

***Delgamuukw* and Diplomacy**

First Nations and Municipalities in British Columbia

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Introduction

The *Delgamuukw* ruling is a major contribution to Canadian legal and political thought. It has relevance for every Canadian interested in what Canada was, is, and will be. However, it is we British Columbians, both aboriginal and newer-comers, who are the most immediately and directly affected. In my view, the public discussion of the ruling in our province has so far focused too much on the details and too little on the principles, with the result that particular interpretations have lacked context and have at times been highly misleading. Unfortunately, both aboriginal spokespersons and their critics may have produced the general impression that the ruling is a victory for aboriginal peoples that leaves little room for the rest of us, and may even make the treaty process pointless.

The ruling is certainly a victory for aboriginal peoples. It validates what British Columbia Indian leaders have believed and claimed ever since colonial settlement began. It recognizes that aboriginal title ex-

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ists, defines it as a right to land, and places it within the guarantee provided by section 35 of the *Constitution Act, 1982*. But there are a number of reasons why ruling is by no means a defeat for the province, or for the rest of us.

Two of these reasons are especially significant. First, the ruling does not make aboriginal title automatic or universal. Each First Nation has the responsibility of demonstrating that the ruling's criteria are met. A First Nation's present-day area of aboriginal title will rarely, if ever, include all of its traditional territory. The court states explicitly that some First Nations may not be able to demonstrate that they have any non-reserve lands under aboriginal title.

Second, and of the most fundamental importance, the ruling makes clear that the outcomes of the whole range of normal legislative actions of the province (from authorizing resource development to the creation of towns and cities) have been and remain legitimate even where such actions have infringed upon aboriginal title. This aspect of the ruling has escaped some of the critics, who seem to believe that the ruling has the effect of destroying the province's ability to govern. While nothing as dramatic has occurred, it remains the case that First Nations do emerge with enhanced legal and constitutional standing.

What has been missing in our public thinking and public policy is a concern for ensuring that the new constitutional reality is reflected in the practical relations between First Nations and the rest of us. Most of these relations will exist at the local level, between First Nations and their neighbouring communities. The province has been loath to acknowledge this bit of practical reality, let alone to allow it to be fully reflected in the treaty process.

The approach of starting with the principles of *Delgamuukw* opens the way to developing creative strategies that can be undertaken at the local level to meet the varying needs of differing localities. In a modest way, these strategies can open the way for real participation by ordinary people in the political setting that is most meaningful to them; that is, in their own local community. These strategies can thus lessen the dangers that arise when officials have to make decisions in advance of public understanding and support. These strategies can be undertaken not only outside the treaty process (but still with the long-term purpose of strengthening that process), but also outside the immediate control and interference of the province (with the long-term purpose of strengthening local communities and enhancing community self-government, both aboriginal and Municipal).

In this paper, I begin by identifying three principles arising from *Delgamuukw* that relate directly to local communities, and then say something about the views held by opponents of the three principles.

Next, I comment on the place of First Nations in British Columbia and discuss ways that they and Municipalities should relate to each other, giving detailed attention to the principles and practice of local diplomacy. I conclude with comments on the relevance of the principles to the BC Treaty Process and a discussion of the benefits of First Nation-Municipal diplomacy.

Three Fundamental Principles in *Delgamuukw*

Primary among the principles set out in the *Delgamuukw* ruling is that of *reconciliation* between aboriginal interests and those of the larger Canadian public or polity. This reconciliation is to be achieved not through the courts, not through legislated imposition, but through negotiation between aboriginal peoples and the Crown. This principle is driven home in the ruling's closing, when Chief Justice Antonio Lamer states:

Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve ... 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown'. Let us face it, we are all here to stay.

The second major principle, emphasized in *Delgamuukw* but already well developed in previous Canadian jurisprudence relating to aboriginal interests, is that of the *honour of the Crown*. In general, this principle requires that Parliament, legislatures, and governments act consistently and in good faith in honouring agreements and in respecting aboriginal rights and interests. The historic embodiments of this principle are the *Royal Proclamation, 1763* and the related Treaty of Niagara.

Maintaining the honour of the Crown is itself a moral obligation, one that requires not merely the legalistic following of the letter of legislation and agreements, but also having appropriate laws and policies in the first place. The ruling makes clear that the honour of the Crown is at stake in achieving reconciliation through negotiation. As the Chief Justice states, "the Crown is under a moral, if not a legal, duty to enter into and conduct these negotiations in good faith."

The third major principle is that local aboriginal communities (whether Indian, Métis, or Inuit) are *unique and distinct legal and constitutional entities within Canada*. Indian and Inuit communities are unique in having their origins prior to Canada's, distinct in having retained their pre-contact identities, and unique and distinct in possessing collective rights particular to their own history and place. In previous cases the Supreme Court has not hesitated to use the term "distinct

society” as the measure of an aboriginal community (and, of course, to define an aboriginal right as a practice or circumstance integral to a particular society’s distinct identity).

Within our own province, the simple but utterly important constitutional reality is that every recognized local native Indian community (that is, First Nation) has both its identity and its rights confirmed and guaranteed. This constitutional status of First Nations, which is a status Municipalities can for the moment only dream of, was evident prior to *Delgamuukw*, but it is amplified in by the ruling. First Nations and their rights are here to stay.

While other principles can be identified in the ruling, the three that I have enumerated are the most significant. Although the resulting consequences are many, in our context today in British Columbia, the *Delgamuukw* principles lead us directly to two further principles or ideals. The first of these is *co-equality of local communities*. The second, following from the first, is *diplomacy as the guiding principle* in relations between First Nations and their neighbouring communities.

Taking the practical steps to embody and implement these principles requires no change to any legislation and does not depend on any permission from, or action by, either the Department of Indian Affairs or the Ministry of Municipal Affairs (let alone the Ministry of Aboriginal Affairs). The main impediment is the hesitancy on each side to regard communities on the other side as co-equal. But the hesitancy is more entrenched on the non-aboriginal side. Part of the Municipal hesitancy is the result of taking the prominent critics too seriously. It is also the case that many Municipal leaders have not yet had the opportunity to familiarize themselves with the place and role of First Nations. For these reasons, I shall deal with the critics and the place of First Nations before dealing with the two further principles and with their implementation.

The Critics

The *Delgamuukw* ruling brings major elements of certainty to the legal and constitutional debates about aboriginal rights. Within British Columbia, the ruling provides the final legal and constitutional rebuttal to the major myths, assumptions, and doctrines that underlie and explain hostility to native claims in general, and to the principle of aboriginal title in particular.

Fortunately, of course, court pronouncements do not end political or public debate. However, the ruling does place the province’s most prominent critics of aboriginal rights in the unenviable position of being out of step with the nation’s highest court, and with established legal

thought in the rest of the country. Also, as they have been consistently for the last 15 years, the critics remain out of step with public opinion in the province, which continues to support the principles of aboriginal rights and of treaty negotiations.

In their desire to have British Columbia exempt from *Delgamuukw* and from the policy beliefs that have been long-established in the rest of Canada, and in their belief that the provincial majority has the right to impose its views on ethnic minorities, the prominent B.C. critics are taking the same approach as Parti Québécois leaders in Quebec. In effect, the critics want a special status for British Columbia, one in which we British Columbians can pick and choose among the rulings of Canada's highest court and can return to those idyllic days when the majority could dictate or deny aboriginal rights. The fact that the prominent critics are fervent opponents of special status for Quebec says much about the consistency and depth of their thinking.

As their hot-line shows, newspaper columns, and public statements have made clear, the prominent critics do not agree with the three principles that make up the core of the *Delgamuukw* ruling. The critics are reluctant to accept that First Nations are distinct societies with collective rights within Canada and British Columbia and they have little respect for the honour of the Crown. Many of the critics assume that we live in a populist republic in which there is no higher political God than current majority sentiment expressed on an issue-by-issue basis, locally or province-wide. Nor do the critics wish to promote reconciliation; instead, they wish to impose solutions rather than to negotiate in good faith with First Nations.

During the debates on whether Quebec should be recognized as a distinct society, both supporters and opponents at least agreed on one thing—both sides sported bumper stickers proclaiming “My Canada Includes Quebec.” Federal Reform Party supporters, at least in my neighborhood and among my acquaintances, were enthusiastic about this slogan. I have been suggesting that the time is right for a new bumper sticker with a new slogan, this time proclaiming “My British Columbia Includes First Nations.” Sadly, I have to report that none of my Reform Party acquaintances seems too keen on the idea.

The Place of First Nations

British Columbia English has still not evolved uniform terminology to refer to aboriginal groups, with the inevitable result that there is often misunderstanding and confusion as to the scope and applicability of both claims and rights. Our leading reporters and columnists still make fundamental errors. Among native Indians, the village-level communi-

ty is the primary social and political entity (although the language group, consisting of several communities of common cultural heritage, can also be important politically).

Until recent decades, the word “nation” was commonly used in British Columbia and the rest of Canada to refer to village or tribal-level Indian communities. The *Royal Proclamation* uses “tribe” and “nation” as synonyms, while the *Oxford English Dictionary* continues to give “tribe of North American Indians” as one major definition of “nation.” Although the word is a provocative irritant to the major critics who seem to assume that any Indian “nation” must be bent on joining the United Nations as a sovereign entity, the word remains perfectly ordinary and acceptable in the aboriginal context—and politically neutral to those knowledgeable about our history. The term “tribal nation” is at times used to refer to the comprehensive, but still very much locally-based, cultural group (for example, Nisga’a, Okanagan, Sto:lo).

“First nation” has emerged in the last decade as the most common term in this province for village-level community, although at times (as in the B.C. treaty process itself) it is used more loosely. With few, if any, exceptions, each First Nation continues to have a legal identity as a particular “Indian band” formed and operating under the *Indian Act*. For the purpose of this paper, the word “community” means a First Nation—or a Municipality.

What must be understood is that among native Indian populations in British Columbia it is only the local community (that is, First Nation) that can possess aboriginal title and other aboriginal rights. Individual Indians (and sub-groups such as houses or clans) can exercise aboriginal rights, but only as members of a particular First Nation. No province-wide or countrywide Indian grouping has or can have any constitutional status or ability to possess aboriginal rights.

For most practical purposes, Municipalities do not need to concern themselves with any aboriginal grouping other than First Nations, who will also be *Indian Act* bands for various legal purposes. The same will generally be true for school boards and regional districts, although here there is greater likelihood that the local tribal nation will be of importance. (The larger towns and cities, however, do have substantial numbers of aboriginal residents who may be represented by such interest groups as the United Native Nations or Métis associations.)

How, then, should First Nations and Municipalities go about thinking about each other and dealing with each other? As I have indicated, I believe that the *Delgamuukw* ruling leads us to two further principles or ideas: first, *co-equality of local communities*; second, *diplomacy as the guiding principle* in relations between First Nations and Municipalities.

Co-Equality of First Nations and Municipalities

The principle of equality of individual persons is one of the foundations of Canadian political and constitutional thought. At one time, this principle was highly controversial, with opponents pointing to the actual individual differences in such matters wealth, education, character, gender, personal abilities, ethics, and civic contributions. Yet today we take for granted that each person is of equal moral worth entitled to equal civil rights and equal political voice. I suggest that we apply this same sort of thinking to local communities—that we regard First Nations and Municipalities as fundamentally equal to each other.

For First Nations and Municipalities to regard each other as of equal moral worth requires some fresh thinking on both sides. From the First Nations' perspective, Municipalities can quite understandably be seen not only as mere creations of the province, but also as undignified creatures kept on a rather short leash. The Municipal model is made even less palatable when the prominent critics present it as one First Nations should follow. (The Sechelt First Nation is often said to have accepted such a model; however the Sechelt negotiated the terms of its own special legislation with Parliament, rather than with the provincial legislature.) In essence, the Municipal model rests on the same principles as does Indian band government under the *Indian Act* and is thus the polar opposite of the models of aboriginal self-government that First Nations are pursuing. It is in good part for these reasons that First Nations were generally opposed to allowing Municipalities a role of their own in the treaty process.

My impression is that there is no uniform Municipal perspective on First Nations. Any such perspective at the present time would likely focus on practical aspects, noting that First Nations typically have much smaller populations and much higher rates of social and economic problems. What is quite clear is that Municipal leaders do not at present look upon First Nations as sources of models or ideas or support that could be of benefit to Municipalities.

Nevertheless, from a perspective that embraces both First Nations and Municipalities, there is a substantial similarity. In the human dimension, both are collectivities of local residents who have similar daily and longer-term concerns. In the governance dimension, both are local governing authorities. The day-to-day activities, issues, and operations handled by their officials are amazingly similar. As a rough estimate, I would say that eighty percent of the time and effort of First Nations politicians and officials is spent on the same things that occupy Municipal politicians and officials.

Given these actual similarities, it seems to me a small step to accept First Nations and Municipalities as having equal moral worth. Perceiving the two as having equal human value does not mean that either will be forced to be identical to the other. For this reason, I suggest the term “co-equality,” rather than simply “equality”—to indicate that First Nations and Municipalities are different and will remain so, but also to acknowledge that they are also fundamentally similar insofar as they are composed of local communities of British Columbians, led by community governments concerned with local needs.

Accepting the principle of co-equality of First Nations and Municipalities opens the door for leaders on each side to come to realize that the other can be an important source of support and ideas for improving local government and for strengthening the role of local communities in the B.C. Treaty Process. More immediately, however, accepting the principle of co-equality points to diplomacy as the foundation of relations between the two communities, and as the direct and pragmatic way to move leaders on each side step-by-step through the doorway to better understanding and practical benefits.

The Principle of Diplomacy between Communities

It is perhaps necessary, given the fearful misperceptions of some of the critics, that I stress that I am here merely adapting some elements of international diplomacy, and that I am doing so strictly as a means towards better community relations at the local level. I am not proposing local embassies, suggesting border checkpoints, or contemplating immunity from parking tickets.

Diplomacy has three working assumptions that are especially germane. First, participants are equal. Second, recognition of similarities and common goals provides a basis for dealing with differences. Third, having regularized channels of communication lessens the chance of conflict and simplifies resolving any that does occur. Put simply, diplomacy is the art and practice of neighbourliness.

The methods of diplomacy are many, but formal protocol is always one major attribute. Protocol allows each side to display the symbols of its history and values, and it allows each side to demonstrate its respect for the history and values of the other. Protocol also allows each side to display its leaders and to acknowledge the position of leaders on the other side. Protocol prevents surprises (including unintended omissions or insults), and so provides predictability. Mutual respect for protocol is a mark of mutual respect between the participants and is itself thus an important manifestation of neighbourliness.

Protocol is most visible and routinized in the planning and conducting of scheduled formal events, but it is a factor in all communications and interactions—as shown in the fact that knowing when and how to “dispense with protocol” is itself an aspect of protocol. Protocol can be looked upon as the aspect of diplomacy that creates and maintains a secure and stable framework for informal and speedy communication and co-operation.

The Practice of Diplomacy at the Local Level

Many neighbouring First Nations and Municipalities already have good relations. Typically, these rest on agreements or contracts relating to specific services or activities. However, in few, if any, cases has fully developed diplomacy been attained—that is, the existence of an active relationship having the following features:

- (1) The councils and officials on both sides genuinely accept the principle of co-equality and regard good relations as a policy imperative.
- (2) Each government invites representatives of the other to all major official community functions, where their presence is acknowledged and welcomed.
- (3) There are regular events intended specifically and primarily to demonstrate the principle of co-equality and the desire for good relations. For example, perhaps each council hosts an annual feast/banquet for the councillors and senior officials of the other community.
- (4) Individual councillors and senior staff are personally acquainted with their counterparts in the other community’s government and are reasonably well informed about the issues and concerns facing them. There is no hesitancy about picking up the phone to talk with a counterpart, and visits to the other’s office or work location occur informally as a matter of course.
- (5) There is an ongoing issues audit. Current issues of common concern are identified, as are future issues that may cause friction. Explicit common action is taken to resolve issues before they become of wider concern.
- (6) Official symbols, such as coats of arms, maces, crests, and talking sticks, may be designed or modified to take account of the presence and history of the other community and to symbolize co-equality. Less obvious symbols, such as street, subdivision, and building names, may also be relevant.

- (7) Leaders on both sides are well aware of the fundamental differences between the two communities and thus of the asymmetry inherent in their relationship. For example, families or houses or clans are seen as components of community on the aboriginal side and so the Municipal mayor knows the worth of an invitation to a potlatch and values the respect he or she conveys (and gains) by attending a First Nations family funeral.
- (8) In general, among leaders and public on both sides there is a sense of satisfaction with the relations between their communities, a recognition that in a certain sense they form a shared local community, and an automatic willingness to regard each other as local allies against provincial and federal impositions.

Attaining a state of fully developed inter-community diplomacy is not an over-night task. Given that First Nations generally have fewer resources and that their officials face debilitating demands upon their time and attention, the initiatives will in practice often have to come from the Municipal side. Given that minorities with grievances have long memories, and that many good words have been offered without follow-up in the past, those making the initiative will in some cases need extra-strength patience and credibility. In most cases, however, the beginnings have already been accomplished; in British Columbia, the Union of B.C. Municipalities and the First Nations Summit have played an important leadership roles in this endeavour.

In a few cases, relations are already on a promising and evolving foundation. The Tsleil-Waututh (Burrard First Nation) and North Vancouver District, and the Katzie First Nation and Pitt Meadows provide two examples. There are relevant models also in the corporate sector, with perhaps the most notable and progressive example of relations with First Nations having been developed and put into practice by B.C. Tel, through its Aboriginal Liaison Officer, Paul Peters.

Where beginnings have not been made, and in those few cases where relations are actively hostile, indirect or outside facilitation may be appropriate. An indirect beginning could take the form of hiring a researcher to organize local volunteers (jointly from both communities) to prepare a history of key historical developments in both communities, to collect documents and photographs for display in a place welcoming to members of both communities, and to provide a list of the major annual events and ceremonies in both communities. A more direct beginning could involve hiring a consultant in the emerging specialty of community-level diplomacy. Here, a first stage could be an assessment of the state of relations and factors bearing upon including, in the case of larger communities, the role of the media.

My eight-point check list merely illustrates the general themes of diplomatic relations at the community level. Every locality will have its own variations and innovations. The larger First Nations and Municipalities will need to consider having a senior official specializing in relations with the other community—or perhaps they could jointly appoint one person to work for both. The danger associated with such specialization is that regular senior officials may tend to view community diplomacy as outside their own responsibility. What is certain, however, is that in the initial stages every large Municipality will need to have one person or committee to whom councillors and staff can turn for prompt protocol guidance in contacting the First Nation and in developing the diplomatic relations.

The B.C. Treaty Process

The B.C. Treaty process is critical for all First Nations and important to most Municipalities. Yet too many burdens have been placed upon it. Even were it not overloaded with too many tables and too little funding, the process could not by itself develop the widespread prior trust, respect, and confidence that are essential if the final treaties are to be more than words on paper. Much has been said about the need for education of the non-aboriginal public to this end, but the reality is that those not directly affected have little motive to pay attention to it, and those whose interests are directly affected will dismiss it as propaganda.

The First Nations who have entered the treaty process have for the most part failed to appreciate fully that the treaty process is part of the provincial and federal political processes. The strategies that worked for First Nations during their isolation under the *Indian Act*, when the larger public was politically irrelevant, will not work today. The philosophy and the idealism that kept the land struggle alive cease to be helpful guides to action once the struggle has been won. New approaches are needed when the Promised Land has been attained, especially when parts of it have other inhabitants. Community level diplomacy offers one of these approaches.

The Benefits of Local Diplomacy

The immediate benefits of community-level diplomacy are just that: immediate benefits in the form of better decisions and better programs and, less tangibly, in the satisfaction that derives from good government and the minimizing of disagreement.

Two British Columbia examples illustrate my point. Both are cases in which a First Nation had its principal reserve within a Municipality and wanted to develop condominiums. In one case, the proposal, its first phase now complete, has been the centrepiece of continual friction

and public hostility (including a road blockade by Whites), even though the development is picayune compared to giant transportation facilities already imposed on the reserve by the province. Almost unknown is the harmonious relation that has developed in the other case. Here, an escalating controversy over the First Nations' desire for Municipal street connections quickly subsided when a Municipal councillor sought advice on how to approach the First Nation. Neither side had any doubt about the wisdom of proceeding diplomatically. Before too long, the road was built and the condo development went ahead, with agreement that the Municipality's building standards would be met, and enforced by the Municipality's inspectors. Pragmatism prevailed—not least because the Chief and Council realized that Municipal inspection approval would bring a better price for the condos.

In the longer term, most Municipalities and almost all First Nations can build on local diplomacy to gain benefits from the treaty process. Municipalities have complained much about their lack of influence in the process, but in their Pavlovian turning to the province for a solution, they have missed seeing the opportunity waiting at home with their neighbours.

Direct bilateral local diplomacy outside the treaty process, but focusing specifically on treaty subject headings, provides a rich potential for both Municipalities and First Nations to further their common and individual interests—especially by giving them the opportunity to identify those interests in the first place. This potential is greatest in the major urban areas, but it exists almost everywhere. The relevant subject headings will differ somewhat from place to place, but most will be the everyday matters of local government. First Nation self-government provisions will, of course, be front and centre.

For First Nations, the benefits of this bilateral diplomacy outside the treaty process are substantial. Casting off the old inward-looking philosophy and accepting the new diplomacy opens ways to creative problem solving and positive community development within the First Nations themselves. Community empowerment comes through reaching out and coming to know one's neighbours. Hence, the seeming paradox that the First Nations most committed to strong self-government are those that will most welcome involvement with Municipalities.

Local diplomacy opens the way to meaningful public education. Treaty-oriented local diplomacy brings Municipal leaders, who form the established core of public opinion leaders throughout the province, into a focused learning situation that deals directly with the matters that are the subjects of the critics' misperception and misinformation. Indeed, giving local community leaders the opportunity and the incentive to link their communities' interests to the treaty process seems to

be the only workable way of engendering local-level and province-wide appreciation of the treaty process.

(It might even be the case that the treaty process overload could be reduced, to the advantage of all parties, if First Nations were to propose that for the next several years the negotiating tables would not deal with the matters the First Nations wished in the meantime to pursue with their Municipal neighbours. The tables could thus focus on the more economically and politically sensitive subject headings, presumably those relating to natural resources allocation and development.)

Generally, however, the most tangible benefit to the First Nations would be the possibility of Municipal support for their positions at the treaty tables. Municipal leaders do have a representative role that is independent of the *Municipal Act* and in this role, acting on behalf of their communities, they can provide a powerful political resource for First Nations to call upon. Positions and proposals that had been co-operatively developed locally would be both technically and politically more difficult for the so-called “senior” governments to interfere with or to oppose.

Following a Yukon precedent, a First Nation could even include a Municipal representative on its negotiating team. Who knows, since the Agreement establishing the B.C. Treaty Process allows any party to bring any matter to the table, a First Nation could even propose that the local treaty grant self-government and constitutional status to its partner Municipality.