our people from our lands. It has taken away our jurisdiction, our management, and our benefits from our lands. We want to re-establish our authority over our lands and to do this, if we want to do this in a court of law, we have to prove that we have title. To prove that we have title, we have to meet certain criteria as established by the Delgamuuk'w decision. So this paper briefly examines the Delgamuuk'w decision, as well it examines the Heritage Conservation Act and it has a brief review of the Kitkatla decision, as it considered the Heritage Conservation Act. Just make to make a further disclaimer, at the time I was writing this paper and preparing it I was suffering the effects of the flu and it was sort of rushed but, nonetheless, it is there in front of you.

Before I forget, is that when we examine Delgamuuk'w, Delgamuuk'w says that if we can prove title, we have the right to the land itself. That decision came down in the fall of 1997. Since then, no court has determined that our people have held title to the lands. There has been numerous court cases, but essentially no court of Canada has recognized that any First Nation has title to their lands. So essentially it is a hollow victory until we can get that first decision that recognizes a First Nation has title to their lands. If we can establish title, it confers certain rights and privileges upon our people. The first one is exclusive use. If we can show that we have title, we can fence off our property, our territory -- and we know that from history our territory was quite wide. It's just like our neighbors have fences, and that's what our use would be, is to fence off our territory. That's basically what exclusive use means. Secondly, we have the right to choose to what uses the land can be put -- and basically what the court's saying there in Delgamuuk'w is that we have jurisdiction, if we have title; we have management rights over our lands. I take the strongest interpretation possible in Delgamuuk'w because if you don't the court will read it down, the government will read it down, so you got to go directly the opposite and take it as far as you can take it.

So refer to the second page of my paper. The third concept of our title right is that we have the right to financially benefit from our lands. We have a right to make money off of harvesting our logs and timber on our lands. We have a right to other commercial ventures upon our lands. This concept of title is quite important to the future of our people, so that we can move forward and become independent once again and no longer dependant on the government. So how do we prove our title? And you've heard Dave Schaepe, provide a brief review of Delgamuuk'w, and I will just quickly review the same principles again. In this we have a test that was established by Delgamuuk'w which sets out that First Nations must prove three criteria to establish title. The first part of the test is that the lands must have been occupied prior to sovereignty, prior to 1846. Secondly, since contact the land must have been continuously occupied. In the second part, the court indicated that our people may have been disrupted from our lands for an interim period of time; we may have not utilized land for,

maybe, a period of time because settlers affected our interests. However, we utilized those lands; it's enough to establish continuous occupation. This is really important for our people to revitalize our traditions, to utilize our lands even though they may not have been utilized as formally for some time. We have to go back and learn our traditions and utilize our lands to show that we are continuously utilizing our lands. The third criteria, at sovereignty First Nation occupation must have been exclusive to other First Nations. However, the Supreme Court of Canada said that title could be shared amongst First Nations where there is overlapping areas or maybe shared hunting areas, shared fishing areas. So those two First Nations that utilize that area have a shared title.

So the court set out some guidance on how our people can establish title, pre-European contact. Basically we have to prove that we physically occupied the lands prior to contact. How do we do that? As was stated, we could prove this by demonstrating that we had houses, we had enclosures, we had fences, we had burial grounds. As well, we can show that we utilized certain tracts of land for hunting and fishing and other activities. That is probably most important aspect: is looking at the regular use of our lands, not just being very narrow and looking at where we lived, but where we utilized our full lands, because our territories were quite large and we know that a lot of our people only lived along the river or ocean edges. However, we utilized the areas up in the mountains and there is not a lot of evidence of our use because when we're going out hunting or practicing our spiritual ways, you don't leave a lot of physical use of our territories. So that is where we have to be creative. Archeologists have to be creative on how to demonstrate how our people have utilized our lands, particularly in relation to spiritual practices. Based upon this test, we have to rely upon the professionals to establish title: archeologists, anthropologists, whomever. As well, we can't forget about our local people: the community members, our Elders, people who are very knowledgeable about our title occupation. And it's the community members who are probably the most important people to establish our title rights. This is quite an onerous burden upon our people to establish this title, especially to advance it in the court, because a lot of this evidence is oral -- and tomorrow this conference will be touching upon oral evidence; I'm just trying to stick to the physical aspect. So we need lots of evidence, and that's if we are going to bring a case forward in a court of law. If you're in treaty negotiations or going into consultations, you don't have as a high burden to establish title; you can assert it and maybe back it up. But when you go to court you need a lot of evidence to establish title, and I think it's quite critical for archeologists and for community members to know what court cases have said, post-Delgamuuk'w, in relation to the evidence that required. This is a high burden of proof to establish our title rights. Once you establish title, then you can try to establish that your rights and title have been infringed and then the Crown will try to justify the infringement.

So based upon the Delgamuuk'w decision, it's my way of thinking that it's quite important for our communities to revitalize our traditions. We can go to professionals for assistance, but basically it is the community that is going to decide title future. If you're not practicing your traditions, then you can't assert your title rights. That is the message that I bring to you today, is that you really have to go out there and keep your way of life going. Second, part of my paper is looking at heritage site protection. You go out and find all sorts of sites throughout your territory based upon your traditional use studies, from archeological impact assessments, from your Elders' knowledge. You know that you have these sites and they may be impacted by decisions from the Crown. The Crown may decide to allow a logging company to log your territory. This logging may negatively impact upon your rights and title to certain sites in your territory. The purpose of the Act is to encourage and facilitate the protection and conservation of heritage property in the province. Part one of that Act provides certain definitions that are relevant today. The three definitions: heritage object, heritage site, and heritage value. Basically, a heritage site is any land covered by water that has heritage value to an aboriginal group. So what is heritage value? They provide a definition: heritage value means the cultural worth of a site or object. Basically most of our sites, our people are important to us culturally and heritagely.

I refer you to page four of my paper. Pursuant to Section 5 of the Act, the Act is binding upon all ministries of the government and prevails over any other provincial legislation. However, the Act does not apply to the federal government. In Section 13, the Act provides for the protection of heritage sites and provides for the protection of burial grounds, rock paintings, rock carvings, and any sites that have evidence of our occupation or use prior to 1846. We know that we have many burial grounds throughout our territories, we have many rock paintings, and we have many evidences of our occupation prior to 1846. What the province does, is that when they are doing an archeological impact assessment, the archeologists will try date those culturally modified trees. They will try to date them pre-1846 or post-1846, and if they date them post-1846 they are not protected by the Act here. That is what you really have to look out for and try to make an argument that they may have been pre-1846. It provides certain measures that, if somebody interferes with any of these heritage sites, that the person commits an offense. I believe that this Act is not enforced with any rigour by the province. However, it is there for our use and we could try to put the government to task to use this fact for our benefit to protect our sites. Section 13.4 of the Act requires the province to consult our people regarding our heritage sites or objects that may be

affected by Section 13. So if a logging company is issued a permit by the government and that logging permit covers off-forest area that has some C.M.T.s [culturally modified trees], that is going to affect that First Nation's interest. The government has an obligation to consult that First Nation regarding the logging activity within that area. Further, the Act provides the province may turn to agreements with the First Nation for the management of the heritage sites. From what I know, is that there has been very few agreements entered into. If you have any important heritage sites identified, I'd recommend that you bring it to the attention of the Archeology Branch and say that you want to protect it and you want to have an agreement. They may say, "no, we can't enter into an agreement, we don't have the funding," whatever. But put them to the task, put them to the onus, because they have an obligation to carry through the Act. The Act authorizes the minister to issue a temporary stop work order if a property has, or may have, heritage value and is likely to be altered. So if a logging activity or excavation may affect a heritage site, you should petition the minister to have that site protected and for the minister to issue a temporary stop work order to protect that site.

To my knowledge the Act has not been amended to deal with the Delgamuuk'w decision, nor has it been administratively enforced to reflect the Delgamuuk'w decision. This is a policy area that our people should take the government to task to have this Act to reflect our peoples' rights and title.

Page five of my paper. I'd like to refer to you the Kitkatla decision, which has considered the Heritage Conservation Act. The decision rendered reviewed here was handed down by the B.C. Supreme Court of October 21 of last year [1998]. The Kitkatla band sought a judicial review of a decision of a minister to grant International Forest Products Limited a site-alteration permit issued under the Act to harvest C.M.T.s. In the case here, I.F.P.L. holds a forest license over area on the coast, and this area in question is known as the "chameleon area" -- excuse me if I can't pronounce that correctly -- and the band asserted that they had rights and title to this area. The forest company, they provided a forest development plan to harvest this area. The band expressed an interest. They asserted that they had rights and title to this area and would be affected by any logging of this area. There is some consultation meetings that occurred last year; they broke down. During the early part of 1998, there was an archeological firm hired by the logging company. They conducted an archeological impact assessment within the proposed logging area. The band participated with this archeological impact assessment: it provided two members and they identified some C.M.T.s within the proposed logging area. I.F.P.L. applied to the minister for a site-alteration permit to cut down some of these C.M.T.s within the proposed logging area. The minister wrote to the band regarding comments of the proposed logging of these C.M.T.s. The band did not respond to the minister. Subsequent to that, the minister issued a site-alteration permit authorizing I.F.P.L. to harvest certain C.M.T.s within the logging area. The minister issued this permit without even reviewing the archeological impact assessment. In the Supreme Court of Canada -- page six, the first full paragraph -- found that the minister did not fully consult with the band prior to issuing the site-alteration permit. The court found that there was a duty of consultation upon the government, in that this duty of consultation is legislated pursuant to the Heritage Conservation Act. Here, the First Nation was not afforded any opportunity to consult, so the court set aside the site-alteration permit as it relates to the seven cut blocks in which the C.M.T.s were found. So this is a important decision for other First Nations, for C.M.T.s may be within your area or other important heritage sites within your area. The government has the duty of consultation. As we know from Delgamuuk'w, consultation requires government to engage in consultations in good faith and to substantially address any concerns of the First Nation. On certain occasions, the government has to obtain the consent of the First Nation prior to making decisions.

Subsequent to this decision, there was another court decision that was rendered earlier this year, February 2 of this year [1999]. I just found this court case this morning on the Web and I am just going to briefly review it because it also involves the Kitkatla case with this process of the logging company trying to harvest certain C.M.T.s within the cut blocks. So, subsequent to this decision of October 21 of last year, the government engaged in consultations with the Kitkatla band. What the forest company planned, that they would leave eighty percent of the C.M.T.s; however, they would harvest twenty percent of the C.M.T.s. The twenty percent represented forty culturally modified trees, and that these forty C.M.T.s would be cut down and left at the sites and be left there for a study for the band and archeologists. The band brought an application, and what happened was the minister issued a site-alteration permit in December authorizing the forest company to harvest those forty C.M.T.s. So the band brought an injunction to prevent the logging of the C.M.T.s and that injunction was not granted, and the band appealed. I believe a leave of appeal was granted. So pending the appeal, the band brought an injunction against the logging company from harvesting those C.M.T.s pursuant to the minister's order. Section 8 of the Conservation Heritage Act basically provides that no provision of the Act can abrogate from the aboriginal rights of the First Nations of B.C. So basically, that Act cannot take away our rights in B.C. So here, the minister provided another permit and the band was saying that was going to abrogate our right. Our right includes preservation of every single C.M.T. within our territory. So the minister disagreed with the band and the minister said, "we don't have to consider your rights. Your rights don't include preserving every single C.M.T. and we are not going to make

a declaration of your rights within that logging area." So the minister granted the site-alteration permit without considering the band's aboriginal right claim within that area. So the band brought an application to overturn the second decision of the minister. The court denied that application, and it's on appeal at the B.C. Court of Appeal. So pending appeal, the band brought an injunction to prevent the logging of these forty C.M.T.'s.

To be successful in bringing an injunction against a logging company to protect certain culturally significant sites, the petitioner or applicant -- being the First Nation or the band here -- has to prove three things, has to meet this three part test. Basically, the first part of the test is that the band must show that there is a serious question to be tried, and here the question to be tried is that they were asserting that their rights will be the infringed by the minister's decision. The court said that -- the first part of the test is a low threshold -- and so the court said that band met this part of the test. On the second part of the test, the band has to show that not granting the injunction will... the band will suffer irreparable harm as a result, if the injunction is refused. So here the court found that the band may suffer losing its heritage objects, being the C.M.T.s. The court also said that the logging company will suffer an interruption of its logging business. At this second part of the test the court went on to say that, even if the band can establish its rights over the area, the court said that right may not include preservation at every single C.M.T. However, the court said, "well the band has established the second part of the test, that the band would suffer irreparable harm if logging were allowed of those C.M.T.s, so we will go to the third stage." And here the court said that the balance of convenience weighed in favour of the logging company; that if the injunction were granted it would affect the safety of the logging operations, it would affect the economic interest of the logging company because, basically, if the injunction were granted, the court said, they would have to change their logging plans and would have to cut around the C.M.T.s, and there is evidence that the logging company that said that, if they had to go around the C.M.T.'s, that would endanger the workers. The court accepted that argument and the court said that the band may not be successful in proving or establishing that they had a right to protect every single C.M.T. So the court here declined to grant the band an injunction pending their appeal. So essentially, based upon this decision, the logging company can go ahead and log those forty C.M.T.s pending the band's appeal of the minister's decision to the B.C. Court of Appeal. So that's this decision. I wanted to review another decision, but I think I will just leave it for another day.

Just in closing it is my recommendation that, my advice that, again, that you just have to go out and try to maintain a way of life and document -- you don't have to write everything down, but make sure that your people, your negotiators, are aware of your way of life -- so that when you're in consultation meeting with the government that you can advance your uses to protect your territory. That's my concluding remarks. Thank you.