

THE DUTY TO BARGAIN IN GOOD FAITH ARISING
OUT OF DELGAMUUKW

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THE DUTY TO BARGAIN IN GOOD FAITH ARISING
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BY

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My thesis in this paper is that there is a new duty to negotiate in good faith declared in *Delgamuukw* and that by looking to the model of labour relations case law, we can give meaning to this duty and how it might be enforced.

There are new opportunities arising out of the *Delgamuukw* decision which can be used to advance negotiations of treaties and to control the process of those negotiations for the benefit of Aboriginal people.

These opportunities can provide the foundation for compelling the Governments to deal with Aboriginal Nations in the negotiation of treaty settlements in a fairer way. The scrutiny of negotiations will move the process along and compel more meaningful negotiations.

The reconciliation of Aboriginal title with Crown title is now directed by the Supreme Court of Canada to occur in the justification process following the establishment of title. Whether and where the Governments can interfere with Aboriginal title within First Nations' territory, and how justification will occur, will undoubtedly be the subject matter of treaties. In the justification process, it will be crucial for Aboriginal Nations to clarify the points at which Federal and Provincial Legislation can interfere with Aboriginal title without the consent of aboriginal people.

There is little doubt that the Supreme Court of Canada is telling the Province of British Columbia and Canada to get at it and to negotiate settlements. Mr. Justice La Forest, at

¹ With grateful acknowledgment for the assistance of Gretchen Brown

para. 207, of the *Delgamuukw* decision repeated what so many courts have said:

On a final note, I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake. This point was made by Lambert J.A. in the Court of Appeal, [citation omitted], at pp. 379-80;

so, in the end, the legal rights of the Indian people will have to be accommodated within our total system by political compromises and accommodations within our total system by political compromises and accommodations based in the first instance on negotiation and agreement and ultimately in accordance with the sovereign will of the community as whole... [Emphasis added].

There is a new development, however, in the Court's admonition to resolve land claims by negotiations in the Supreme Court's decision in *Delgamuukw*. The Court has now directed that the Crown must negotiate with Aboriginal Nations and that those negotiations must be conducted in good faith.

Chief Justice Lamer, at para. 186 of the judgment, said:

Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation* and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s.35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. **Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. 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 what I stated in *Van der Peet*, supra, at para. 31, to be a basic purpose of s.35(1) - "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. [Emphasis added]

What is new in this statement is:

- a. a legal duty on the Crown to enter into and conduct negotiations;
- b. negotiations must be conducted in good faith;
- c. the purpose of negotiations is to reach settlements;
- d. there must be give and take; and,
- e. the courts will superintend these negotiations when the issue comes before them

Prior to this direction, the British Columbia Court of Appeal in *Delgamuukw* held that, there was no obligation on the Province to negotiate with Aboriginal Nations in good faith. In 1986, the *Gitksan* and *Wet'suwet'en* tried to write into their claim a provision that would have required the Governments to negotiate a settlement in good faith. Hutcheon J.A. speaking for a unanimous Court stated:

I can find no jurisdiction in law and, in my view, the Supreme Court has no jurisdiction to declare the defendants are obligated to negotiate. No One doubts, however, that must of necessity be done. Still less, has a Supreme Court the power to direct the defendants to meet with -the plaintiffs and negotiate in good faith as sought in para. 15 of the prayer for relief ²

After eleven years, the Supreme Court of Canada has found such a duty and directed negotiations in good faith. I suggest the reason is that the Court was convinced the negotiation process in British Columbia was not working for Aboriginal Nations and that, in addition to establishing the principles around which negotiations would be conducted, there had to be rules for the process under which the negotiations would occur.

When it started treaty talks with the *Gitksan* the Province also took the position that there was no need to agree to bargaining in good faith. In 1995, the *Gitksan* proposed to the Province that "good faith" language be inserted in the Protocol agreement to govern and control the negotiation process. The Province refused.

2 *Delgamuukw v. The Queen, unreported, C.A. 006460, [BCCAJ, December 5, 1986, pp. 7-8*

There is no better illustration for the need for a duty to bargain in good faith in the treaty process than the Province of British Columbia's withdrawal from negotiations with the *Gitksan* in February of 1996 and the forcing of the *Delgamuukw* case to appeal before the **Supreme Court**. In his letter of February 1, 1996 to **Don Ryan, Chief Negotiator for the Gitksan**, Mr. Cashore said:

The Province's decision is based on a number of concerns. Negotiations between the Province and the *Gitksan* over the past year and a half have not achieved the progress envisaged in the Accord. It is clear that there are fundamental differences between our views of the nature and scope of aboriginal rights and jurisdiction. These differences lead us to believe that treaty negotiations with the *Gitksan*, at this point, will not achieve progress until the issues concerning aboriginal rights are decided by the Supreme Court of Canada. While the Supreme Court of Canada is considering some aspects of the contents of the aboriginal rights in the fisheries appeals, it is our view that resolution of the broader issues between the Province and the *Gitksan* first require the Supreme Court of Canada to decide the *Delgamuukw* appeal.

As a result, be advised that this is formal notice of suspension of treaty negotiations, pursuant to section 13.1 of the *Gitksan* Framework Agreement signed July 13, 1995. Once the litigation between us is concluded, the Province would be prepared to discuss with the *Gitksan* a resumption of treaty negotiations.

The Province's walking away from the bargaining table and the reasons for it given by Mr. Cashore are not acts of bargaining in good faith.

There is a body of law which has been developed in the labour jurisdictions of Canada which provides considerable guidance on the duty to bargain in good faith. It is to this law and jurisprudence that I would see Aboriginal Nations and the Governments turning to find standards and principles to apply in order to enforce the good faith bargaining requirement now established by the Supreme Court of Canada.

Why look to this body of law? Only in the labour law context do we have a fully developed treatment of the law governing the duty to bargain in good faith.

There are important parallels between bargaining in a labour context and bargaining a negotiated settlement between Aboriginal Nations and the Governments. Aboriginal title is a s.35 right held by the Nation as a whole (*Delgamuukw*, para. 115), and therefore the duty to negotiate is to negotiate a collective settlement for the members of the Nation as a whole. This incorporates the collective bargaining obligation. The purpose of collective negotiations is to reach a negotiated collective settlement and thus to reconcile the pre-existing rights of aboriginal societies with the sovereignty of the Crown.

As in labour relations, the collective interests are part of an on-going relationship. There is a long term and interconnected relationship between Aboriginal Nations and the Governments which must be settled in order for the aboriginal and non-aboriginal communities to co-exist.

There are also differences between labour bargaining and treaty negotiations which have to be acknowledged. In labour negotiations, for example, the focus is primarily on economic issues and the employer has to cost out every demand. In treaty negotiations, the issues are social, cultural and jurisdictional as well as economic. How would the duty to bargain in good faith. apply to power sharing, devolution of programs relating to health and education and to land issues?

The underlying principle in labour law is that the parties must act with the intent. to conclude an agreement to bargain in good faith and make every reasonable effort to do so. The duty to bargain in good faith is set out in labour legislation:

B.C. Labour Relations Code states:

- 11 (1) A trade union or employer shall not fail or refuse to bargain collectively in good faith in British Columbia and to make every reasonable effort to conclude a collective agreement.

The Canada Labour Code states that once a party gives notice that they wish to bargain the parties must:

50(a)(i) Meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and

(ii) Make every reasonable effort to enter into a collective agreement.

Labour legislation in B.C. and Canada sets up a three part test for the duty to bargain in good faith:

1. a requirement to bargain in good faith;
2. make every reasonable effort to enter into a collective agreement;
3. the purpose is to conclude a collective agreement.

Chief Justice Lamer was deliberate in directing a good faith bargaining duty which parallels the requirements in labour law:

1. there is a duty on the Crown to enter into and conduct negotiations in good faith;
2. the negotiations are for the purposes of reaching negotiated settlements;
3. there must be give and take on all sides.

I see the requirement for give and take as importing the reasonable efforts standard required in labour legislation. I cannot imagine that the parties to a negotiated land claim settlement would not be required to negotiate with any thing less than a reasonable efforts obligation.

Obligatory collective bargaining with trade unions arose in response to unilateral employer

power. The good faith bargaining requirement in labour relations was introduced to scrutinize and control bargaining conduct and to ensure that collective agreements be reached. The Woods Report on Labour Relations in 1968 pointed out:

Collective bargaining works more effectively and yields more satisfying results when both sides to the negotiations act in good faith. This applies both to the negotiation of an agreement and to its administration. Where one party does not act in good faith, the disease is usually contagious. A sign of bad faith by one side is likely to make the other suspicious, and to weaken the possibilities for meaningful accommodations both before and during the life of a collective agreement.³

The duty to bargain in good faith a settlement between the Governments and Aboriginal Nations is triggered, on my analysis, by a notice to require the Crown to bargain. Although in the labour jurisdictions that notice is a statutory requirement, for negotiations with Aboriginal Nations this duty arises from the requirement set down by Lamer, C.J.C. "**to enter into** and conduct those negotiations". It does not matter whether the Governments have established a preferred mechanism for conducting the negotiations, such as the British Columbia Treaty Commission there is an obligation to negotiate with B.C. Aboriginal Nations.

Under labour law, there are certain basic subjects which must be the subject matter of negotiations in order to comply with the good faith bargaining requirement:

- rates of pay;
- hours of work;
- employment terms and conditions;
- holidays;
- arbitration provisions.

3 Canadian Labour Law, 2nd Edition, May, 1997, at p. 10-95

Similarly, I suggest, there are basic areas which must form the subject matter of negotiations for a treaty:

- the scope of the Nation's Aboriginal title (not just specific rights);
- the boundaries of the Aboriginal Nation's territory;
- the nature of self-governance rights over that land;
- the resource use of the land by the Aboriginal Nation;
- compensation to be paid for past uses;
- the extent to which the Government can interfere with Aboriginal title in respect to different parts of the territory.

Under labour law, the good faith bargaining requirement has generally been applied to procedural issues, so as to control the approach and process of bargaining, not the substance of the parties' positions. Recently, however, as a result of the decision in *Royal Oak Mines* (1996), 133 DLR (4th) 129 (SCC), the Supreme Court of Canada has approved the use of the good faith bargaining duty as a means to assess the reasonableness of a party's substantive positions in bargaining.

The content of the duty depends on the circumstances but it generally prohibits the following:

1. Outright refusal to negotiate or meet.⁴

- Cursory attendance will be insufficient to meet the duty: *Kaycee Enterprise and IWA of Canada* (1986) BCLRB No. B91/96.

⁴ *Re Phillips and NABET* [1979] 1 Can.L.R.B.R. 180;
Austin Airways Ltd. [1980] 3 Can.L.R.B.R. 393;
ATU, Local 1374,83 C.L.L.C. 16,026 (Alta.L.R.B.);
Northern Telecom [1981] 11 Can.L.R.B.R. 306;
Allan Martin [1979] 13 Can.L.R.B.R. 184;
AUPE, Local 127 [1986] Alta.L.R.B.R. 117, supplementary reasons (1986) Alt.L.R.B.R. 280

- The Federal Government must establish a treaty process which is in keeping with the principles of justification articulated by the Court in *Delgamuukw*.
 - Neither Government cannot unilaterally withdraw from negotiations.
2. Refusal to meet unless procedural preconditions are met.⁵
- The Governments cannot require that the negotiations will only go on under the auspices of the B.C. Treaty Commission.
3. "Surface" bargaining with no true intent of concluding an agreement.⁶
- Surface bargaining is going through the motions or preserving the surface indications of bargaining without any real intent to conclude a collective agreement: *The Daily Times*.
4. Refusal to discuss a term which is basic and standard in similar agreements.⁷
5. Seeking a provision which is illegal or contrary to public policy.⁸
- The Government could not require a condition that it would extinguish the Federal fiduciary duty.

5 Canada Labour Law, page 10-1,00 to 10-101.
School District No. 44 and North Vancouver Teachers Assn., 92 C.L.L.C. 16,067 (B.C.I.R.C.);
B.C. Rail Ltd. and CUTE, 93 C.L.L.C. 16,072 (B.C.L.R.B.);
Northwood Pulp and 7-Imber Ltd. and CEP, 95 C.L.L.C. 220-001 (B.C.L.R.B.).

6 *Royal Oak Mines* (1996), 133 D.L.R. (4th) 129 (S.C.C.);
77ze Daily Times [1978] 12 Can. L.R.B.R. 446 (Ont);
Radio Shack, 80 C.L.L.C. 16,003 (O.L.R.B.).

7 *Royal Oak Mines*, *supra*.

8 *Brewster Transport Co.* (1986), 66 di 1, 13 C.L.R.B.R. (N.S.) 339, CLRB 574.

- 6 Deliberately inflammatory proposals-⁹
- 7 Unexplained and sudden changes in position.¹⁰
8. Refusing to meet unless specific concessions are agreed to.¹¹

It would be a breach of the duty to demand that specific progress must be met or there is no deal.

9. Failure to commit time and preparation required. ¹²
10. Failure to explain positions taken. ¹³
 - The most basic duty on parties is to state their position on the matters at issue and explain that position.
 - Bargaining must be informed; there must be rational discussion.
11. Failure to disclose relevant information. ¹⁴

9 *Royal Oak Mines, supra.*
Tan Jay Co. and ILGW, (1986) 16 C.L.R.B.R. (N.S.) 350 (Man.);
ATU, Local 1374 and Brewster Transport, 86 C.L.L.C. 16,040 (Can.L.R.B.).

10 *Kaycee Enterprise and IWA of Canada* (1986) BCLRB No. B91/96.

11 *Elevateurs de Sorel Ltee* (1985), 61 di 18, 85 C.L.L.C. 16,032.

12 Canada Labour Law, page 10-106;
CUPE, Local 8 and Travois Holdings Ltd. (1987) Alta.L.R.B.R. 413;
Kaycee Enterprise and IWA of Canada, supra.

13 Canadian Labour Law, page 10-95, 10-107;
Radio Shack, 80 C.L.L.C. 16,003 (O.L.R.B.);
Kaycee Enterprise and IWA of Canada (1986) BCLRB No. B91/96.

14 *Pine Ridge District Health Unit* [19771 O.L.R.B.R. Feb.65];
DeVilbiss (Canada) Ltd. [197612 Can.L.R.B.R. 101 (Ont.) at 114-115];
Byers Transport Ltd. (1988), 75 di 164, CLRB 715.

- There must be sufficient information to support the party's position and there must be full disclosure of that information to allow Aboriginal Nations to make informed decisions.

- 12 Misrepresentations.¹⁵
13. Offering less than would exist without the agreement.¹⁶
14. Refusing to follow through on matters already agreed to.¹⁷
15. Changing conditions throughout the negotiation process.¹⁸

- The parties cannot move the goal posts in negotiations.

16. Threats during the negotiation process.¹⁹
17. Contradictory offers and gross misstatements, especially when given publicly.²⁰
18. Failure to participate in bargaining sessions and failure to submit written or oral proposals.²¹

15 *Inglis Ltd. [1977] 1 Can.L.R.B.R. 408 (Ont.)* at 415.

16 *Iberia Aefiennes d'Espagne* (Unreported) May 17, 1990, CLRB 796.

17 *Nolisair International Inc.* (Unreported) September 29, 1992, CLRB 960.

18 *DeVilbiss (Canada) Ltd. [1976] 2 Can.L.R.B.R. 101 (Ont.)* at 114-115.

19 *Voyageur Inc. (1989)*, 77 di 14, 90 C.L.L.C. 16,021, CLRB 732.

20 *Eastern Provincial Airways Ltd. (1983)*, 54 di 172, 5 C.L.R.B.R. (N.S.) 368, reversed in part on other grounds [1984] 1 F.C. 732.

21 *Kaycee Enterprise and IWA of Canada, supra.*
DeVilbiss (Canada) Ltd., supra.

19. Refusal to bargain with particular people or objecting to the composition of a bargaining committee.²²
20. Pressing certain matters fundamental to a settlement to an impasse.²³
 - The parties cannot take a "take it or leave it" position and walk away on fundamental issues to the negotiations.
21. Using the negotiation process to resolve or address a distinct dispute.²⁴
22. The duty to bargain is a continuous one until agreement is reached.
 - Even though there is litigation, the parties must still bargain;
 - The Federal Government must scrap its "where litigation, no negotiation, strategy."

A Labour Board will not usually intervene, however, to control hard bargaining, that is, where tough positions are being advanced. The theory is that the principal parties should be left to freely negotiate with the give and take in the bargaining process. Nor will a Labour Board review the fairness or reasonableness of proposals put forward in negotiations. The "reasonable efforts" requirement is directed at procedure only, not substance.

This latter position has given way recently where there are serious and exceptional circumstances. These circumstances existed in the facts before the Supreme Court of Canada in *Royal Oak Mines*. This case arose out of the strike at the Giant Yellowknife

²² *Marshall-Wells Co. Ltd.*, 55 C.L.L.C. 18,002 (Sask.L.R.B.) application for judicial review dismissed [1995] 4 D.L.R. 591 (C.A.), affd 2 D.L.R. (2d) S.C.C.

²³ *Elevateurs de Sorel Dee* (1985), 61 di 18, 85 C.L.L.C. 16,032.

²⁴ *Otis Elevator v. International Union of Elevator Constructors*, (1973) 35 D.L.R. (3d) 566 (B.C.C.A.)

Mine where the company replaced its entire work force with replacement workers. There was a long strike and bitter negotiations which seriously split the community. The Supreme Court upheld the Canada Labour board's decision that several of the employers bargaining positions violated the duty to bargain in good faith. The company's refusal to bargain an arbitration provision for strikers **discharged for picket line misconduct was seen as the most serious of** these positions. The employer's refusal to negotiate any sort of due process by which employees could challenge their discharge was to deny the good faith standard and was a term no union could be expected to agree to. In the circumstances of a long and bitter strike, and where the employer fails to bargain so no agreement can be reached, the Court will approve of a Labour Board imposing terms on the bargaining process.

In this case, the Supreme Court approved of the Labour Board reviewing the reasonableness of the company's bargaining positions and it upheld the remedies used by the Board to force a settlement of the strike and the contract.

What this case tells us is that in certain extreme situations a third party charged with scrutinizing good faith bargaining will have jurisdiction to evaluate the reasonableness of bargaining positions and, if found unreasonable, the court will approve of remedies which are designed to overcome bad faith bargaining in the positions advanced.

As a result of the decision in *Royal Oak Mines*, the positions of the parties in treaty talks may be subject to scrutiny for reasonableness. This will permit greater latitude for court intervention to compel negotiations, to ensure that negotiations occur fairly and around principles established by the courts and to fashion remedies and, if necessary, to require terms be placed in settlements.

How will these principles apply to the Government's positions in the treaty negotiations to date? I would suggest that it is not bargaining in good faith to require the surrender of rights and title as a pre-condition to entering into treaty negotiations.

It is not negotiating in good faith to take intractable positions such as fixing the amount of land available for settlement (the 5% rule), or that no. compensation will be paid for past alienations, before the parties can negotiate and -reach- agreement on other terms. The Governments cannot refuse to bargain these issues.

It cannot be good faith bargaining to continue to grant interests in land over which Aboriginal title is claimed and at the same time to negotiate the status of those same lands.

It will not be bargaining in good faith to unreasonably protract negotiations if the evident motive is to cause injury to the Aboriginal Nation or to make the Nation submit to inferior terms which are less than terms reached with other Aboriginal Nations.

The remedies for procedural violations of the good faith bargaining duty are compliance orders and restraining orders. Labour Boards have issued compliance orders forcing the parties to do things such as disclose information, explain positions and provide times for meetings. Labour Boards have issued injunctions preventing a party from relying, on fixed positions, from surface bargaining and for misrepresenting facts.

In one case, at the Labour Board of British Columbia,²⁵ the Board directed the parties to meet the company and to provide dates for meetings. It directed a mediator to participate in negotiations and to set dates for meetings. It directed that particulars be given of the positions of the parties. It directed that the company pay for wasted negotiation costs.

But, in *Royal Oak Mines*, the Supreme Court went so far as to order the company to table a last offer minus certain issues it had previously put forward. The Court approved of the Board's order imposing a back to work protocol which included an arbitration procedure for dismissed employees. The parties were given a further thirty days to bargain and, if no agreement, the matter was to be referred to mediation/arbitration. The Board was broadly

25 Comox District Free Press and Graphic Communication international, BCLRB 1995

interventionist in determining the content of the agreement. I can see similar orders being required in the treaty process to ensure a fair settlement.

There is no enforcement mechanism suggested by Chief Justice Lamer nor is one part of the existing treaty negotiation framework. **The role of the British Columbia Treaty Commission** does not lend itself to making enforceable orders against the parties in negotiations.

There are two possible enforcement mechanisms that could be established to control the negotiating process. First, the Chief Justice of the Supreme Court of British Columbia could establish a **special panel** of judges to hear expedited applications, in Chambers to control the negotiation process. A complaint of a breach of the duty to bargain in good faith could be brought quickly before a judge of this panel, decided on an expedited basis and the issue resolved through compliance or injunctive orders. The court could also invoke the mediation procedures, which it has established, in order to assist the parties to get through an impasse.

The process of negotiation calls out for scrutiny by a third party with the legal clout to make a binding decision. This may well be the only way, short of litigation on the substantive issues, to check abuses of the process and to compel the parties to reach negotiated settlements in a timely way. The labour law standards which have evolved over many years would be applicable to the issues that needed to be resolved to keep the negotiation process for Aboriginal Nations on track and productive.

Second, the Federal Government could pass legislation to establish an enforcement board to monitor the negotiation process and to require compliance with good faith standards. In *Delgamuukw*, the court said that s.91(24) embraced off-reserve interests and the Federal Government is duty bound to protect aboriginal title involving those interests. The Federal Government could enact legislation to discharge this obligation, in part, by establishing a Treaty Negotiations Board to adjudicate disputes arising out of the process.

These two mechanisms would provide the means to ensure that the parties respect the process and their duty to bargain in good faith and hopefully this would lead to more timely settlements.

Enforcing the legal obligation to bargain in good faith as required by Chief Justice Lamer is an achievable goal which would greatly enhance the negotiation process and improve the place of Aboriginal Nations in that process.