
IMPLEMENTING DELGAMUUK'W

Biography of Peter Di Gangi

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Peter Di Gangi graduated from Trent University in 1980m with Honours BA in Native Studies/Anthropology. He began working on land claims research in 1980 for the Union of Ontario Indians. Since then, he has continued to work in the research field – land claims and policy. This included 5 years at the Assembly of First Nations as Director of the Centre for Treaty Advocacy and extensive work for the Royal Commission on Aboriginal Peoples in the area of Treaties and Lands. He has also worked for the Union of Nova Scotia Indians, the Union of BC Indian Chiefs, the Native Womens Association of Canada, and a variety of individual First nations and Tribal Councils. He is currently Director of the Algonquin Nation Secretariat, and is responsible for coordinating the preparation of evidence regarding aboriginal title.

Thanks, Wayne. I want to start off by saying thank you to the U.B.C.I.C. for inviting me back to B.C. and having an opportunity to share some of our experiences with some of these issues.

On the issue of consultation, before I start into the issue of Delgamuuk'w, I'd just like to review a bit of the background to get a sense of where this issue of consultation actually comes from. I'd suggest there is probably at least four or five phases that you could look at to really get a better sense of what consultation is supposed to mean today. What you have to do is go back in time.

The first phase, I'd say, started at the time of contact in eastern and central Canada, the French and English wars in the period leading up to the [Royal] Proclamation of 1763. At that time there was no doubt that First Nations held title to their lands. The Crown certainly behaved that way. And if you look at instruments such as the Royal Proclamation of 1763, it's key that, number one, there was a recognition that First Nations held title in their lands; number two, that their consent was required before anything could be done to infringe their title. I think it is important always to remember that's the basis of the relationship and the basis of this whole discussion over consultation and consent, is that Crown policy started with a recognition that title existed and that consent was required. The other thing -- if you look through the primary sources and you get a sense of people like Sir William Johnson and others who were attending treaty councils with the various Indian nations, to consult with them and get their consent or their consideration of issues -- they were prepared for very long drawn out sessions. I mean, you look through the records of treaty councils, they would go on for days. Crown representatives were fully prepared to sit and take the time that it took to hear the views, canvass the views, and come up with some form of reconciliation or resolution.

But starting particularly after Confederation all that changed. That is what I call the second phase, from Confederation up to about World War Two, when assimilation became the formative element to Crown policy. It meant a non-recognition of title, it meant the whole purpose was civilization and assimilation, so why would you want to consult with Indian people if your whole purpose was to change their mode of mind and to illegitimize their governance and their point of view? Certainly, at that point, consent and consultation in general terms were thrown out the window in favour of assimilation and abdication to the provinces to allow the dispossession of lands and resources. The other thing that is important about that phase is that the Crown denied that there was any legal obligation for it to undertake consultation or to seek consent when there was infringement on lands outside a reserve.

After 1945, though, you really get what I call the modern era of the policy consultation process. That's when, starting with the Joint Senate-House of Commons Committee on Indian Affairs in the 1940s, they started to actually begin to approach formally the leaders of nations once again to seek their views. At that time it was in the context of amendments to the Indian Act, but you see the same trends established that continued right through until today: they'd ask people what they thought, they'd take into account the things people said that they agreed with, and they'd ignore the stuff they didn't agree with. It's very similar to the way things occur today. In that period up until 1982, you start to get the beginnings of a legal foundation for the Crown to actually have legal duties in this respect. With Calder in 1973, the court broke down on a technicality but they did establish that in theory title could exist. So the government came up with the native claims policy in 1973 to respond to that.

But what I'd really like to focus on is a period from 1982 onward, because with Section 35 of the Constitution Act (1982) you have for the first time in Canada's domestic constitution aboriginal and treaty rights recognized and affirmed and you start to have the courts trying to figure out, well what does this mean?

In 1984, with the Guerin case, they established that the fiduciary duty of the Crown to act in the best interest of the Indian nations is a legally enforceable duty. Up until that time the Crown had insisted that it was a political trust, that it was not enforceable and that they weren't really required to do anything except what they felt like doing. Starting in 1984 you start to get this legal basis for a duty on the part of the Crown to act in the best interest of the nations, number one, and also that requires them to consult, to find out what the views of the nations themselves are. Then you have a whole slew of cases following that, that build on those principles. With respect to aboriginal rights, you have Sparrow, Necall, NTCC Smoke House, and Vander Peet and, finally, Delgamuuk'w in December of 1997. Generally speaking, the Crown's response to each of those developments has been very consistent and you can distill it to a couple of key responses: avoid it, deny it, and delay any response, and if you have to respond then develop a policy that is much less than what the courts say, but looks like it might satisfy the general public, essentially; to certainly limit the application of these decisions, particularly when it comes to matters of Crown duty and what the law requires of the Crown. So you could see this consistent pattern certainly hasn't changed post-Delgamuuk'w. Continue as much as possible with business as usual. That's just sort of a bit of background sort of to give you a sense of where to place Delgamuuk'w and the response to Delgamuuk'w in the historical timeline and in the policy timeline.

What I'd like to do, for taking a look at Delgamuuk'w and the issue of consultation, is to compare two papers that were written on this very issue of consultation and Delgamuuk'w. One was drafted by a woman named Lori Young, who's counsel for the Department of Justice; it was presented at a conference on Delgamuuk'w that was held in Victoria a couple of weeks ago. She puts a disclaimer in it that says that it doesn't represent the view of the Department of Justice or Canada and it is her views but, interestingly, you will find in your kits that there is a slide show from the Department of Justice on consultation post-Delgamuuk'w which this same Lori Young authored, and her paper, in fact, is entirely consistent with the contents of that slide show, which is an official Department of Justice document. So certainly there is some continuity there. So that's on the one hand, to give you an idea on how government has taken a look at this. On the other hand, I took a quick scan of a paper that was prepared by Stuart Rush called, "What the Crown Must Do and What the Aboriginal Nations Can Insist It Does as a Result of Delgamuuk'w" that was from December of 1998. As I understand it, Stuart has worked for many years for First Nations and he is coming at it from a perspective of looking at, what are the positive duties emerging from Delgamuuk'w? What I wanted to do was give an idea of the contrast of the analysis just to show you that, if we are to seek this kind of reconciliation that the Supreme Court talked about, there is a considerable ways to go to bridge the gap.

As you know in Delgamuuk'w, the court talked about a spectrum of rights. On the one hand, you have aboriginal rights that are general in nature that can be exercised throughout a territory and, going along the spectrum, you have rights that are site specific and, at the end of the spectrum, you have full title, which means exclusive use: the power to decide the uses to which the land will be put and so on. The court seemed to also establish a spectrum for consultation depending on the nature of the right and also depending on the degree of possible infringement. At the one end you have a duty to merely consult, which is the shallow, traditional version of consultation; they have to at least inform you of what is going on, and then if the infringement is more intense then there is a duty to consult more deeply, and then, finally, at the other end of the spectrum there, is actually requirement for consent. Now if you look at what the Department of Justice lawyer says about this spectrum, mere consultation, they say, is where infringement might be minor or temporary and all it really requires is advisement; in other words, they have to advise you that something is going to go on and that would be sufficient. On the other hand, Mr. Rush's analysis suggests that, at the low end of the spectrum, there has to be give-and-take and there has to be an actual dialogue, whereas Department of Justice seems to be taking the view that all you have to do is simply inform -- provide notice -- and that's enough. Here is another example, again, how I think it shows where the federal government's coming from in terms of responding to this. They're suggesting that consultation only has to really address infringements that relate to traditional practices. In Delgamuuk'w it is very clear; they said that title involves much more than just traditional practices -- hunting, fishing, and gathering -- it involves the whole spectrum of economic activity and that those properly fall within the gambit of aboriginal title, whereas Justice is immediately sending out signals that, well, we've really only go to consider things that infringe on traditional use. Another interesting thing about the issue of consent, what you have the Department of Justice saying is that in most cases you're going to need consent in areas where the infringement hits to the core of aboriginal identity or culture. That being the case, most of those kinds of infringements are going to take place on provincial Crown lands, therefore the federal government has no duty to consult in cases of extreme infringement, in most cases, because it is a provincial heading of authority. I find that quite interesting because, certainly if you take a careful reading of Delgamuuk'w, it speaks at length about the federal government's [Section] 91(24) responsibilities, and that they extend to aboriginal title lands off-reserve within provincial Crown lands. The court goes to great length to explain how the federal government is going to need to grapple with this expansion of the responsibility and that it has a duty to act on behalf of First Nations when provincial government actions on provincial Crown lands stand to

infringe title. Yet here you have the federal government's legal people ignoring that completely and suggesting that, well in the rare cases where consent will come up as an issue, it's really going to be up to the provinces, so the feds won't have to worry about that.

The other thing which I found astounding in this paper that was prepared by Lori Young is that consent doesn't really mean consent. What she is suggesting in there is that when you do have cases where consent is required, it doesn't really mean a veto, it doesn't mean that aboriginal nations can actually say no and that it's going to be up to the balance of convenience and for judges ultimately to decide whether or not the withholding of consent is actually unreasonable. I don't know if any of you have been following that recent Supreme Court case on sexual assault where the court came down clearly to say that "no means no." Obviously Justice doesn't take that view. For them "no" means "yes" or "maybe," but it certainly doesn't mean "no." I mean, how much clearer can you get than the requirement of consent? And here they are already trying to find ways around it to say, "well, consent doesn't really mean consent." It does make you wonder about how far things need to go before you get the kind of good faith that is going to be required for reconciliation.

The other interesting thing I found about the federal analysis is that they make it very clear that there is no legal obligation to fund consultation. This gets back to an issue I'd like to speak to directly with respect to the nations in B.C. here. I come from central Canada, I have been working on aboriginal title claims for the Algonquin Nation for the past three years to prepare the evidence required to proving aboriginal title. In eastern Canada and in Quebec the way the comprehensive claims process works is that they fund, through contributions, they fund you to do your research to get your evidence together. So we are in the process of doing research; we're three years into it now, we've had to do genealogy, land use, the primary record, archeology, and so on and so forth. But by in large that has been funded through contributions from the federal government. When they established the B.C. Treaty Commission, as some of the speakers discussed earlier in today's proceedings, they changed the process -- although they didn't change the policy -- they changed the process so that once you've sent in a letter of intent and it's been accepted, you are immediately into negotiations. There really are no contributions for research, which, personally, I would suggest puts nations at an extreme disadvantage in negotiations for a number of reasons. But let's just apply this to the issue of consultation. Say, if the government does approach you in good faith and there is an issue where title is to be infringed, and they're consulting you, they're asking, "well what do you think about this possible development?" Well, unless you know your facts, unless you have your land use studies done -- current use, traditional land use -- unless you have a sense of the archeological sites in the region, unless you have a real clear sense of your own facts and your own history, how can you make an informed decision about how this infringement will affect your nation or your community? I'd suggest that, without having the research done, without having a clear grasp of the facts, it becomes very difficult for nations to, number one, consult effectively and, number two, provide informed consent to anything, because without a full grasp of the facts what are you basing your decisions on?

Turning from that, I'd like to turn to a couple of the things that, from the First Nations side, I think are important to consider. Oh, here is one more big difference between the federal analysis and the indigenous nation analysis. What the federal government says is that the legal duty to consult is not there unless the First Nation has proven title. So, in other words, there is no presumption that you have title; you have to prove title first then the legal duty to consult kicks in, whereas other language in the decision from the court is read by others to suggest that all you have to do is establish on face value that you have title -- in other words a presumption of title -- and that is enough to trigger legal duty. So again there is a big difference in terms of the interpretation of the sides on what Delgamuuk'w means and how it applies to consultation.

There is more I could say but I know we have got another speaker and you have been running late today, so what I'd like to do is just go over a couple of things that I would like to highlight for people maybe to keep in mind when thinking about Delgamuuk'w and the issue of consultation. Number one, it is very important to remember that the Crown owes you a fiduciary duty to act in your best interest and that duty includes the duty to consult and to seek consent where required. It's not a matter of discretion, it's a matter of a legally enforceable duty that flows from the fiduciary obligations of the Crown. The other thing I think, perhaps most important of all, it's important for indigenous nations themselves to determine how they want to be consulted, in what circumstances, and to put other governments on notice. Myself, my recommendation is it's very important to be proactive in these times and in this area. If you are not happy with the consultation process that is being offered, don't be silent because they'll take silence as acquiescence. You've got to provide an alternative and propose an alternative and follow up with them and make them deal with you, make them tell you why they don't want to consult with you in the manner that you have chosen, and get them to put it on paper to create a paper trail.

Another thing that I think is important to keep in mind is that quite often people talk about consultation -- you know, the Crown has a duty to consult with the nations -- which is true, but the flip side, I believe, is that the nations also have a duty

to consult with their membership. In the context of consultation and negotiations, post-Delgamuuk'w, I think it's crucial to realize that it can't be just Indian negotiators to federal negotiators to provincial negotiators. There has to be that backwards loop to consult with the membership and to get direction from them. And again, because otherwise when it comes time to talk about informed consent, it can get pretty dicey if the membership isn't behind the leadership on these issues, if they haven't been consulted diligently. Again, I mentioned earlier about the research and I continue to emphasize that without a full grasp of the facts it is very difficult to make informed decisions and very difficult to have a positive impact on consultation, because without the facts you're sort of in a perpetual fog.

In that light, I notice that when I was in Kamloops earlier last week -- and I heard it again today -- saying that the B.C. treaty process is not a rights-based process, it's supposed to be a political process, it is not rights-based. I am from the other end of the country so I come and hear all this and look at it, but then I look at the Nishga'a agreement and I look at the Sechelt AIP [Agreement in Principle] and I look at the general provisions in those two agreements, it certainly looks rights-based to me because any rights that they have they are going to give up and exchange for what is in the final agreement. So although, maybe to get in the gate, it's not rights-based, certainly at the end of the day with the extinguishment provisions and those general provisions it is rights based, because the rights are on the table and there gone at the end of it, replaced with what's in the final agreement. So I'd caution people who suggest that it's strictly a political process, this B.C.T.C., because at the end of the day it's clearly rights that are on the table and clearly rights that the Crown is seeking to extinguish fully and finally.

One other point is be careful what you say, who you say it to, and how you say it. Although as I've mentioned and tried to give some examples, governments are going to try and avoid in every way they can for meaningful consultation or seeking consent. But the flip side is that every phone call that they make to your office they are going keep a running file on it and they've got that running file to come out when the day comes to say, "well we consulted, we phoned so and so on such a day and we sent a letter and they never wrote back," and so on. So you have to be careful who you talk to, what the context is, and, if you don't feel it to be consultation, you have to state that very clearly for the record.

And I got my two minute warning here, so I'll just make one final comment. The government is not going to give you anything, you guys have to push for it. In the context of consultation, as I mentioned earlier, you have got to push for what your communities want and keep pushing the envelope, particularly with respect to the federal government. I mentioned earlier that the court has significantly expanded the [Section] 91(24) responsibilities of the federal Crown, essentially giving them the mandate and the responsibility to go after the provinces in cases of infringement, where title is at stake. There is no doubt that the federal government is going to deny and you're going to have to drag them kicking and screaming to fulfill that duty, but you have to do it because no one else is going to do it and certainly they are not going to do out of the goodwill of their hearts. So you can normally expect that other governments will rebuff or refuse your request for meetings for consultation, but you have to keep going back at them on it and insisting and providing them with the model on how you would like it to work. With that I will end my comments. Thanks.