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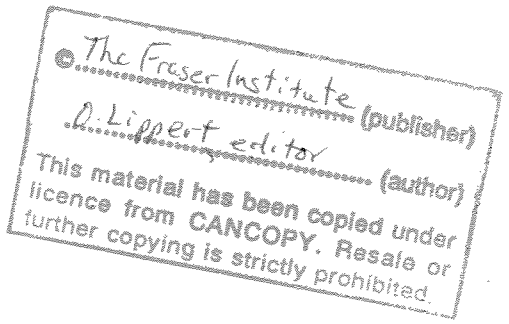
Beyond the Nass Valley

National Implications of the Supreme Court's *Delgamuukw* Decision

EDITED BY OWEN LIPPERT



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Contents

The Effect upon Alberta Land Claims

TOM FLANAGAN

At first glance, the *Delgamuukw* decision may seem to have little or no bearing upon native land claims in Alberta. In *Delgamuukw*, the Supreme Court of Canada held that aboriginal title may still exist in British Columbia because it has not been extinguished through negotiated agreement or appropriate legislation. All of Alberta, however, has been surrendered to the Crown through five of the Numbered Treaties:

Treaty 4 (extension)	1894
Treaty 6	1876
Treaty 7	1877
Treaty 8	1899
Treaty 10	1906

Each of the Numbered Treaties states, in the words of Treaty 6, that the Indian signatories "do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for her Majesty the Queen and Her successors forever, all their rights, titles and privileges, whatsoever, to the lands" described in the treaty.[1] If all bands signing treaties have given up their aboriginal rights and title to land, *Delgamuukw*

Notes will be found on pages 181–182.

at most might have relevance to a few Alberta bands, such as the Lubicon Cree or the "Aseniwuche Winewak Nation" (previously the Métis of Grande Cache), whose members claim to still possess aboriginal rights and title because they have not adhered to any treaty.[2] If this were all, *Delgamuukw* would only affect the rights of a small number of Alberta bands in remote locations and would hardly justify being discussed at a national conference. I believe, however, that the matter is more complicated than appears at first glance.While the direct impact of *Delgamuukw* upon Alberta and the other prairie provinces may be small, its indirect impact may turn out to be very great because of the way that the Supreme Court treated oral traditions in that case.

Prior to the 1990s, oral traditions played only a limited role in native-rights litigation. In the 1935 *Dreaver* case, the Exchequer Court heard testimony from Chief Dreaver, who had been present at the signing of Treaty 6 in 1876, and allowed him to state his understanding of the "medicine chest" clause in that treaty.[3] In 1971, Justice Morrow heard oral evidence from Indians who had witnessed the signing of Treaties 8 and 11. But neither of these cases had high legal (as compared to political) impact. Justice Morrow's decision was overturned on appeal, and *Dreaver* remained little known and was not even reported until the 1970s. Moreover, both cases exemplified not oral traditions in the true sense of stories passed down across generations, but non-literate witnesses recounting their own memories of events witnessed decades ago.

The Supreme Court of Canada said in the *Horse* case (1988) that treaties should be interpreted in accordance with the normal rule for contracts, "that extrinsic evidence is not to be used in the absence of ambiguity."[4] In other words, the *Horse* rule was that oral traditions could be used as an aid to interpretation where courts found the wording of a treaty unclear. More recently, the Supreme Court's *Badger* decision (1996) opened the door even more widely to the use of oral traditions. Justice Peter Cory wrote:

> The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement .... The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages ... of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing.[5]

The Court's decision in *Badger* did not turn entirely, or even chiefly, on oral tradition; but it did make use of oral tradition, as recounted by a Cree Elder, to help interpret the words of Treaty 8 as well as the accompanying promises made by government representatives during the negotiations.

The judicial standing of oral traditions received a further boost in 1997, when the Supreme Court of Canada handed down its *Delgamuukw* decision. The technical reason why the Court ordered a new trial in that case was its finding that the trial judge, although he had admitted the oral histories of the Gitksan and Wet'suwet'en as evidence, "went on to give these oral histories no independent weight at all."[6] Chief Justice Antonio Lamer laid down the following principle:

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.[7]

The Chief Justice was rightly concerned that, in cases like *Delgamuukw*, involving facts from a time when no written records existed, it might be impossible for native plaintiffs to make out any case at all if oral traditions were not given independent weight.[8]

There are, however, some important differences between *Delgamuukw* and treaty litigation. In *Delgamuukw*, there was no text to interpret because there was no treaty; the Indian plaintiffs were offering their oral traditions as evidence about their occupancy of land prior to the time when white settlers were present to write down their observations. In contrast, treaty cases focus on the interpretation of a text, and Indian oral traditions recount events which are also recorded in conventional documents. Indeed, Indian peoples had already become at least partially literate when the later treaties were signed.

In 1836, the Methodist missionary James Evans developed a syllabic form of writing for the Cree language.[9] Syllabics were quickly adopted by missionaries of other faiths and adapted to other native languages of the north, such as Dene and Inuktitut. Henry Faraud, who founded the first Oblate mission at Fort Chipewyan, used syllabics from the outset as a tool of evangelization.[10] After Indian converts learned to read Chris-

tian texts and hymns in their own languages, they used syllabics for secular purposes, such as sending letters.[11] Father René Fumoleau's book, *As Long As This Land Shall Last,* contains a photographic reproduction of a letter written in syllabics in 1883 by two Chipewyan chiefs.[12]

To be sure, only a relatively small number of northern native people were literate in any language by 1899, but they would all have understood the importance of writing. Those who had converted to Christianity attended religious services involving the Bible, prayer books, and hymnals. All aboriginals, whether Christian or not, had been dealing with fur traders for over a century and so had come into contact with written contracts, bills of sale, and account books. According to the documentary evidence of the treaty negotiations, the Indians understood the importance of the written treaty and were anxious to obtain copies of it. The Cree chief Keenoshayo said at Lesser Slave Lake in 1899: "We want a written treaty, one copy to be given to us, so we shall know what we sign for."[13]

The courts will, no doubt, take such factors into account when they weigh the importance of oral traditions in treaty litigation. Nonetheless, I suspect that the *Delgamuukw* decision may tend to raise the status of oral traditions in treaty litigation. Is it likely that Canadian courts, having swung the door wide open to oral traditions in aboriginal rights litigation, will leave it barely cracked in treaty cases? There will be strong pressure to adopt the *Delgamuukw* approach, whatever that turns out to be in practice, across the board.

This would mean repudiation of the quite limited approach to oral traditions taken in *Horse*. Advocates of aboriginal rights detest the *Horse* decision and are continually inviting the Supreme Court to overrule it.[14] Their goal is to promulgate a transformed understanding of treaties in which the written words of the agreement are not determinative because, as Sharon Venne puts it, "the written text expresses only the government of Canada's view of the treaty relationship: it does not embody the negotiated agreement."[15]

Not surprisingly, the Royal Commission on Aboriginal Peoples (RCAP) adopted a similar point of view:

> The commission believes that the unique nature of the historical treaties requires special rules to give effect to the treaty nations' understanding of the treaties. Such an approach to the content of the treaties would require, as a first step, the rejection of the idea that the written text is the exclusive record of the treaty.[16]

The real target in all of this is extinguishment, that is, the surrender of aboriginal title.[17] "The treaty nations," wrote RCAP, "maintain with virtual unanimity that they did not agree to extinguish their rights

to their traditional lands and territories but agreed instead to share them in some equitable fashion with the newcomers."[18] RCAP conceded that "the text of the post-1850 treaties clearly provides for the extinguishment of Aboriginal title" but argued that we cannot rely upon the text because "the people of the treaty nations reject that outcome."[19] Moreover, aboriginal people could not have surrendered their title because they did not understand the legal language of the treaties and their own cultures and languages did not contain concepts like rights, surrender, and extinguishment. "Thus, it is possible that Aboriginal title continues to coexist with the Crown's rights throughout the areas covered by treaties, despite the Crown's intention to include a cession of Aboriginal title."[20]

RCAP's conclusion was that Canada should henceforth act on the basis of this novel and untested legal theory and regard aboriginal peoples as co-owners of all land, even though they signed agreements extinguishing their land rights, have received substantial benefits for doing so, and continue to seek punctilious fulfilment of those treaty clauses from which they draw benefits. The Commission's call for the "implementation and renewal of treaties"[21] comes down in the end to a one-sided reading of the treaties. Implementation means that clauses conferring benefits must be fulfilled to the letter, while renewal means that clauses involving the surrender of rights must be ignored, reinterpreted, or replaced.

An early victory of this view of treaties occurred in the campaign against Treaty 11. In 1973, sixteen chiefs in the Northwest Territories and northern Alberta attempted to register a caveat on about 400,000 square miles of land ceded by Treaties 8 and 11. They succeeded in persuading Justice Morrow of the Supreme Court of the Northwest Territories that "notwithstanding the language of the two Treaties there is sufficient doubt on the facts that aboriginal title was extinguished that such claim for title should be permitted to be put forward by the caveators."[22] At trial, the would-be caveators produced a series of Elders who had been present (mostly as children) at the signing in 1921 and who testified, in the words of Chief François Paulette:

> No lands have ever been surrendered or ceded in the first treaty. It was sort of a peace treaty ....
>
> No land was mentioned. That peace treaty was with regard to whether the white people can come in without any conflict with the Indians and the Indians have no conflict with the white people.[23]

This view of the treaty was widely disseminated through Father Fumoleau's book. Morrow's decision in the *Paulette* case was overturned on appeal, but the political victory had been won. The federal government

entered into negotiations with the Dene and Metis of the Northwest Territories (but not Alberta) for a new land-claim agreement.

The repudiation of treaties has not yet spread to other parts of Canada, perhaps because conditions in the Mackenzie Valley were unique. Land there was still under the jurisdiction of a federal territory, so a provincial government did not have to agree to give up control of its Crown lands. Also, reserves had never been taken up, relatively little land had been alienated to private owners, and native people were still a demographic majority outside of Yellowknife.

Delgamuukw's elevation of oral traditions will abet the guerrilla warfare in the courts, in which aboriginal advocates are attempting to undo extinguishment by gradually undermining the Crown's control of public lands and natural resources. A recent example is a case decided by the Provincial Court of Saskatchewan in 1998, which acquitted two Dene from Buffalo Narrows of the charge of hunting moose illegally on the Primrose Lake Air Weapons Range. Basing this part of his judgment largely on Dene oral tradition, the judge held that Treaty 10, even though it contains the usual clause about surrender of title to the land, actually meant that "the land would thereafter be *shared* along principled lines."[24] The decision was overturned on appeal;[25] but if it had stood, it would have deprived Saskatchewan of its control over resource development on Crown land, compelling the province to get permission from one or more Indian bands every time a project is contemplated. There might also have been implications about compensation for past developments in which the Crown acted as if it had a clear title.

Another example is the *RioAlto* case now wending its way through the Alberta courts. RioAlto Exploration sought and obtained permission in the normal way from the Ministry of Environmental Protection to run seismic lines in the Treaty 8 area. The Fort McKay First Nation, alleging that seismic exploration would interfere with its members' trap-lines, asked the Court of Queen's Bench for "an Order of Mandamus compelling the Minister of Environmental Protection to consult with the Applicants regarding the scope, nature and extent of the impact of all exploratory activities approved by that minister on the exercise of the Treaty and Aboriginal rights of the Applicants."[26] What the band is after is the right to approve, and receive compensation for, any economic development on Crown land in what it considers its traditional territory—in effect, a form of co-ownership with the province. Counsel for the band will base an argument on the Treaty's guarantee of the continued right to hunt and fish on Crown land. The language of the treaty is inconvenient, because it says that hunting and fishing can continue "saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading

or other purposes."[27] In response, the McKay First Nation will quote the oral promise of the treaty commissioners:

> But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.[28]

They will also bring forward various oral traditions purporting to show that their people never intended to give up their land rights.

The dockets of courts in Alberta and other western provinces are already filled with cases in which aboriginal litigants intend to argue that the treaties do not mean what they appear to mean, and that the written texts can only be understood in the light of aboriginal oral traditions. Aboriginal researchers have been laying the foundations of this campaign for more than 25 years by systematically collecting interviews with tribal Elders. Much of this material has been published in books such as *The Spirit of the Alberta Indian Treaties* and *The True Spirit and Original Intent of Treaty 7*.[29] One only has to glance through these books to find numerous examples of oral traditions purporting to show that Indians never intended to surrender their land rights in the treaties. Consider this conversation of Jean-Marie Mustus with interviewer Richard Lightning in 1975:

> *Lightning:* Do you know how much land was given up or sold to the white man?
>
> *Mustus:* The amount of land they gave up was written down on paper. I am wondering whether it was one foot underground or more. It was written down, but I do not know where the paper could be found.
>
> *Lightning:* And you do not know how much was to be used?
>
> *Mustus:* No, I do not know, but whatever they selected for themselves they kept; the rest was taken. I do not recall my grandfather telling me about the depth underground.
>
> *Lightning:* Did he ever tell you anything about underground minerals or oil?
>
> *Mustus:* Yes, these things were mentioned, as was the timber within the reserve; the Indians had a right to anything underground.[30]

This sort of quotation will be marshalled in support of continuing Indian rights over mineral and timber resources.

This is not just a problem for Alberta or the prairie provinces. Treaties 3 and 5 cover parts of north-western Ontario as well as Manitoba; and Treaty 9, negotiated in 1905-06 and expanded by adhesions in 1929-30, covers more than two-thirds of the entire province of Ontario. These are Numbered Treaties and will have to be construed by the courts in the same way as the other Numbered Treaties that cover the prairie provinces. The southern part of Ontario was surrendered by a large number of earlier treaties that present additional issues, but there is no reason to doubt they will be equally open to reinterpretation based on oral traditions.

As an example of what to expect in Ontario, Patrick Macklem has recently argued that the extinguishment of aboriginal title in Treaty 9 is only "apparent."[31] According to Macklem's "expansive interpretation of the right to hunt, trap, and fish,"[32] the province cannot undertake or authorize any development that would cause aboriginal hunting, fishing, and trapping to become less successful than they have been, "measured by reference to the fruits of past practice."[33]

If extinguishment is undermined in the courts by such an "expansive" interpretation of hunting rights, buttressed by the oral traditions that *Delgamuukw* has so powerfully endorsed, it will produce an awkward duplication of property rights. Indian bands will not receive ownership rights as such, but rather veto rights, or perhaps the right to be consulted, on economic development projects that might affect hunting, fishing, and trapping in "traditional territories" whose boundaries are at present not defined. Provinces will lose the ability they now have to undertake or authorize projects on their own authority. It is, moreover, inevitable that bands will have overlapping conceptions of their traditional territories, so that provincial authorities may have to deal with two or more bands, not just for major projects like dams, but for minor projects like seismic lines. Such an impossibly cumbersome system of dual or multiple property rights would stultify economic activity.

In any case, it seems likely that the *Delgamuukw* decision is destined to reverberate across Alberta, the other prairie provinces, and Ontario—wherever land-surrender treaties are in place. Native litigants will mobilize oral traditions to bolster their claims that, whatever the treaties appear to say, their aboriginal rights and title are unextinguished. They will appeal to the authority of *Delgamuukw* to persuade courts to place their oral traditions "on an equal footing" with the texts of the treaties. If provincial governments hope to retain the control of Crown land that they have enjoyed in the past, their litigators will have to learn to deal with oral traditions more effectively than they have done in the past.

Epilogue

In the highly publicized *Donald Marshall* decision, released September 17, 1999, the Supreme Court of Canada drove the final nail in the coffin of *Horse*, holding in effect that extrinsic evidence must always be used in interpreting treaties.[34] *Donald Marshall* did not deal with oral traditions as such, but rather with a presumed contemporary oral understanding of the treaty to be inferred from documentary evidence. Although not a definitive precedent for the mandatory use of oral traditions in interpreting the Numbered Treaties, it is further evidence that the Supreme Court is moving in that direction.

Notes

1 Treaty 6, in John Leonard Taylor, *Treaty Research Report: Treaty Six (1876)* (Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1985), p. 60.

2 On the Lubicon, see Thomas Flanagan, "Adhesion to Canadian Indian Treaties and the Lubicon Lake Dispute," *Canadian Journal of Law and Society* 7 (1992), pp. 185-205. The Aseniwuche Winewak Nation have a long history of making claims as Metis; see Trudy Nicks, "Grande Cache: The Historic Development of an Indigenous Alberta Métis Population," in Jacqueline Peterson and Jennifer S.H. Brown, eds., *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: University of Manitoba Press, 1985), pp. 163-181. They recently presented themselves as an Indian nation in an appeal to the Tax Assessment Review Board of the Municipal District of Greenview, No. 16, 1998.

3 Delia Opekokew, "A Review of Ethnocentric Bias Facing Indian Witnesses," in Richard Gosse, James Youngblood Henderson, and Roger Carter, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich, 1994), p. 197.

4 *R. v. Horse* [1988] 2 W.W.R., p. 300.

5 *R. v. Badger* [1996] 133 D.L.R. (4th), p. 344.

6 *Delgamuukw v. British Columbia* [1997] 153 D.L.R. (4th), p. 235.

7 Ibid., p. 232.

8 Ibid., p. 239.

9 Regna Darnell, "Cree Syllabics," *The Canadian Encyclopedia* (Edmonton: Hurtig, 1985), vol. 1, pp. 438-439.

10 Henry Faraud, *Dix-hit ans chez les sauvages* (Paris: Régis Ruffet, 1866), pp. 117-118, 155.

11 Telephone interview with Raymond Huel, Department of History, University of Lethbridge, June 22, 1998.

12 René Fumoleau, *As Long as This Land Shall Last* (Toronto: McClelland and Stewart, n.d.), pp. 32-33.

13 Charles Mair, *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899* (London: Simpkin, Marshall, Hamilton, Kent & Co., 1908), p. 62.

14 E.g., Monique M. Ross and Cheryl Y. Sharvit, "Forest Management in Alberta and Rights to Hunt, Trap and Fish under Treaty 8," *Alberta Law Review* 36 (1998), p. 648; Alan Pratt, "The Numbered Treaties and Extinguishment: A Legal Analysis," Discussion Paper for the Royal Commission on Aboriginal Peoples, May 1995, pp. 41-43; Royal Commission on Aboriginal Peoples, Report (Ottawa: Minister of Supply and Services, 1996), vol 2, p. 29.
15 Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective," in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) p. 173.
16 RCAP, *Report*, p. 35.
17 Michael Asch and Norman Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations," in Asch, *Aboriginal and Treaty Rights in Canada*, p. 209.
18 RCAP, Report., p. 45.
19 Ibid.
20 Ibid., p. 47.
21 Ibid., p. 50.
22 Fumoleau, *As Long as This Land Shall Last*, p. 13.
23 Trial transcript, p. 157. Glenbow Alberta Institute, William G. Morrow Papers, M 1865, box 1, file 1.
24 *R. v. Catarat and Sylvestre*, Provincial Court of Saskatchewan, August 26, 1998, typescript, p. 39.
25 *R. v. Catarat and Sylvestre*, Saskatchewan Court of Queen's Bench, August 25, 1999.
26 Originating Notice, *Ahyasou et al. v. RioAlto et al.*, February 13, 1998, s. 5.
27 Treaty 8, in Dennis F.K. Madill, *Treaty Research Report: Treaty Eight* (Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986), p. 128.
28 Madill, *Treaty Eight*, pp. 122-123.
29 Richard Price, ed., *The Spirit of the Alberta Indian Treaties* (Ottawa: Institute for Research on Public Policy, 1979); Treaty 7 Elders et al., *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996).
30 Price, *Spirit of the Alberta Indian Treaties*, p. 146.
31 Macklem, "The Impact of Treaty 9," in Asch, *Aboriginal and Treaty Rights in Canada*, p. 97.
32 Ibid., p. 116.
33 Ibid., p. 133.
34 *Donald John Marshall v. the Queen*, September 17, 1999, paragraph 13, www.droit.umontreal.ca.