An Overview of Treaty Negotiations before and after *Delgamuukw*

ALEC C. ROBERTSON

In December 1993, the British Columbia Treaty Commission began receiving First Nations into the tripartite six-stage treaty negotiation process. Four years later, when the Supreme Court of Canada delivered its judgment in *Delgamuukw,* there were 51 First Nations in the process representing about 70 percent of the aboriginal population of B.C. They were organized into 43 negotiating tables of which 34 were in the fourth and principal stage of the process, negotiating the substantive terms of their treaty.

Although one or two agreements in principle were close, none had yet been reached. The Nisga'a remained the only First Nation that had completed an agreement in principle and they were outside the Treaty Commission process. However, it was well understood by 1997 that treaties would not come quickly. There were no precedents for modern treaties in British Columbia and it would take time to hammer out fundamental issues like "certainty" and "taxation," as the Nisga'a and Sechelt negotiations have demonstrated. It will take longer to hammer out the several 'treaty models' that are required to reflect the diversity of British Columbia and its aboriginal groups. The Nisga'a model may have some application in northwestern B.C. but its mix of lands and re-

sources will not fit much of the rest of the province. There need to be models for First Nations that are urban, suburban, rural, interior, northeastern, and trans-boundary. Each model requires government to work out the appropriate set of policies and mandates. Once the models are in place, it is expected that treaty making will move more quickly.

From the perspective of non-aboriginal British Columbia, it is worth reiterating the benefits of the decision by the provincial government to participate in treaty negotiations as a mechanism for dealing with aboriginal land claims. This approach has delivered stability and the economy has largely escaped a repetition of the protests that were so prevalent in 1990, before the treaty process began.

The Treaty Commission's role included identifying obstacles to progress, and a number of obstacles had emerged by December 1997.

The first was labeled "System Overload" by the Treaty Commission. The process was open to all who could qualify as a "First Nation," without regard to size or capacity to negotiate a comprehensive treaty. The Task Force that designed the process expected about 30 First Nations on the basis of historic and linguistic groupings. Fifty-one have entered the process, many of which are Indian Act band councils representing single communities of a larger linguistic group. The Task Force had underestimated the success of the Indian Act in fragmenting the traditional governance systems that had held the original nations together. Even tribal councils sometimes have difficulty retaining their members. A number of communities threatened to separate from tribal councils and enter the process on their own until the Treaty Commission adopted policies that effectively precluded the practice.

There is a very real need for the Principals (Canada, British Columbia, and the First Nations Summit) to agree on the criteria, including size and capacity, for determining an appropriate negotiating unit, or to mandate the Treaty Commission to do so. Alternatively, Canada and British Columbia need to disclose clearly what they will and will not negotiate with smaller aboriginal groups.

Canada and the province each have six negotiating teams. The latter stages of an AIP negotiation will require virtually an entire team. Realistically, the two governments can sustain active concurrent negotiations with 10 to 12 tables. The natural consequence of system overload is that the governments will focus their resources where they expect to make the most progress. By December 1997, the governments were focusing their resources on about 10 tables. The Treaty Commission referred to these as "fast-track" tables to distinguish them for funding purposes from the remainder, who were on a slower track.

While it suits some First Nations to proceed at a slower pace, others have the capacity to negotiate at a faster pace and wish to do so, as

they are borrowing heavily to stay in the process. Further, the fast track tends to favour smaller First Nations. The larger tribal councils in the fourth stage require time to organize their mandates, but once mandated, expect to negotiate at a faster pace.

At the same time, capacity on the government side has been declining. The province, with no depth of experience in treaty making to build on, has lost personnel through budget cuts and attrition, not only in the Ministry of Aboriginal Affairs but also in key areas of the "dirt ministries" vital to treaty negotiations, such as Environment Land & Parks, Forests, and Energy & Mines. The province has the least capacity, which meant that it was setting the pace of negotiations.

System Overload remains a critical problem and has been underscored and accentuated by the findings and repercussions of the *Delgamuukw* judgment.

Overlapping land claims was another growing problem exacerbated by the number of smaller First Nations. There has been no incentive for First Nations to resolve their overlaps, and in many cases there is cultural resistance to provoking antagonism towards their neighbours. However, unresolved overlapping claims can undermine treaty negotiations. The litigation by the Gitanyow Hereditary Chiefs, arising out of the Nisga'a AIP, demonstrates the need for both governments to adopt new policies to address overlaps in treaty negotiations, and the Treaty Commission has urged them to do so.

Approaches to negotiations and mandates were also a source of friction.

The approach adopted by the two governments was to negotiate a complete treaty package, not a series of incremental agreements. There are obvious tactical reasons for this approach, but the approach does not suit protracted negotiations. It means that substantive negotiations began with the easiest subjects and the deal-breakers of lands, resources and cash are left until the end. It also means that interim measures are rarely negotiated, on the grounds that interim measures cannot be justified until the treaty lands are identified. This approach was frustrating to First Nations who were borrowing money to remain in the process, and needed to demonstrate to their people that treaty negotiations could produce tangible benefits to offset the mounting debt.

Mandates are influenced by each party's perception of the other party's legal rights. When negotiations fail, the alternative is litigation.

By December 1997, differing perspectives as to the nature and extent of aboriginal rights were affecting negotiations. The aboriginal perspective was an historical, lawful claim of aboriginal title within their traditional territories, a title tantamount to ownership. Indeed, the agreement of the public governments to enter into treaty negotia-

tions was initially perceived by many First Nations as a symbolic act of mutual recognition: the Crown was recognizing aboriginal title and jurisdiction in traditional territories, and First Nations were recognizing the underlying title and jurisdiction of the Crown in those territories. That mutual recognition has never been acknowledged by the two governments or their negotiators. The perspective of the governments, as reflected in statements by government negotiators when pressed, was to acknowledge only the undefined, site-specific, activity-based aboriginal rights upheld by the B.C. Court of Appeal in *Delgamuukw. Aboriginal tile was never mentioned.*

By December 1997, there were some First Nations close to suspending negotiations because they believed their members would not accept a treaty based on the governments' perspective of their rights. At the same time, a well funded lobby group was publicly criticizing provincial mandates as being unduly generous and treating aboriginal rights as more consequential than the rights upheld by the B.C. Court of Appeal in *Delgamuukw.*

The Impact of *Delgamuukw*

On December 11, 1997, the Supreme Court of Canada handed down its reasons for judgment in *Delgamuukw.* The shock waves have not yet subsided.

Aboriginal title is said to exist in British Columbia as a substantive legal right, the aboriginal equivalent to fee simple ownership.Wherever aboriginal title is established or acknowledged, the Crown's jurisdiction is limited and the provincial share of that jurisdiction is minimal. While the Court has expressly stated that the province can infringe on aboriginal title, legal scholars have pointed to the Court's confirmation that land subject to aboriginal title is firmly entrenched in federal jurisdiction under the Constitution, and question the legal basis for provincial infringement. This is one of the most unsettling aspects of the judgment and will require further direction from the Court.

A provincial economy and administration predicated upon provincial ownership of and jurisdiction over all Crown land has been thrown into question.

There is also the huge question of compensation for past, present and future infringement and how that compensation is to be calculated. As of which date did compensable infringement begin: in colonial times; when B.C. joined Canada; or in 1982 when aboriginal rights became constitutionally protected? To what extent do the Crown grants that support private ownership create compensable claims?

The extent of aboriginal title is unknown. Clearly isolation and freedom from overlaps will favour aboriginal title. While some lan-

guage in the judgment suggests that large areas may be subject to aboriginal title, the Court's description of a spectrum of aboriginal rights, varying in the degree of their connection to land, suggests that trial judges may have a broad discretion in deciding the extent of aboriginal title within any territory.

The Court's requirement that aboriginal title can only be claimed by the successors to the aboriginal nation that occupied the territory in 1846 may well require the reconfiguration of a number of First Nations now in the treaty process and help to address one aspect of System Overload. The Court's requirement that government must, in good faith, negotiate with all aboriginal groups claiming an interest in the area under negotiation, should provide the incentive to address overlaps.

It is also important to recognize that the Court, by making no specific finding of aboriginal title but providing a near unanimous dissertation on its consequences, was setting the stage for negotiations and concluded the judgment with a strong message to that effect.

The Status of Treaty Negotiations after *Delgamuukw*

Immediately following *Delgamuukw,* the Treaty Commission proposed to the Principals that they select appropriate representatives and work together to settle the modifications to mandates, approaches and to the treaty process itself that would be required to revitalize the treaty negotiations. The Principals agreed, and a list of issues was settled which included the issues identified by the Treaty Commission. Priority was to be given to accelerating land and resource negotiations at treaty tables. Preliminary meetings were held in March 1998 and substantive meetings in April 1998.

Canada tabled a proposal that would enable lands and resources to be negotiated in three phases. Firstly, as interim measures at the beginning of negotiations, with the tacit recognition that Canada would have to participate in the funding of interim measures. This is important as Canada is not required under the cost-sharing Memorandum of Understanding (MOU) to fund interim measures, and that has been a major obstacle to their negotiation. The second and intermediate phase is the negotiation of economic development agreements involving lands and resources to provide employment and capacity building. These would ultimately be incorporated into the third phase when treaty lands and resources are settled.

At the last set of substantive meetings in April 1999, the province tabled a proposal to accelerate the negotiation of land, resources and cash, with an overarching agreement to be negotiated among the Principals over the next six months that would address specific issues impor-

tant to the province. The meetings concluded on the understanding that Canada and the First Nations Summit would respond to BC's proposal.

The Summit neither accepted nor rejected the proposal, but instructed its leaders to continue negotiations and report back to the Summit at the end of June. The province responded by withdrawing from further tripartite negotiations and by refusing to reappoint the Chief Commissioner of the B.C. Treaty Commission whose term had just expired.

The province sought to pursue bilateral negotiations with each of Canada and the Task Group of the Summit, but I understand that both wanted the tripartite negotiations to continue. I am told that tripartite meetings among the three Principals have resumed with the object of both improving the treaty negotiation process and accelerating the negotiation of lands and resources.

I understand that treaty negotiations continue at the various treaty tables, but the level of activity is generally low while the parties wait for new mandates to be developed.

The Options Facing British Columbia

It might be useful to look at the options facing British Columbia to test whether there are realistic alternatives to a tripartite negotiation process for resolving these critical issues. I offer the following brief commentary on some of the options facing non-aboriginal British Columbia. The list, I am sure, is incomplete.

(1) Persuade Canada to legislate limits to aboriginal title or to compensation payable for past infringements.

Delgamuukw confirmed that only the federal government can legislate in relation to aboriginal rights, and aboriginal title is a constitutionally protected aboriginal right. That means legislation must meet a strict test of justification, administered by the courts, that takes into account not only the legitimacy of the purpose, but also the fiduciary relationship between Canada and its aboriginal peoples. Furthermore, the "notwithstanding clause" in the Constitution used to override certain constitutional rights does not apply to aboriginal rights. Legislation diminishing aboriginal rights or compensation for past infringements is unlikely to survive the legal hurdles it would face, even if it survived the political firestorm it would ignite.

(2) Encourage litigation as a means of mapping the extent of aboriginal title and determining how compensation is to be fixed.

Litigation is always an option when parties won't negotiate or negotiations fail. It is not the first choice for many reasons. Critical court deci-

sions will inevitably be appealed through to the Supreme Court of Canada taking 7 to 10 years altogether. The expense is enormous, and if there are counterclaims, the party that launched the lawsuit cannot unilaterally stop it. The parties have no control over the outcome and the results can be unpredictable or, as in Calder and Delgamuukw, inconclusive.

Litigation is best used strategically. When negotiations reach an impasse, it is appropriate to consider the costs and benefits of litigation, as well as its effect on each of the parties and on the negotiations. The *Sechelt* decision to litigate their claim of aboriginal title was strategic. They have made it clear that they can be persuaded to come back to the table. The province made a strategic decision in 1995 when it suspended negotiations with the Gitksan, thereby compelling the Delgamuukw appeal to be heard by the Supreme Court of Canada. Even when used strategically, litigation is risky.

(3) Demand that the federal government assume full responsibility for negotiating treaties.

The rationale here is that land subject to aboriginal title is, under *Delgamuukw,* within the exclusive jurisdiction of the federal government. Some aboriginal groups look upon Delgamuukw as confirming their view that only Canada can negotiate treaties with aboriginal nations. But land subject to aboriginal title has not been mapped, and land not subject to aboriginal rights or title belongs beneficially to the province. If deals are to be struck that reconcile provincial rights with aboriginal rights, the province must participate.

Delgamuukw, by clarifying the extent of federal jurisdiction and the concomitant fiduciary obligations, does imply that the federal government will have to assume a larger role in treaty negotiations and assume a larger burden of the associated costs.

(4) Continue tripartite treaty negotiations.

This appears to be the only viable alternative, and the post-*Delgamuukw* environment is now more supportive of those negotiations.

There is no longer debate as to whether aboriginal rights are substantial legal rights, or whether they can be settled for less cash and little, if any, land. The public, and particularly the resource sector, is expecting government to resolve the uncertainty they are experiencing and that resolution must come through negotiation. Even industries wishing to negotiate resource developments directly with aboriginal groups will need to avoid either antagonizing the government that claims jurisdiction or finding themselves embroiled in complex legal issues.

There is a very real need for the Principals to continue the negotiations among themselves to settle the new rules that will apply not

only to treaty negotiations, but also to the consultation process with First Nations that *Delgamuukw* mandates. Even though the latter principally affects the province, Canada has a constitutional responsibility for developments affecting lands subject to aboriginal rights and must play a role in arriving at a consultation mechanism that is accessible, workable, and expeditious.

The Litigation Factor

Aboriginal litigation attracts media attention and the media are now speculating that First Nations will prefer litigation to negotiation.

I think the opposite is true. The Treaty Commission closely monitored First Nation reactions after *Delgamuukw* and the overwhelming response has been a desire to get on with negotiations. First Nations have a healthy distrust of litigation for the reasons already mentioned, plus two others.

I have been told many times that First Nations find it culturally degrading to expose their Elders, their rituals, their myths and oral histories to unsympathetic and adversarial court proceedings.

More concretely, litigation will not address their core issues of unemployment, rising birthrates, low socioeconomic expectations, dependency, and lack of capacity to effectively use the land rights that a court might ultimately award many years in the future. Treaty negotiations can't resolve all these issues, but their focus is on addressing core problems by providing an economic base, infrastructure and funding to stabilize the community and move it towards self-sufficiency. Treaty negotiations allow First Nations to shape the ways their needs will be addressed, litigation doesn't.

If the Principals do not make solid progress in revitalizing treaty negotiations, then litigation will increase. But I believe the prevailing view is the one cryptically expressed by Chief Joe Mathias at a recent business gathering: "Litigation is still a crap shoot. We're here to negotiate."

Treaty Costs and Compensation

My task was to set the stage by providing an overview of treaty negotiations before and after *Delgamuukw*. Another issue involves treaty costs and compensation. My thesis that tripartite negotiations offer the only realistic means of reconciling aboriginal and non-aboriginal objectives has a point relevant to both.

The perception that *Delgamuukw* will unduly increase the cost of treaties must not obscure the fact that most First Nations have compelling reasons to negotiate. The Nisga'a, who came within one judicial vote of aboriginal title to the Nass Valley and have strong leadership and depth of experience in negotiations, elected to continue to finalize

their treaty after Delgamuukw. The current circumstances of their people, their culture, and their economy are compelling reasons to pursue the deal they have already made. If a final agreement is as imminent as claimed, there will soon be an opportunity to assess the incremental cost of Delgamuukw for treaty negotiations.

My second point relates to the role of compensation for past infringements in treaty negotiations. Since the beginning of treaty negotiations, First Nations have demanded that compensation for past wrongs be a separate head of negotiations. Both governments have refused, arguing that treaties were to address the future and not the past. It is understandable that governments would wish to avoid a recitation and evaluation of every wrong that has occurred since colonial times. However, the reality of treaties is that their benefits, including fiscal payments, have among other purposes, compensation for past infringements *because the treaty will require the First Nation to release all claims for past infringements*.

In short, the issue of compensation for past infringements is arguably most appropriately and efficiently settled in the context of treaty negotiations. Even as a separate topic of negotiation, that context will enable the give and take necessary to arrive at the package that each party can accept.

Author's Note

Some 18 months after this paper was presented, it can be said that the tripartite meetings among the Principals did resume and have produced initiatives from the federal and provincial governments to negotiate lands and resources at an earlier stage in the process in the expectation that this will accelerate negotiations generally. In addition, activity has increased at the treaty negotiation tables, particularly at those tables on the fast track. In April 1999, the first Agreement in Principle under the BCTC process was signed with the Sechelt Nation, and as of February 2000, the two governments have tabled offers to six other First Nations in the process.