The Road Ahead
Negotiation or Litigation?

PATRICK MONAHAN

The following are excerpts of a presentation by Patrick Monahan, professor of law at Osgoode Hall Law School, York University.

We have explored the details of *Delgamuukw* judgment and many of its implications in specific areas. The purpose of this presentation is to place *Delgamuukw* in a broader context and, in particular, to discuss the question of the extent to which this case will affect the evolving relationships between aboriginal peoples and their government, and governments outside aboriginal communities and Canadian society in general. There are really only two main options post-*Delgamuukw*: negotiation and litigation. At the end of his judgment, Chief Justice [Antonio] Lamer made a plea, almost, to "please settle these cases—don't come back to us again to resolve these cases." What does that entreaty say to us, and what *will* it say to us?

An earlier speaker suggested that the plea from the Chief Justice was, in effect, an admission of failure, an open admission that "well, we [the members of the Supreme Court] really haven't solved these problems." I don't think that is really a fair characterization. It is generally accepted amongst lawyers that, other things being equal, negotiation is clearly preferable to litigation. It is preferable for a lot of reasons. Consensual outcomes are more stable outcomes. They are more legitimate

outcomes because all parties accept them. Therefore, they are more durable and more lasting than those outcomes imposed by the court. Litigation is extremely costly—not that negotiation isn't also costly—and the costs include more than the costs of the lawyers involved. In terms of social costs, litigation tends to foster conflict and "all or nothing" solutions. Litigation is also of very limited utility because all it will do is resolve very narrow, discrete issues. It will not provide a comprehensive settlement or resolution of all matters that are in dispute.

The *Delgamuukw* case itself provides a classic illustration of the shortcomings of litigation. The trial began in the British Columbia Supreme Court in May of 1987. The claim itself had been filed three years earlier. We had a 374-day trial that concluded in June 1990. We then had a trial judgment rendered in March 1991 and the Court of Appeal decision in 1993. Finally, the Supreme Court of Canada decision was handed down in December 1997. So we had over a decade between the first day of the trial, which of course was not the day that the claim was filed, until a final judgment from the Supreme Court of Canada.

And what do we know on the basis of *Delgamuukw*? Surprisingly, we don't know very much more than we did at the commencement of the litigation. The Supreme Court *did* say that the claimants had an unextinguished aboriginal right over or in—and I say over or in because I think this is a point that we have to pay attention to—at least some, and potentially all, of the territory that they were claiming. But what exactly is the nature and extent of this right? We do not know because the right may amount to title or ownership (which would be the upper end of the right in question) over some or all of this land. That would mean the right to use and possess the land exclusively, subject to certain limitations that the Chief Justice set out in his judgment. Alternatively, it may merely amount to a non-exclusive right to use certain lands for particular purposes. That would be the lower end of the right. My own view is that if they are forced to decide, the Courts will come down on the upper end of the scale, finding title or ownership, at least with respect to some substantial amount of the land in dispute.

But the Chief Justice was very careful not to rule out the possibility that there could be some lesser right that might be found to exist if you could not establish exclusive possession sufficient to found a claim to title. So that is one area that will require clarification. Moreover, the test of exclusive possession is not very clearly defined in the Chief Justice's judgment. Another open question at the next trial will be the proper treatment of oral histories. I certainly would not want to be the trial judge at this next trial. The trial judge is going to read the Supreme Court's judgment and say: "Now, I am told I am supposed to weigh oral history in the same way as written history. But of course, when I weigh

written history, I don't just accept written history at face value. Written history is subject to tests of credibility and testing for validity and so on, so the Supreme Court cannot mean to say that I automatically accept an oral history as correct. If I put oral history on an equal footing with written history I have to have some way of testing it, but how?" I am not sure anyone knows the answer to that question. I certainly don't envy the trial judge who is going to have to step up alone and venture an opinion, and then wait to see what the B.C. Court of Appeal or the Supreme of Court of Canada decides some years later.

So, we don't have a lot of answers from *Delgamuukw*. But maybe the parties themselves will provide the necessary answers by reaching an out-of-court settlement. This is what the Chief Justice was clearly encouraging at the conclusion of his judgment. Unfortunately, this possibility is rather unlikely. In order to understand why, it is necessary to ask a further question, namely, why do people ever litigate?

One possible explanation is simply that litigation is a by-product of the personal failures of the parties. People litigate, according to this view of the world, because they don't understand the real costs of litigation or, even if they do understand the costs, they simply don't care.

This simple answer is not very convincing. It is sometimes a rational choice to choose litigation even though there are significant costs involved. It is rational where the parties calculate that the net benefits of litigation outweigh the net benefits of settlement.

What are the calculations in favour of or against settlement as an option? The first consideration is that the substantive terms of the settlement itself confer a positive benefit because you know you are going to receive what the settlement terms provide. You also have ease of implementation. You know that if the other side accepts it, you are probably going to obtain those benefits, and you know that it is going to be legitimate on an ongoing basis. It is going to provide you with legal certainty in terms of your entitlements, while eliminating negative outcomes that might have occurred if you had gone to court. Because if you do go to court, not only may you not win, but you may lose something that you already have. Of course, the settlement option itself is not cost-free. The cost of settlement is the opportunity of obtaining more by going to court. You give up that opportunity by settling the claim.

Thus the risks and rewards of litigation include the value of the positive result, discounted by the risk that that positive outcome will not be obtained (because you might lose). So you have that discount factor, the potential opportunity discounted by the risk it will not be obtained. You also have the possibility that you could lose something else through litigation, that there will be a negative outcome from the Court's decision. The Court might say: "Not only am I not going to give

you what you want, but I am going to take something else away from you that you thought was not even at issue." Now that, of course, is also discounted by the possibility that this negative outcome will not occur. And then there are the direct litigation costs; there's the time, the 10 years it is going to take you; the uncertainty; and the negative impact that litigation is going to have on your ongoing relationships. Certain parties, those with deeper pockets, are better able to bear those costs, and thus may find that they represent a somewhat smaller inducement to settle. On the other hand, business corporations, which are often characterized as having the deepest pockets, are most likely to prefer settlement over litigation for the simple reason that litigation is usually bad for business.

Finally, there is the question of the differences between the parties' relative perceptions of all of these variables. If the parties have a common perception, a common calculation as to the likely outcome, then it is more likely that they will choose a negotiated settlement rather than litigate. This is because both parties will understand which of them is most likely to prevail if the matter actually goes to court and has to be decided by a judge.

Legal uncertainty contributes to the risk that the parties may inaccurately calculate the real risks and rewards of litigation. It increases the danger of one or both parties miscalculating the true risks and rewards of the litigation option as compared to the settlement option. They may mistakenly think they will win big if they go to court, and that might induce them to litigate when they ought to have settled.

Oddly enough, legal uncertainty may in some circumstances actually increase the attractiveness of the settlement option. Someone might say: "Going to court is so uncertain, if we settle we can put all that aside, we can resolve all these issues, and we can immediately eliminate that uncertainty with a stroke of a pen." So we would be wrong to assume that legal uncertainty is automatically correlated with a tendency to litigate. However, the settlement option does assume some minimum, shared legal framework as the basis for negotiations. For example, you have to know who are the right-holders with whom you have to negotiate and settle. If it is not clear who are those right-holders, then you are not going to be able to achieve a settlement. That has been a big problem in the context of cases like *Delgamuukw* because it is often not entirely clear who exactly are the rights-holders.

Let's see how this framework of the relative risks and rewards of litigation versus negotiation applies to *Delgamuukw*. First of all, *Delgamuukw* is not an isolated phenomenon. It is part of an evolving Supreme Court jurisprudence on aboriginal rights. There are two key features of this jurisprudence. The first is what I call *balancing of interests*. The court

seeks to find what it perceives to be compromise or middle-ground solutions, rejecting "all-or-nothing" solutions in favour of those that seem to give half a loaf, or at least part of a loaf, to both sides. We have seen this tendency in other areas outside the aboriginal context. For example, in the *Secession Reference*, we see the Supreme Court exhibiting this same aversion to giving a total victory to one side, preferring a middle-ground position. And so the Court creates a duty to negotiate secession following a clear referendum result, an argument that was not ever raised in any of the parties' submissions.

In the *Delgamuukw* context, this same tendency was reflected in the Court's rejection of the argument that aboriginal claims in British Columbia had been extinguished by the assertion of British sovereignty. Acceptance of that argument would have been a categorical exclusion of aboriginal claims. But while that argument was accepted at trial, it certainly wasn't the kind of argument likely to find favour with the Supreme Court. Interestingly enough, the B.C. government itself reversed its own position on that and didn't press the extinguishment argument at the Supreme Court of Canada. But I don't think the Supreme Court of Canada would have accepted the argument in any event.

The second related element in the Supreme Court's aboriginal jurisprudence is a tendency to favour a *case-by-case approach*. Cases are decided on their own facts. Not only does the Court want to avoid all-or-nothing outcomes, it wants to avoid sweeping decisions that will set generalized rules. For example, the Court has refused to indicate thus far whether section 35 includes an inherent right of self-government. My own view is that there is a high likelihood that the Supreme Court of Canada will eventually recognize that section 35 includes an inherent right to self-government. But the Court has thus far refused to make that pronouncement, even though it has had an opportunity to do so in a number of cases. Where it *does* announce general rules, these rules are fact-specific. They are fact-driven, such as the *Van der Peet* test for establishing aboriginal rights, which asks whether a particular activity is integral to this particular community prior to contact with Europeans, not whether certain activities were integral to aboriginal life in general in the pre-contact period.

Now how will these trends influence the tendency of parties to litigate? Ironically, although the Court wants to discourage litigation, this case-by-case approach is clearly going to have the opposite effect, in the short term at least. When every case turns on its own facts, the potential risks and rewards of litigation are very difficult to estimate accurately. Further, if you are entitled to assume that a court will give you at least part of what you are asking for, litigation seems a pretty attractive option. Legal judgment and analysis tend to descend very rapidly

into political rhetoric. A lawyer is going to have a very difficult time convincing a determined client that accepting anything less than full satisfaction is the most rational choice in the circumstances.

On the other hand, the calculations over the medium to long term (i.e. 10 to 25 years) are much more favourable to the settlement option. Within the next decade we will have more decided cases, and those cases will tend to flesh out more fully the real risks and rewards of litigation. Lawyers on both sides will, over time, acquire a much more realistic understanding of their likely success in different fact scenarios. Thus, over the medium to long term, we are going to see the emergence of a clear preference for negotiated solutions. But over the next decade, my sense is that the dynamic will very much favour litigation over negotiation and settlement, notwithstanding the best intentions on all sides of the negotiating table. This dynamic in favour of litigation is itself the product of the Supreme Court's own jurisprudence, its privileging of middle-ground positions combined with a case-by-case methodology.

One illustration is the litigation that has been commenced over the *Nisga'a Treaty*. Here we have a situation where the parties have managed to reach a negotiated solution only to find themselves back in court. What is the likely outcome of the challenge to the constitutionality of the treaty that has been filed in the British Columbia courts? If we look at the record in previous cases, we can predict that when the case reaches the Supreme Court of Canada in the year 2006, the Court will try to find a middle-ground solution. Thus, the most likely outcome is for the Court to uphold the treaty in its main essentials, sanctioning the recognition of a third order of government in Canada. But the Court may well also require certain modifications in subsidiary aspects of the treaty by, for example, requiring certain guarantees or special voting rules to protect minority rights (both aboriginal as well as non-aboriginal) in the context of aboriginal self-government. But the main thrust of the treaty, the recognition of the principle of aboriginal self-government as a third order of government, will in all likelihood be accepted. The reason is simply that the courts will not want to have to define self-government rights themselves out of whole cloth. I have already indicated that I believe the courts will accept that section 35 already includes some guarantee of self-government. If this turns out to be right, then the courts will welcome an attempt by the political authorities to define the content of the right. They won't stand in the way for the simple reason that the only other option available would be for the courts themselves to begin attempting to define the context of aboriginal self-government.

What of the other possibility raised, the so-called "legislative solution"? This third possibility (as distinct from the first two of litigation and negotiation/settlement) suggests that the legislature may

define, through statute, the extent of aboriginal rights, along with some form of compensation for the limitation of constitutional rights. My own view is that this third option is essentially a non-starter. Its main shortcoming is that it is an imposed solution. It is a solution that says, "We are going to legislate these rights away. We are going to substitute some right of compensation in place of the rights that are guaranteed under the Constitution." And that is precisely the problem. These rights are guaranteed under the Constitution. Federal law cannot override Section 35 of the *Constitution Act*. If I am right—that the courts will say that not only are these rights to title guaranteed but there is a right of self-government already constitutionally guaranteed—then you are not going to have that legislative option. The Court will not accept an imposed solution. It will require there to be a negotiated outcome. Once you have that negotiated outcome, however, as in *Nisga'a*, the Court will ultimately be inclined to accept it.

Whatever the difficulties, that is ultimately the direction and the place in which we are going to end up. But it is going to take us more than a few years to get there. So the next decade will be both interesting and highly litigious.

Questions from the Floor

Mike Scott (MP for Skeena) I have the dubious distinction of representing the area to which both the *Delgamuukw* and the *Nisga'a* cases pertain. And I have some observations for Mr. Monahan. You say that negotiation is the way to resolve these outstanding issues. You may know that in British Columbia we have had this B.C. treaty process for some seven years now, and it hasn't produced even one treaty. You may also know that the Auditor General was harshly critical of the government last fall when he reported to Parliament saying that, effectively, the negotiations were unfocused, undisciplined, hugely expensive ($9 million to date), and there is no fixed timelines, there are no set goals in terms of concluding any of these negotiations successfully. Almost half of the bands in British Columbia at the present time aren't even in the negotiating process. The *Nisga'a* case is as a prime example of the overlap situation, where neighbouring bands are competing for the same territory. That is a huge issue, and it is now the subject of one of four legal challenges to the *Nisga'a* agreement. So it certainly appears that litigation is going to be with us for a while. Against the backdrop of all this, we have had the *Delgamuukw* decision imposed on us in British Columbia, which has served to greatly undermine the ability of the provincial government to administrate the lands and resources of the

province. The area that I live in and that I represent is comprised of many small communities. Virtually all of those communities' primary economy comes from the resource sector. I appreciate [that] aboriginal people in Canada don't want to be a problem. The fact is, right now in British Columbia, that while we may not say that aboriginal people are becoming a problem, this issue is certainly becoming a greater problem all the time. It is creating such economic uncertainty, with no prospect of a resolution in sight, that something has to give. There are four million people living in British Columbia. At some point, those people are going to say, when they are hurt economically to an extent, that this is no longer sufficient, and we have to do something different. The negotiations aren't working, litigation hasn't worked. There has to be some other model that we can follow as a people that is going to be seen to be fair to all, including aboriginal people, but that will allow our resource communities in northern B.C. and other parts of Canada to continue to exist while we work our way through this problem.

Patrick Monahan Let me say, first of all, that it is always nice to be in the comfort of Toronto or Ottawa and proclaim how things ought to be out in British Columbia. So I welcome the practical comments from Mr. Scott. Some say, "We can't accept this. We can't work with this. This is just totally unacceptable." In other words, what they are suggesting is that there has got to be some way out of this that doesn't involve the *Delgamuukw* model. And my simple comment is, *Delgamuukw* is here. The Supreme Court of Canada has decided. You may think some magic door is going to open, and that we are going to walk through and we are going to say, "oops, we don't have to worry about that any more." But it is not going to happen. In the world of the practical, the reality is that you are going to have accept *Delgamuukw* as your starting point. And I didn't hear an acceptance of that today. I heard a desire to say, "let's go back to some other starting point that doesn't involve *Delgamuukw.*" And that, I think, is a non-starter. What *Delgamuukw* essentially says is that we are not going to accept imposed solutions. The Court didn't try to trace out too much more than that. But it said we are not going to accept imposed solutions. Whatever solutions you have, or are going to come to, are going to have to involve buy-in from the aboriginal peoples. And if they don't, then we are not going to accept them.

Now, you say, "Well look at the negotiation process, it has failed, or it hasn't made any headway." I agree to this extent: that it seems we are going to have to have more litigation for some period of time until either we have somewhat more of clear framework, or the parties' perceptions of what the costs and benefits fall more into line with each other. But to say that we don't have to accept this, that we can begin

from some other point, just reinforces my own analysis which says we are going to have a lot of litigation in the next few years. And yes, negotiated solutions are going to cost a lot of money. At the end of the day, we have an $880-billion-dollar economy here and we are going to have to take some of that wealth, presumably on a one-time-only basis, and try to settle these claims.

Bill Erasmus I am kind of in an interesting situation. My wife comes from B.C. and she is Nutaalit, from Vancouver Island. So my children come from two different nations, the Dene Nation and the Nutaalit Nation. And the way we understand that, my children come from two different Nations, they belong in both. Part of the problem of the comprehensive claims policy is that my children have to choose. That is not a starter for us. And that is the problem. See, we are guided by a policy that was designed and imposed by, and now the courts are saying something else. It is an old policy. It was outdated when it came out in 1986, I would venture to say. So, we have to realize that *Delgamuukw* is not going to go away. It is a starting point.

My wife's people never extinguished their lands, or their waters. So it means they have international water rights. It means a whole lot of things that Canada has to come to terms with. And there is nothing to be afraid of. My wife's people are not people to be afraid of. They never extinguished their lands, and I believe they never will. They were never conquered, and I believe they never will be conquered, so what are we talking about? I think we have to talk about recognizing that underlying title belongs to these people. And what is so bad about that? They have always had that title? Somehow, the biggest myth in this country is that these people gave their lands away, or you somehow took them away. You never took them away. You never legislated them away. They have always owned them, and that is what you got to get in your heads. And it's not so bad. It is just like if I get my hockey team from Yellowknife, and we whip your butts, it is okay. It is just a hockey game. I coach hockey. I went into Banff, and we beat the kids from Banff. It is all right, you know? Next year they might come and whip us. But that is part of living. These people are not trying to pull the wool over your eyes. Sure there is frustration. I have dealt with this all my adult life, and I am prepared to continue to deal with it. And if I don't settle it, then my kids will. You know? But we will settle it. So, I think everything is there. I think that is what the previous speaker is saying. He recognizes that we have the inherent right. *Delgamuukw* goes so far as to talk about title. Let's do it. Let's quit dancing around the table.