Gitxsan/Wet'suwet'en Meeting on Tsilhqot'in & Delgamuukw/Gisday'wa Court Decisions
Gitanmaax Hall
January 19, 2015

Agenda

- Welcome
- Opening Prayer – Gwen Adams
- Introduction of Chairs
- Purpose of Meeting
- Introduction of Louise Mandel
- Louise Mandel presentation
- Questions & Answers
- Closing Statement
- Closing Prayer

Panel: Louise Mandell, Bertha Joseph, Debbie Pierre and Diane Shannoss

- Moment of silence for plaintiffs

- Plaintiff names were read by Gylogit and Hagwilnegh.

Louise Mandel

- It has been 30 years since the writ was written. The court case started May 11, 1987.
- Beautiful gathering of optimism. Going to court to seek justice. Everyone knew the land had been stolen.
- Law that governed the crown required the crown to recognize pre-existing laws to land and were inherent and were given to you by the creator.
- Royal proclamation imbedded that law in the constitution of Canada requiring the Crown governments to recognize your rights to your territories and your laws as legal rights with the assertion of Crown sovereignty and the incremental perfection of Crown sovereignty through treaty .This was embedded in the Canadian constitution.
- In an 1888 case Privy Council said lands are available to the province as a source of revenue, when aboriginal rights are recognized. But that didn't happen in BC.
- Chiefs wanted to know how crown got their title and were prepared to go to Court to show their title.
- Between the time the writ was filed and went to court 15 elder gave commissioned evidence. Evidence was taken in their homes. That commissioned evidence is usable from now to the end of time. After death, the evidence is available whether they could get to trial or not.
- Fought 26 pre-trial motions before trial.

- Justice McEachern was the appointed judge. He was a former partner of the lawyers who represented the Province. Chiefs decided against making a motion to ask him to stand down since they had waited so long to get to court.
- 9,200 exhibits. Jean Joseph kept all exhibits organized – 50,000 pages total.
- 374 days of trial in addition to 15 elders that gave commissioned evidence.
- 61 witnesses also gave evidence. 53 territorial affidavits.
- Trial would pause from time to time due to lack of funds. The leaders were able to secure funding from the government for the trial to proceed.
- Chiefs and elders brought to Court their knowledge and the wisdom in the laws and legal orders. There was beauty in the way they saw things. Legal process is cut and dry. Elders brought oral histories, songs and a strong world view where we are all connected and where humans are not better than any other living species. Generational teachings.
- Judge McEachern ruled against us. He said that "Aboriginal title was extinguished in BC." Ruled the same as in the Calder case but said due to extinguishment there was a "fiduciary duty on the Crown to permit the use by the Gitxsan and Wet'suwet'en of unoccupied crown land until the crown wanted to use it".
- Court of appeal was divided on whether there was ownership and jurisdictional rights (Aboriginal title) in the litigation area.
- Majority did not agree with McEachern so we were gaining ground on extinguishment.
- Appealed to Supreme Court of Canada. Many interveners; FN, industry, fisheries, mining associates etc. Court found aboriginal title was not extinguished in BC and rejected arguments that extinguishment occurred when the government made grants, such as on fee simple lands. This ended 30 year extinguishment debate during which the Crown raised argument to justify their denial of aboriginal title since Confederation and all of these arguments failed. The court said "no, aboriginal title was never extinguished."
- Crown had this time to justify how it got title. With all the help, they did not raise one legal theory to justify their denial of aboriginal title. This conclusion by the Court is the biggest win for Delgamuukw and reverberates into the future.
- Supreme Court of Canada also denied crown arguments that oral history was hearsay. Supreme Court of Canada said oral history is history and an exception to hearsay rules and on same footing as documentary evidence. This is another big win on the case.
- Court refused crown argument about what aboriginal title means. The crown said it is practices such as picking berries but then we would only have title to berry bushes. Not a right to have authority over the land. Court rejected that. Title was found to be a right on the land, a right to choose land uses and a right to economic benefits from the land. This is important of definition of aboriginal title. This is another of the gains made by the Delgamuukw case.
- "What you did not gain is a remedy". Court reluctantly sent the case back to trial or for reconciliation to be negotiated. A new trial was ordered since Justice McEachern did not regard territorial affidavits and gave weight to oral histories. Also the Court found that the pleadings should have been changed.
- The Court said that the end result of case is ligation is long and expensive in economic and human terms, and did not encourage parties to seek litigation but for the parties to negotiate in good faith. However, the evidence of title is preserved. Elders words left behind are in safe keeping.

- Having a remedy of aboriginal title is not the same as having aboriginal title. Aboriginal title was given this generation by the creator and passed to you by your ancestors. A remedy is against the world. Like having a deed on a home. You did not get your deed.
- After Delgamuukw we rejoiced.
- Government did not change. 3-5 months later they granted a multi-year tenure on Haida Gwaii and consulted by making one phone call to the Haida just before the tenure transferred was made. Government took the position that it is business as usual unless a FN goes to court or get a treaty.
- They challenged that position in court. Supreme Court of Canada says to government you cannot treat aboriginal title as if it does not exist. Court in Haida put constraints on crown sovereignty. Constitutional obligation to complete and implement treaties and if impacting aboriginal title, crown has a duty to consult and accommodate. If not for Delgamuukw/Gisday'wa decisions, it would not have got to Haida.
- Rather than to implement Delgamuukw and Haida, Crown created minimalist ways of doing things. Reinvented denial in legal theory impeded in legislation policy including consultation policy and strength of case analysis, government negotiation mandates and litigation positions Aboriginal title they said exists only over small spots on landscape such as on village sites.
- Court of appeal accepted this denial theory.
- The judge that wrote judgement for Tsilhqot'in at the BCCA was a lead lawyer working for Attorney General in Delgamuukw. Supreme Court of Canada rejected that theory in one sentence. No suggestion in jurisprudence that aboriginal title is confined to village sites and farms or that a territorial claim is not tenable. Title exists over a territory. Declared at over large portion of Tsilhqot'in territory. Tsilhqot'in decision stands on shoulders of the Delgamuukw/Gisday'wa decision.
- New in Tsilhqot'in, applying the test to establish title from Delgamuukw/Gisday'wa. They got remedy and in Delgamuukw, the case was sent back to trial. Roger Bannister broke the 4 minute mile. It took the next person 45 days to break the record. Tsilhqot'in achieved declaration of title and other nations can do the same.

What did the Tsilhqot'in get?

- Having met the test, it has ownership rights similar to fee simple but unlike fee simple, Aboriginal title confers jurisdiction. The province has jurisdiction of fee simple lands. You have jurisdiction on how the land will be used, economic benefits, etc. Subject to the legal constraints, that the land cannot be alienated except to crown and an inherent limit on title where you cannot use land to prejudice future generations. Stewardship.

What happens to crown lands once it is established?

- Aboriginal Title lands are not crown lands within the meaning of the Land Act nor is the timber crown timber under Forest Act. The Tsilhqot'in has the beneficial interest in the lands.
- But the Province maintains jurisdiction to justify interferences even over aboriginal title lands if the Tsilhqot'in do not give their consent to developments on aboriginal title lands. Court said this created a high fiduciary stand crown must meet.

- Never had this fiduciary justification standard been before. We do not know what that looks like legally. Court said where Aboriginal Title is not established, to avoid infringement crown should obtain your consent. Court decision lines up with UN Declaration of Human Rights.

What does decision mean to you?

- Who will authorize a case to go to court? This relates to question of the proper title and rights holder. International law says all people have right to self determination. Laws, customs and traditions determine who has right to self determination. The answer resides in your laws and legal orders.
- Delgamuukw/Gisday'wa commenced by Gitxsan and Wet'suwet'en chiefs. Chiefs acted on behalf of houses and collectively sought declaration of title over 58,000 km.
- Crown government raised objections it was commenced by wrong parties. Said it was bands and not Hereditary Chiefs. **The Court rejected that**. Justice McEachern said there was no reason why named plaintiffs who represent houses and represent House territories should not be able to represent the action. But he said that any judgement must benefit all people. He said that the Collective interest in land belongs to Gitxsan and Wet'suwet'en people. Heard evidence of chiefs. Saw feast system bigger than just the houses. **The proper title and rights holder is not the Indian Bands.**
- On appeal plaintiffs changed to amalgamate each house collectively into a communal claim. Said it is a matter of Gitxsan and Wet'suwet'en internal laws the House Chiefs and internal boundaries of House territories. Add all them up; this is external boundary of territory. Court said okay, but should plead in a different way. That is another reason why we were sent back to trial.
- Same thing happened in the Tsilhqot'in case. A sub-group of Tsilhqot'in commenced on behalf of themselves and nation. The litigation area was approximately 5% of the Nation's territory. Only the area of Xeni Gwet'in stewarded and occupied. Province argued it should be the Indian Band who is the proper title and rights holder and that the Xeni Gwet'in, which is an Indian Band, should have authorized the action. Justice Vickers said no, the case was properly authorized since the **Nation is the proper title and rights holder.** He said that First Nations are not nation states but share language, tradition and historical experience. Said that is the true identity lies in Tsilhqot'in lineage. **Band organizations are a Canadian bureaucracy.**
- Court of Appeal the province argued that it is the Indian Act band, and the inconvenience for consultation. Who do we know who to consult with? The Court of Appeal acknowledged the problems. Indian Act bands had a role but rejected the province's position.

If Gitxsan and Wet'suwet'en go back to court.

- Advise - choose carefully what territory is in the litigation area. Consider only a portion of territory or the whole territory as we did in Delgamuukw. But the Tsilhqot'in did not prove title to half of the litigation area. In any event, the action needs to be authorized by the nation as a whole according to your laws which is the support of the hereditary chiefs. **The Nation holds the Collective interest in the land.** By authorizing the case the nation is not

taking anything away from power of houses. Court said your laws govern. **Case needs all Hereditary Chiefs to authorize the action.**

- If you go back to court, what is shape of pleading you bring? We recommend if a decision be made to consider going back to court, that you hire the legal teams of the original case to do a gap analysis. There are different problems to consider now.
- When Tsilhqot'in went to court they had 5% of their territory in litigation area. Of 5% only established title over half of it. Court said for the other half they have rights but not title. Government is taking the position that for ½ of litigation territory the Tsilhqot'in have no title, the crown gets the land by default. Tsilhqot'in cannot go back to court to prove title to this area. Crown is running with this as a victory. Prosperity Mine – say Tsilhqot'in cannot own minerals under that title. Ensure litigation area is where evidence is strong. A Gap Analysis is important
- How you prove title? You did it differently than Tsilhqot'in. You must prove that at assertion of crown sovereignty your nation occupied that area exclusively. What is necessary to prove is that it is your Nation's occupation to specific lands? You do not have to prove that aboriginal title is an inherent right. Or that it pre-existed and survived the assertion of Crown sovereignty and has not been extinguished and finds expression in Section 35. All these legal propositions have already been established. Just prove exclusive occupation of specific lands to your Nation prior to 1846.
- Tsilhqot'in proved it by today's occupation of land. Continuity to 1846. Many people use land today. Trace ancestry.
- Gitxsan/Wet'suwet'en had a very strong contact record. In 1846 you heard historians with fur trade record. Tsilhqot'in did not have that benefit. Good first contact record. Also you had your laws. Court said you proved occupation by use of your laws and we used your laws. Mary Mackenzie, Mary Johnson, Olive Ryan, Johnny David and Kweese and many many more - amazing legal thinkers of your system. Land tenure system. Occupied your lands. Some territory you left as beavers were in jeopardy and you were waiting for things to renew so did not "use" all the time.
- Post Delgamuukw/Gisday'wa we waited for the government to make it move. They moved back into status quo.
- How did Delgamuukw/Gisday'wa keep case in court? Both of you resolved overlapping boundaries before court. You went to neighbors, can you agree to stand aside any overlaps you have and resolve them afterwards. You got those agreements. You had many meetings involving all of the people over many years, education all the way where FN are fighting in court who has title to land. If 2 nations have exclusive title claims, the Courts have said that no one can establish exclusive title and so the crown gets it. You can have shared exclusive lands. And can have shared rights. But it is important to not go to court arguing about exclusive title.
- Is it compatible to have some territory going to court while others territory may be in BCTC process? Yes, but the paradigm shifted legally. Colonial model has been repudiated, and the UNDRIP is based on a human rights model with principals of free, prior and informed consent. Title has not been extinguished. But the status quo is not moving. What is holding this in place? Know that it is a thought structure, a way of thinking which is good to know what it is so we don't replicate ideas in the decisions we make about reconciliation.
- These ideas - embedded in Culture came with colonizers. This is a Culture that gorges on a buffet of individualism. Based on false idea of separation. Colonialized believed in superior

race. Set to bring civilization through assimilation to a less civilized race. This translated into legal positions. The doctrine of discovery, based on the false superiority of Crown governments and the doctrine of terra nullius based on the false inferiority of Indigenous governments. Indigenous people are portrayed as not having real laws. I litigated this for 30 years. Your ancestors are portrayed hunting to meet sustenance needs. Lands devoid of law. Nationhood fragmented. Band rather than Nation. False sense of isolation. Title to only small spots. Separation, segmentation, fragmentation, individualism all competitive. Basically racist. Racism denies the essential fact of our connectedness. These ideas, while rejected by the Court still find expression in government legislation. For example, we still have definition of a First Nation who can conclude a treaty within the BCTC process as an Indian Band. All imbedded in government mandates and litigation positions. When thinking of path together. Doing a gap analysis. One process will require you to come back together as a nation.

- You have title, you need to exercise that.
- Tsilhqot'in proved a continuous usage to 1846. Court said looked at evidence of mining, building on lands, maintaining and warning trespassers etc. This is evidence of title. Court has made clear exercising title is also evidence of title.
- Consider how to engage with crown governments. They hold out carrots. Look at path of compelling crown to engage based on the principals of free prior and informed consent. Tool to do this from Delgamuukw/Gisday'wa was **duty to negotiation in good faith.**
- Court said in Tsilhqot'in the Crown is under legal duty to negotiation in good faith. One way to consider using this: You could write to Crown advising of your position against extinguishment of title and require them in spirit of duty to negotiate to respond to you without a fixed position. Also enforcing free, prior and informed consent, in how you respond to referrals in same manner. Informed parties have access to all information and capacity so you can access risks of proposals.

Doctrine of Free, prior and informed consent

- Structure response to bring free, prior and informed consent. Consider how you internally will deal with giving your consent and deal with sharing benefits from how projects unwind in your territory. What is the interest of house members and Hereditary Chiefs? You have records of your elders traditionally. You laws today may move forward for better use today.

Dispute resolution

- You are not required to go to court to prove title unless someone disputes that. One is Crown and one is neighboring nations. If neighboring nation agree to your boundaries about exclusive rights to territory, what would Crown say to that? In 2009 the province prepared to consider an initiative title without legislation if Indigenous Nations could rationalize it so they did not have to deal with 103 bands. Leadership council recommend to province to fund dispute resolutions. Still benefit to do this if even on your own. Seek through government, public and courts if necessary, if neighbors agree to territory.
- Two bodies who can dispute traditional territories; Neighbors of FN and the Crown. Crown cannot dispute if FN agrees.

- Nexus between resolutions of territorial boundaries.
- Spoke to climate change and affects on all of us. One emotion is love. Love through your oral history. Back to creation of universe. You have lovingly passed through generations. About the connections of all living things. Earth needs stewardship of the land.

Question & Answers

Ernie George: Things are not done right in regards to pipelines. I want to open a can of salmon. In Ft. McMurray they are dying of cancer. I want authorities to eat the oil in the cans of salmon. This is how we live off our land, it is our history. I am 67. My sister died in Burns Lake yesterday. She fell and broke her hip. I came here to express my concerns. Alma Larson came to ask me to drive her to speak about my rights. Treaty – I know what it means. I will not surrender my rights. We can use Tsilhqot'in lawyers to find out information. My grampa and gramma, they raised me, my foster parents. Late Paddy Isaac Frog clan come from Ft. Babine. Wet'suwet'en is a made up name. All Moricetown people come from Ft. Babine. 1893 Annie George was born in Bella Coola. We should work together. My concern is to do a big agenda in Burns Lake for frog clan. Time we should work together. I do not want to see salmon floating in oil or whales. Unity and alliances is what I want.

Henry Wilson gave evidence. Henry's niece is here. He was not mentioned anywhere. I have Tsilhqot'in reason for judgement. What is semi-nomadic and European sovereignty?

Louise:
Semi-nomadic, appeared in judgement. Was used by anthropologists and was picked up by the court. It is pejorative, people that wander lands with no permanent place of residence. Court said they doubted semi-nomadic people could hold title to the land. In Tsilhqot'in said yes, they can have title to land and established title on how they occupy the land. Regular seasonal use of land, trails, encampments. Tsilhqot'in does not describe them that way.

European Sovereignty – is basically an assertive by the crown based on fact they were engaged in imperialistic enterprise and defeats claims of all others in North America and had to deal with the native people. Now is crown sovereignty. It is constrained by Aboriginal Title and terms of treaty. It is not absolute.

Irene Ness: The lawyer explained about how government laid claim to aboriginal lands. They claim the betterment of FN people. They have it documented. They built residential schools to break down families. Small pox blankets depleted the population. The feast system discussed is Bahtlats was outlawed for years and is documented. I mention my father George Milton who told me he was happy the government and church came to Kitsegukla and asked chiefs to come in regalia. In his mind the came to talk about how they would share the land, his understanding. They took pictures of them and proceeded to strip them of their regalia. Regalia are now housed in museums. My question is, why can the Gitxsan and FN lay onus on the government as to how the betterment, lay claim to our territory through this type of betterment? They have it documented. Why can we not use that? I prefer to eat salmon and it is up to China and other countries to get their own oil rather than me sacrifice my salmon for them.

Louise: That was said so beautifully. I have nothing to add.

George Muldoe: We talked about going back to court. What are dangers and benefits of it and costs? Is there a chance we lose our outside boundaries through treaty negotiations. If they want us to do a declaration on our own lands, why don't we make it public? Let them challenge that. We could have Gitxsan sovereignty on our own land and declare it.

Louise: Dangers you do not establish title. Benefit you get a declaration of title and statement to the world it needs to respect. Gitxsan have claimed sovereignty. How to enforce that? Going to court is one strategy to compel crown and industry to respect you. Cost is not knowable without a gap analysis. You can choose not to put boundaries in the court case. If you do and do not establish title, you can lose benefit of crown recognizing your sovereignty over the land. In terms of costs, the Delgamuukw/Gisday'wa case went to court based on treasury board money and politicians impelled crown to fund it. After Delgamuukw/Gisday'wa we went on a court case for Jules and Wilson. We went to the Supreme Court of Canada to establish an *advanced cost order*. If we met 3 criteria the Crown had to play for costs. Criteria a test case to be tried, no available source of funding and an issue of public interest. Tsilhqot'in used that test and got that cost order. Gap analysis – would you qualify or seek to qualify for an advanced cost order.

Q: Do we have rights and title to assert on an LNG terminal in the mouth of Skeena that will impact our salmon in a place outside our territories?

Louise: That requires legal opinion. My impression is that it is worth pursuing if there is a terminal outside your territory but affects your waters inside your territory could be a cause of action to address that. Seek injunctions. Under property law, if there is an action affecting your territory and is toxic you can utilize general torts to address that. We asserted doctrine of trespass. Worth exploring.

Yvonne Lattie: There is a division in our nation. A huge majority of us are looking at things in terms of protecting the water, salmon and environment. Other side of fence is LNG pipeline which will impact us as all salmon are going to the coast. With the division, can we apply to go back to court and what is process and how do we go about doing it?

Louise: One or two can go to court and others may choose to oppose it or not join it at all. Yes, one or two houses can go to court. The most difficult piece of the story is to go to court for some house territory. Gitxsan law collective interest in land. Still need to get authority by nation to bring your action. Find a common form of agreement. If anyone wants to go to court have it authorized on behalf of nation. Wet'suwet'en in feast hall gave permission to chief to represent their house and nation. Different between nations taking action in 1984 with all house territories. You may not get that consent again. You will get into court without putting whole territory out there. You need unity. Plaintiff could be your house and to get "of the nation" you need someone to represent the whole nation.

Bill Blackwater: I was around when the Delgamuukw/Gisday'wa court case started and when they presented declaration to minister of Indian Affairs. After court case there was a request from supreme judge of Canada that Wet'suwet'en and Gitxsan go back and reconcile. Somehow reconciliation did not take place. It went into negotiations of treaty. Nations started falling apart. We need to move forward. We are being contemplated with huge things we can overcome.

Honorarium versus future. We have to come together and we have an opportunity and back to stewardship. Someone must look after the land. This must be based on stewardship. Pipelines proposed is something we must fix real quickly. It is not a development for the future; it is a project that will end when the pipes are buried into the ground. Work toward matriarch. Mothers of all chiefs. Since we have heard beginning of negotiations of Delgamuukw/Gisday'wa versus the Queen, aboriginal title had to be recognized prior to 1846, if that is the case. Can there be compensation? Billions of billions of dollars have been taken off our land.

Louise: In negotiations of treaty they will not pay for the past. In court it will be dealt with differently. There are two causes of actions of compensation. A Carrier Sekani case went to the Supreme Court of Canada arose out of Haida, established tenures granted in breach of crown's duty to consult. Arises when your rights have been interfered with without justification and will require rights or title and prove compensation. We have not had a case tried on this. Interference to reserve lands we have had. Crown relies on limitation purposes. Garron court case, Court said limitation will start when wrong took place. Wrongs in past, if you just learned about it, your limitation time will start then. 30 year time of limitation. You are in best position in BC. Your action started in 1984 your limitation period go back a long way. Revitalize parts of the Delgamuukw/Gisday'wa case, and in pleading we plead damages, just never got there. Damage claim was severed from rights and title. *I will check with Peter on this*. It would be worth doing if going to court for title and Delgamuukw/Gisday'wa pleadings best to go with.

Hagwilnegh: I was a translator for the Delgamuukw/Gisday'wa court case. There is not an education institute in the world that would give me education that I received in this court case. I walked 22,000 sq km with my pen. Lawyers treated our elders badly and our elders never spoke up against them as they respect themselves. They were fighting for our land. I think of that when I hear what is going on in our community. I wish our people heard those words of our elders that gave evidence. Listen to them speak from their heart, not their heads. It was our lives they talk about, our way of life. They never disrespected one another. They made me feel like a million bucks when they spoke to me. Our people are now calling down their own clan members on Facebook. Those chiefs demonstrated, walked their talk. They demonstrated respect; they did not talk about it. I am glad this court case is being talked about again. We have all the evidence in our office and people are free to see it. Why can't Wet'suwet'en do their own declaration and have the two governments recognize it? Do it in our laws. Pipelines are dividing our community as well. Gitxsan and Wet'suwet'en were together in our court and paved the way for many other FN. Talking about our laws and land, they did not talk about it in past tense, they used it.

Louise: You were our fastest speller ever. I like your idea about making your declaration of Gitxsan/Wet'suwet'en sovereignty. How do you get other governments to recognize it? Consider going to neighbors and getting neighbors to recognize boundaries and then go forward with industry and government. That is a new legal argument to advance. We would have a new avenue to move through.

Bridie O'Brien: Tsilhqot'in is going after remedy and winning. Gitxsan too could do that but run risks of winning deed over entire territory and possibly only jurisdiction over it. Does Tsilhqot'in have internal boundaries and how do decisions affect them? 2ndly ensure we resolve external boundaries with our neighbors. Thank you for reminding us actions we hold as Gitxsan today is evidence our children will use for the future.

Louise: Tsilhqot'in does not have internal boundaries. They have stewardship areas. Boundaries are not as legally pronounced and from a result of an ancient legal system as yours. Resolution must come from your own laws. If feast is not strong enough, develop a judiciary external to feast but draws from laws of feast to resolve boundaries. Every single nation has boundary disputes. Court is not the place for this. Next step think of doing that. Court is not place for internal or external boundaries. In Tsilhqot'in was discussion of Tsilhqot'in and a neighbor. Followed lead of chiefs. They went to neighbors and say disputes will not be resolved now or in the future. We want an agreement that we solve our problems against the crown and return to internal dispute resolutions. Benefit for you as a solution now. Val Napoleon has done great work on this. Bring them in rather than a judge.

Ardith Wilson: Like declarations of title. Since then the landscape is different. Wet'suwet'en have proceeded on their own and Gitinyow pushed their agenda. Gitxsan have been at a standstill. Does it require the 3 groups to come together to proceed with collective litigation to get title? You stated no other nation in BC we have proven our title in court. We established title but got no remedy. I want to set tribal council in motion. Cohesive political unit for Gitxsan. If going back to court, I want you and Peter to look at agreements from industry. If signed, they may impact our ability to go to court to seek that declaration.

Louise: I have not seen LNG agreements. Proper title and rights holders are like a quiver in your arrow. If agreements are signed on behalf of the collective as proper title and rights is the nation. All 3 go to court, I do not want to be quoted, but after a gap analysis, Gitxsan could authorize and Wet'suwet'en could on one hand authorize. We took them together in Delgamuukw/Gisday'wa. I would like to work with Peter on this. Use framework of Delgamuukw/Gisday'wa would you all need to authorize it. Same for Gitinyow. I do not know if it is all 3.

Gary Naziel: Our ancestors brought us together. I took this name to take on the fight. Join together. It's been 24-25 years sitting in limbo. As Bill said, millions of dollars of our resources are coming off the territory and we see nothing. We are still poor and still walking. I suggest revive this court case we have a feast with Gitxsan and Wet'suwet'en joined together to have strength in numbers. As Hagwilnegh said, our elders showed respect and nowadays we do not see that. We need to reunite. Main word is unity. We need to bring back the feast hall. That is our government.

Warner Naziel: Freda and I have been living on our territory for 3 years. Unistoten camp is run internationally to fight against pipelines. I was working with our people in 2006 and did a study in population of our people and what our opinion was of PTP. 100% of our people said no to gas and oil pipelines. With federal and BC government encouraging bands to sign agreements as Hereditary Chiefs do we have enough to sue the Indian Act and government for lands we won title recognized in 1997. In case of oil and gas and province sign injunction against Unistoten or Madii Lii camps, what recourse do we have? Trespass to crown lands act, BC civil liberties said discussion in government instead of injunction will file trespass on crown lands to allow RCMP to dismantle camps.

Louise: Two cases, Delgamuukw/Gisday'wa and Tsilhqot'in said clearly Indian Bands are not proper and title and rights owners. The governments continue business as usual. They still get agreements with bands. Agreements with bands that affect aboriginal title land. There is legal recourse to challenge those agreements. Involves challenging Band Council and government or might be

strategic to just challenge government and agreement and not to alienate bands. You have a right to sue for an agreement to affect territory made by bands. Bands were very supportive with the Hereditary Chiefs in the Delgamuukw/Gisday'wa court case. Going to trespass. I think nothing excites me more than government suing you for trespass. We took a case for Okanagan. We sued the company for trespass. 1st time trespass law had ever been used. Company said we are meat in the sandwich. Court said trespass law dictates. Bottom questions are who has title? If in position 99% of law. They must show they have better title. Do not worry about it and stick to your guns it will be a great fight. Okanagan Indian Band was asserting title; they did it on behalf of the nation. Your action would be stronger if the Wet'suwet'en nation authorized you to be there.

Freda Huson: What is next step from here? This one day meeting is not enough. We need a larger gathering and period of time how we can change what has happened to our people. Over the past 3 years we identified more of our land has been decimated. We will not have anything for our future children. Industry is increasing and they are destroying our neighbor's lands. Stand against government who are issuing permits and dividing our people by offering bits of money as they starve our people. People speaking for land are culturally brought up. Economy will collapse and money will not mean a thing. You must be able to sustain yourself. We cannot continue with the norm. Everyone in here is responsible to make change for the future of our children as our ancestors did for us. Pipelines will wipe out the 10% we have left. We are standing firm to protect our waters. I am tired of going to meetings and nothing happens after that.

Debbie Pierre: The purpose of today is to provide information to leadership of Gitxsan and Wet'suwet'en to think of ways to build on strengths of Delgamuukw/Gisday'wa and Tsilhqot'in decisions.

Bertha: in making a decision on how Wet'suwet'en and Gitxsan go forward; everyone is on the same page. Louise has a clear indication of issues and decisions to be made. She identified internal discussion must be done. Questions is will you go together as a group? If you want to establish a working group, we can meet and identify a gap analysis.

Larry Joseph: I work on Forest stewardship Council based in Bohn Germany with offices in Mexico. I implement declaration of Human Rights. Everyone must realize declarations are soft law. End of day you must fall back on hard law. I am in favor of declarations but realize it is soft law. Work I do is the notion of free, prior and informed consent, called FPIC. We need more time to look at pros and cons of litigation. FPIC is the way to go for me. There must be reconciliation in our communities. One risk if you implement Tsilhqot'in, use FPIC, if we get aggressive, do you see a risk of using SLAPP (Strategic Litigation against Public Participation)? I want to establish a working group to do a gap analysis done by young git/wet lawyers and lawyers from the Delgamuukw/Gisday'wa case.

Louise: I will look into SLAP and give you a proper opinion.

Bertha: Need for reconciliation. In 1994 the Gitxsan and Wet'suwet'en signed an accord with BC and Canada on board. There has been nothing happening. What is needed in change? More sitting at the table and gaining debt.

Bridie O'Brien: There are many reasons why we need to be thankful today and to Louise. She spent greater than 30 years of her life strengthening and reaffirming who we are and we are not going anywhere. We are presenting a small token of our appreciation to work you committed to us as aboriginal people and we thank someone for their lives work. We cannot do this work on our own. We need to allow outside people to guide us. We are not fighting but have differing views. Our grandmothers and fathers are in this room to give us strength to move forward collectively.

Irene Ness: When we stand together we are strong. Remember it is not us we are doing this for.

Request for clarification. In relation to hard and soft laws.

Louise: It is a matter of enforcement. Hard law is courts have recognized in case of established remedy or government passed in legislation. Soft law is where UN Declaration passed a declaration which is what courts will interpret and if the action before court applies the Un Declaration on Human Rights in an interpretive way, say no other law in Canada stops me; the court can interpret consistency in the UN Declaration but cannot hold up declaration and will not enforce that remedy. Strongest and ancient branch of our confederation is indigenous law, no soft or hard law. It is the law of the land. Pre-existing crown sovereignty. Indigenous law does not have a name yet. Crown laws are not superior. Another line of law is called the law of the land.

Bertha: impacts of Delgamuukw/Gisday'wa and Tsilhqot'in decisions. How is the Crown able to continue developments such as Site C dam in light of these decisions? How is the Tsilhqot'in decision being implemented in other areas of BC?

Louise: *2nd question*: Comments I made earlier were about compelling litigation. When Crown contemplates action to infringe title and rights they must do strength of case analysis. Every SOC case done in your territory is illegal. They define them as small spots. Court in Tsilhqot'in said any evidence of title must be through the lens of an aboriginal perspective. Another way is to move into FIPC and invite crown to your strength of case and set groups for judicial review or crown decisions. Only way to implement Tsilhqot'in are to take steps to impel it. Legislation, policy is all in line with small spots theory and is illegal. You need to push that. Not good certainty for 3rd parties. If you have consent of neighbors of exclusive title better than them perpetuating status quo of going to court.

1st question: Same point I just made, they will minimize SOC and say they consulted. They do it by the carrot and not by the stick. Create partnerships with nations and create conflicts within nations. I have never seen them do it this way so much as now.

John Olson: Growing up in Hazelton was exciting. Blockades were many standing up for our rights. It has nourished that seed in me to grow. Back then I witnessed unity. We need one voice. I see government changing environmental laws. Telling us this pipeline is fine to be installed. We should do our own Environmental Assessment and tell them no. Within our nation, it is undermining happening. You talked about internal judiciary system where we resolve our own problems. Watching our own people take our people to court. How do they recognize an internal dispute to be resolved internally? That is a root of our problems. Government is ramming these things down our throat and if one person signed an environmental assessment paper on behalf of a house, what rights do those house group members have to say stop, no one consulted us this is happening.

Global ecosystem. What a neighbor person does upriver from their neighbors and affects those neighbors down rivers. Are there laws in place where you need FPIC.

Louise: You have a brilliant mind. Your internal dispute resolution method. When Splatsin Tsm7aksaltn passed their child welfare laws in early 1980's they passed law and bylaw under the Indian Act. When a kid came before the court, they asked please remit kids back to Splatsin. Over time courts were doing it on their own. We were not challenged by the crown for decades. Go to the chief justice of the Supreme Court and advise court to make it clear there is another judicial system and if questions come before the court and the court should make referrals back to your system. If you have to, go to court to argue your right to make laws under Section 35. As yourself who will challenge it. In Splatsin it was parents looking to court to have children dealt with in a different way. Court still respected the bylaw. Next step is enforcement.
Environmental Assessment under UN Declaration has 2 clauses. Indigenous people have rights to establish states have obligation to acknowledge that. Global Ecosystems – amazing idea!

Norman Moore & party: I've heard statements of law today. I find them confusing. I was involved with Delgamuukw/Gisday'wa court case and know what elders brought there. I wanted Brian and Richard here with me as we built a cabin on our territory. We declared sovereignty on our territory. We used the two decisions to do this. Tsilhqot'in decision says you have ownership to the land, it is no longer crown land and timber on there is no longer crown timber. We made a statement and it was the government, we have a website and government is monitoring our website. The government has come on our territory when no one was at the gate. When we found out we went to them and said you are not to be on our territory and they said sorry and got off our land. We must take this action because we were stepped on all our lives. Our system of governance, feast system has been corrupted to point where it is practically unrecognizable. People have taken names that do not belong to them. Government is using these people as signatories to agreements that affect everyone. I told them these agreements are outside the law and not right. We have our cabin out there and did this as a collective. My question, I thought each house is autonomous on their territory and the houses are a collective. When we went to court and each house said they have autonomy. Only time they came together was in times of war. Our court cases said the crown has a fiduciary duty to look after FN as wards of Canada. Section 35 says if you get title to your land, that land cannot be alienated or used for purposes to stop future generations to use it and benefit from it. Where is fiduciary duty of government when they come to us and tell us using underhanded ways to get our people to sign on to pipelines? Where is duty when we have no voice? We are here today to tell you there are solutions rather than treaty and negotiating. We say this land is ours. We decided why not do it and go on the land and is exactly what we did.

Louise: That was a wonderful presentation. Have I said something different that the house has supreme on use of the land? The relationship between house and collective title is Gitxsan law. When we argued the Delgamuukw/Gisday'wa case, I will be pulling out evidence of stewardship of house territories and what remains of collective title. The court said Tsilhqot'in were historic community of people at time of assertion of sovereignty. That does not address your own laws where under your laws there are house chiefs and members to a particular territory. It is not our evidence there is nothing left of Gitxsan/Wet'suwet'en collective title. Still have collective system of laws. I do not have an answer. It is to be worked out internally or your laws or a modern agreement. If we took a case now and only house chief, we would find body of evidence against you from the trial. Lines are blurry but solutions are to be found in context of your laws. Counter of that

is when government goes to house territories for authorization or Impact Benefit Agreement it may be that they are ignoring collective interests and give way to. A question of how you will interpret collective interest on land. It is in interest of government to deal piecemeal. It is a colonial way of thinking.

Bertha: With an Impact Benefit Agreement a particular house may benefit. Who is going to be impacted, fisheries, hunting, are right of the nation. Disagreements in house or territory need to be dealt with prior going to court.

Louise: They don't have to be. It is possible through your own judiciary or feast system to the extent you can solve disputes. Also take into court a declaration of title. Preferable way to go. Put yourself in position of solving it all before court you may say will take too long. I would recommend this be part of the gap analysis.

Bruce Johnson: It would cost $200 billion dollars to fix our lands. Ask the government for this money. Ministry of Forest laid charges against 4 of us. We won and they appealed. We won that. We should have a victory parade. We do not know how to celebrate.

Sarah Rush: What legal rights do we have as Gitxsan youth?

Louise: Inherent limits of title cannot compromise future generations. Stand up as aboriginal title.

Alma Andrews: Spoke to being displaced due to flooding. Also band decisions affecting her personally.

Louise: For displacement you would need legal advice. As a band member and you don't like decisions, find common allies to assist you.

Barry Bush: Is there legal recourse from media against someone saying "revert to be a real Canadian". If an agreement is signed is it true Gitxsan cannot interfere in the LNG line?

Louise: Slander – Legal recourse is required or refuted by taking stage yourself in media. Regarding LNG – I have not seen the LNG agreement. Who is proper title and rights holder? Look for openings in the agreement to discredit it. Give public notice to industry and government that does not bind Gitxsan nation.

Norman Stevens: Spoke to All nations' declaration.

Theresa Morris: Spoke to the following; Mikisew FN rights, create a declaration geared to pipelines, has the 1977 Wet'suwet'en/Gitxsan declaration, be active on the territory, camps important, bands only listen to industry and government (bring them to court), use same tactics as government, UN Declaration, lack of education of council members, scholarly work.

Louise: I like discussion about the way the declaration began. Mikisew was applied judgement in Haida. Haida applies in BC and Mikisew just applied that statement in a treaty statement.
I felt the outset of your questions you raised very important issues that will require further discussion.

Robert Austin: Mining.

Louise: One issue I will dwell on is mining. Court said aboriginal title right to subsurface. If you don't get title, you assert your right to the minerals. Up to crown to stop you from mining yourself. Without a declaration, they carry on business as usual. In Tsilhqot'in they established title area; mineral right will belong to them. Prosperity Mine is going forth for 3rd time. If it passes the Environmental Assessment the government will treat title will be extinguishing by litigation and company will pass it on to Prosperity Mine. They may have some cause of action on how mine disturbs land. Dicey situation around minerals.

Charlie Muldoe: Are government obligated to ensure Gitxsan continue to follow their laws in terms of decision making processes? You mentioned the importance of maintaining our laws. Proof of occupation post 1846. How important is modern day use and occupation for those territories?

Louise: Following your laws – if you assert your laws in a court case and contrary evidence is in Delgamuukw/Gisday'wa that record will be brought to new witnesses and be told to discredit that. If you did a gap analysis, carry that forward, clear statement how law was expressed in certain situations. This generation can make laws too. Ancient laws from your ancestors and laws made by chiefs in proper way you decide things. Your new law would be conscious if overriding ancient law. Modern day use and occupation. The using of your laws on land and caring for land, that is your form of occupation and harvesting. Guarantees you pass title on to your kids. When oral history is not passed on and loses connection to the land that is the biggest danger against title. By default land slips away, law was made in Australia. It has not crept into our legal discourse.

Cynthia Nelson: I am Tsimshian. Treaty is being pushed on us and there are boundary problems. Majority of members do not back up treaty band council. Tsimshian are broken. I feel helpless. Problems induced by BC treaty process. I requested information from treaty reps. Band council is pro treaty. Claiming aboriginal title within treaty claim. Is that legal? Can we sue BCTC? Not our treaty office? They have all the money. We will bring this message of a declaration to Tahltan and Haisla.

Louise: I know nothing about your treaty. We saw what happened with Nisga'a. Treaty takes on overlaps after AIP and then consults with those who they are overlapping with. I would challenge the government negotiators mandates in X number of years in BCTC process and running on an illegal slate. Aversion comprehensive claims by federal govt and UN Declaration. Bring a mandate about past infringements and is against the UN declaration. Make aboriginals pay for this. Collaborative action, find alliances is better plan than one of against AIP's.

Recommendations

1. Nation to nation declaration.
2. Setting up a working group (Wet'suwet'en need to take this to absent chiefs). Contact Eileen joseph to be part of a working group. For Gitxsan members that want to be part of the working group, contact Eileen Joseph.

We heard clearly who the proper title and rights holders are and can share this information.

We will share notes taken today with Eileen Joseph who was absent due to illness.

Education

LL.B University of British Columbia, 1975
B.Ed. University of British Columbia, 1971

Professional Standing & Affiliations

Member, Law Society of B.C. (1976)
Retired Member, Law Society of Alberta (1984)

On January 1, 2011, Louise moved out of the day-to-day practice of law – she remains connected in the esteemed capacity of 'partner emeritus' to the firm.

On behalf of many First Nations clients, Louise has, for three decades, devoted her professional life to the advancement of their Aboriginal and Treaty rights. She was brought into the area of Aboriginal law when it was in its infancy, working under the direction of the late Grand Chief George Manuel, President of the Union of B.C. Indian Chiefs and the World Council of Indigenous Peoples. Louise has been one of the major conceptual thinkers in this area of the law, shaping the legal and evidentiary principles which have been accepted by the courts at every level and found reflection in the existing state of the law. Her tireless spirit, creativity and devotion have been acknowledged by her clients and by her colleagues in the many awards she has received.

In addition to litigating major cases contouring the dynamics of Aboriginal/Crown relations, she provides legal options, presents claims to government, and negotiates settlements on behalf of Aboriginal peoples.

She has made presentations to Standing Committees of the House of Commons and, in the last few years, has been a speaker on every aspect of native rights at over twenty conferences sponsored by the Pacific Business and Law Institute, The Canadian Institute, Continuing Legal Education Society, Insight Information, Banff Centre for Management, Australian Racism Conference, to name a few.

Louise is an engaging public speaker and is committed to passing on her knowledge through her involvement in continuing legal education workshops and forums.

Louise was appointed Queen's Counsel in 1997. She is married and the mother of two children, Max and Sarah.

Bertha Joseph LL.B., M.B.A.

Bertha has been practicing in the area of First Nations law and governance since being called to the BC Bar in 1997. She also has more than 15 years experience in First Nations' economic development, including six years as a trustee responsible for overseeing a $66 million trust fund for the Squamish Nation. With extensive experience in strategic planning, policy development and conducting program and employee evaluations, Bertha has also developed a special interest in alternative dispute resolution. After completing the Small Claims Mediation Practicum, she has acted as an Adjudicator for residential school claims in the Independent Assessment Process.

As a litigator, Bertha has appeared before the Supreme Court of BC on aboriginal rights and title cases and Indian Act/taxation cases. As a solicitor, she has acted in the areas of natural resources, treaty and local governance, negotiations, contract and employment law.

Her economic development work has included ten years of management consulting and work experience in developing business plans and conducting socio-economic impact assessments, local labour force training needs assessments, financial review of companies in receivership; program evaluations of federal economic development programs, and providing policy advice to the First Nations Mountain Pine Beetle Working Group. Bertha has also conducted a consensus-building process on corporate governance and accountability for a First Nation organization, and assisted in developing a Remedial Management Plan for a First Nation.

As a Project Analyst with N.E.D.P. (now Aboriginal Business Canada), she was responsible for assessing financial and commercial viability of business ventures and made recommendations on federal government funding for proponents, and advised applicants on preparation of business plans.

Bertha received her Bachelor of Laws from the University of British Columbia in 1996 and a Master of Business Administration from Queen's University in 2002.