

RESOLUTION OF COMPLEX LITIGATION IN THE FEDERAL COURT

By Peter Grant¹

The resolution of complex litigation in the Federal Court has been increasingly successful in the area of Aboriginal law. I believe this development is due to a more involved judiciary, and clients and legal counsel for First Nations and the Crown seeking creative and more collaborative ways to address past injustices. As the late CJ Lamer stated with respect to Section 35 rights in *Delgamuukw v. The Queen*:

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.

Although that comment referred to Aboriginal-Crown reconciliation, such cases are among the most complex and time-consuming that this Court has to deal with.

Today I will be referring to one case, *Joseph v. Canada*², to highlight some of the points I wish to make in the context of settlement of complex litigation. I was lead counsel for the First Nation involved, Hagwilget Village.³

OUTLINE OF THE ISSUES IN THE CASE

Much of the case has for many years been a matter of public record. In 1959, representatives of the Department of Fisheries and Oceans dynamited approximately fifteen large boulders in the Bulkley River, at a place called Hagwilget Canyon. This is just below the picturesque Hagwilget Suspension Bridge outside of New Hazelton, BC. These boulders, together with a considerable amount of debris, had fallen into the river in approximately 1820. When the debris was cleared by the First Nations peoples the boulders remained, providing resting spots for salmon before they continued on their journey to spawning grounds upstream. This also created a renowned Aboriginal fishery so plentiful that it attracted First Nations and non-First Nations peoples from

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² *Joseph v. Canada*, 2008 FC 574.

³ The author wishes to acknowledge Jeff Huberman, an associate at Peter Grant & Associates and a member of the litigation team in *Joseph v. Canada*, for his significant contribution in preparing this paper.

all over northern BC every summer. The fishery was so good and attracted so many people that Hagwilget Village became known as The Gathering Place. Its history is well documented in a popular history by Maureen Cassidy.⁴

Hagwilget Canyon is surrounded by reserve lands solely because of its high value for the Aboriginal fishery. It was not just the quantity of the fish, but also the quality. The sockeye caught there were, the people of Hagwilget knew, of an excellent quality for smoking and preserving. By the time the sockeye reached Hagwilget Canyon they had lost some of the fat from their long swim up the Skeena River and were perfect for smoking.

Canada's purported rationale for the destruction of this fishery was to allow the fish to move more speedily and easily up the Bulkley River into Morice Lake for spawning purposes, thereby promoting commercial cannery interests over those of the First Nation which depended on the fishery at Hagwilget Canyon. What was quite clear, however, is that depletion of the sockeye salmon stocks over the years had little or nothing to do with the Aboriginal fishery at Hagwilget Canyon, and almost everything to do with overfishing by the commercial fleet and cannery interests on the coast.

After dynamiting of the boulders in 1959 the entire Aboriginal fishery at Hagwilget was destroyed. The salmon no longer had the boulders as places to rest before their journey up the Bulkley River. They swam through the newly created deep centre channel of the canyon far too quickly to be caught by net, dip net, spear or other technologies. The impacts on the people of Hagwilget Village, comprised of both Gitksan and Wet'suwet'en, were immediate, devastating and long-term. Their social structure which had centred on the fishery was destroyed, and a major source of food and trade was gone. If the matter had gone to trial, there would have been tears during oral testimony of Hagwilget witnesses, the pain of what occurred in 1959 is still so raw.

HISTORY OF THE LITIGATION

The litigation was commenced on February 21, 1985 and for approximately two years prior to the commencement of the *Delgamuukw* trial in 1987, the litigation was fairly active with document exchanges and other procedural steps being taken. At that time, legal counsel on both sides recognized the significance of the claim.

During the course of the *Delgamuukw* trial in January 1988, one of the first Wet'suwet'en witnesses, Gisday'wa (Alfred Joseph, one of the representative plaintiffs in the Hagwilget Village litigation), testified about the destruction of the fishery at Hagwilget Village. This was to demonstrate the significance of the fishery as part of the Aboriginal rights and title of the

⁴ Maureen Cassidy. *The Gathering Place: A History of the Wet'suwet'en Village of Tse-Kya*. Hagwilget: Hagwilget Band Council, 1987.

Gitksan and the Wet'suwet'en.⁵ The significance of the Hagwilget fishery was thereby demonstrated through the evidence in the *Delgamuukw* case by Gisday'wa.

By the late 1990s Chief Dora Wilson, who had initiated the action when she was the elected chief in 1985, was re-elected as Chief of the Village, and she wanted this matter resolved. Because there was a shortage of money to take the case forward, a specific claim was filed in accordance with Canada's 26 year old Specific Claims policy. In 2001, the senior person in charge of specific claims in British Columbia informed legal counsel for Hagwilget that it would be 20 years before the claim would be evaluated for review. With that news it was clear that many of those who were alive at the time of the blasting of the rocks in 1959 would be dead by the time the specific claim was dealt with. Moreover, the promise was not to *settle* the claim within 20 years, but only to *have it evaluated* by legal counsel who were reviewing specific claims for Canada.⁶

The Chief and Council of Hagwilget Village decided to accelerate the court case at which time there were challenges made by Canada to the form of the pleadings. These challenges were addressed by extensive court arguments, all of which further depleted the already limited resources of the First Nation. These procedural battles continued until 2005, preventing the substantive case from being advanced.

SETTLEMENT OF LITIGATION

In 2008, Hagwilget Village brought an application to the Federal Court for an interim, or advance, costs order such that Canada would be required to provide the First Nation's costs to prosecute the litigation and to do so in advance of the litigation ultimately being decided by the Court. Mr. Justice Hugessen heard the application, and he ruled that Canada was required to pay the First Nation's costs according to a pre-determined budget with limits.

The advance costs order created a huge change in the dynamic of the case. Although the costs available pursuant to the order were limited in several ways (by phase of litigation, hourly rates, and maximum number of hours), it was clear that it would allow the case to get to trial. The Federal Court also offered to have Justice Hugessen sit as a settlement conference judge with the

⁵ Hagwilget is a relatively unique village as it has, among its residents, hereditary Chiefs of both the Wet'suwet'en and the Gitksan and it exists within the larger Gitksan traditional territory. Hagwilget Village was created by the rock fall in or about 1820 when Wet'suwet'en people came there because no fish were getting through the canyon at Moricetown, approximately 40 miles up the Bulkley River. By the 1860s when the Village of Hazelton was being created just across the canyon and a few kilometers from Hagwilget at the junction of the Bulkley and Skeena Rivers, extensive trade occurred not only across the river from the trading post at Hazelton, but also at Hagwilget.

⁶ At that time, British Columbia had the largest number of specific claims filed, and there were very few legal counsel from Canada assigned to review these claims. They were doing about 20 claims a year, but over 50 claims a year were being filed. In other words, the backlog was increasing each year.

plaintiffs and Canada. There were many important settlement conference sessions during which complex issues and the plaintiffs' claims were addressed.

Ultimately, Justice Hugessen made it clear what his view was with respect to the case although he would not be the trial judge. On the Friday prior to the trial scheduled to commence on a Monday morning in Hagwilget Village, Canada agreed to pay Hagwilget Village \$21.5 million to settle the case. There is no doubt that the active assistance of the Federal Court through the Settlement Conference Judge was a critical factor in arriving at a settlement.

If the case had gone to trial, there was little doubt that it would have gone to appeal because of the complex nature of the issues involved, and there would have been several years of consequent delay. Such delay would have further damaged the Crown-Aboriginal relationship at a minimum and, at worst, led to a financial award that would never have addressed the resolution in the long-term for Hagwilget. Instead, this First Nation used the settlement funds to establish a trust for the long-term social, educational and cultural benefit of its members. Most significantly, this has occurred during the lifetime of some of those who saw the devastation of their fishery in 1959.

FACTORS CONTRIBUTING TO SETTLEMENT

1. Involvement of Settlement Conference Judge

Settlement in the Hagwilget Village litigation would never have been accomplished without the full involvement of the Federal Court judge in the settlement conference process. He pushed both sides and insisted upon the development of rationales for the parties' positions and why the settlement awards should be in the amounts proposed by the parties. His experience and wisdom were not only invaluable, but appreciated by the legal counsel involved. It was also critical that it was a Federal Court Justice as it was understood that he provided some insight into judicial thinking.

While Justice Hugessen has now retired, it is hoped that the Federal Court will continue to provide access to other members of the judiciary willing to devote the time and thought necessary to explore all settlement avenues, pushing the parties when needed, and providing clear comment on how each matter might be dealt with by a judge at trial. We believe such comments were important not only for our client, but for the Government of Canada to hear. Justice Hugessen had the remarkable ability to get messages across so that he was heard not just by the lawyers in the room, but by the clients. It is one thing to hear something from your lawyer and another entirely to hear it from a Federal Court judge.

The ability to resolve these matters and the assistance of a committed and active settlement conference judge is, in the author's view, a critical element as it forced both parties to confront

the complex issues of trial in front of a justice who is experienced with those very complex issues and has a way to address them.

2. Advance Costs

A second element that enabled the case to be settled was the awarding of advance costs. This is a matter that should be carefully considered in all cases. An advance costs order – or at least ensuring that a First Nations litigant has sufficient funds in place to know that it can bring a matter to trial – is important so that settlements are arrived at because they are right for both parties rather than merely because of a paucity of funds forcing the settlement. As importantly, the knowledge that Canada has to pay a First Nation's legal costs in advance obviously serves as an additional motivating factor towards settlement.

While the Supreme Court of Canada has set a high standard by which advance costs may be awarded, the author believes that many First Nations may be able to meet that standard, and that litigation counsel should explore the possibility with clients more frequently. As Justice Hugessen demonstrated in his decision⁷, advance costs orders need not be blank cheques to run up huge litigation bills for the taxpayer. Wherever possible plaintiffs' counsel should frame such orders to provide for moderate and limited forms of assistance to ground breaking litigation by First Nations who would otherwise be unable to bring forward their prima facie valid claims. Indeed, requests for advance costs may have a greater chance of success if they are modestly framed. Doing so not only removes some of the arguments against advance costs, but may also create more possibility for other First Nations needing this limited form of assistance. In the Hagwilget Village litigation, Justice Hugessen set out specific terms to control the amount of costs involved.

3. Proper Representatives at the Table

The full Hagwilget Chief and Council attended several of the many dispute resolution conferences, and it was extremely helpful to have them there as part of the process and actively working with legal counsel. Canada ensured that its representatives were often present, but these were, unfortunately, not the high-level decision makers necessary. This is one of the reasons why it took over four weeks after the last settlement conference and, on the verge of a costly trial commencing in northern BC, for there to be a settlement. Having *senior* representatives of the parties at all settlement conferences, or at least at critical sessions, greatly increases the possibility of more timely settlement of litigation.

⁷ *Joseph v. Canada*, 2008 FC 574

4. Identification of Objectives

It has been my experience that the more a First Nation plaintiff knows its true objectives for the litigation, the greater the possibility of settlement. While many First Nations know exactly what they want to achieve in litigation, others file claims without having had the internal community discussions necessary to determine what the real objectives are, or what the ranking is for those objectives. These First Nations come to court with a desire to right a historical wrong, but without a clear sense of what, in practical terms, that will mean for them in the litigation result. It is clear that in many cases, it is impossible to completely right the historical wrong, such as in instances where the loss or losses involved relate to something irreplaceable such as cultural or linguistic losses. In those cases the goals end up being to in some way acknowledge at a community-wide level what happened and what was lost, and what it will take to move on and create some community benefit and healing. Hagwilget Village most certainly knew exactly what it had lost (the fishery) and its members and Chief and Council had a very clear sense of its litigation objectives.

It is not only a best practice, but indeed the responsibility of legal counsel for a First Nation in complex litigation to encourage these internal discussions and to listen deeply to the true goals of the First Nation client.

At the very least the First Nation and its legal counsel should have a common understanding of the objectives for the litigation as early as possible in the process. Having that clear understanding will open avenues for creative discussion of settlement options with opposing legal counsel and parties, ensure that the First Nation will obtain what it truly wants from the litigation rather than what legal counsel *thinks* the First Nation wants, and ultimately save time and money for all involved. On that last note, while we must act as zealous advocates for our clients, we are also officers of the court. As such, we bear an increasing responsibility to ensure that the court's resources are used efficiently and not unduly taxed by our lack of clear communication with clients. It should also go without saying – although it will be expressly said here – that it is also incumbent upon legal counsel for First Nations to explain to his/her clients the limits of the litigation process, that is to say what it can and cannot do.

4. Be a Conflict Resolution Advocate

Barristers tend to think of themselves as litigation advocates. The settlement of complex litigation, however, requires that we have a dual role as what might be called a conflict resolution advocate. Litigation counsel sometimes approach settlement as a sort of side show to the main event which they tend to see as trial preparation and trial. Consequently, there is a tendency to

consider settlement only as a matter of duty⁸ and only where settlement appears possible, as opposed to legal counsel actively creating and pursuing settlement possibilities. A zealous pursuit of settlement is required rather than a more passive approach. While a well prepared trial brief can impact both the opportunity for and outcome of settlement, settlement must be pursued as either the main event or at least one on equal footing to the litigation itself. This requires a shift in perspective, for some of us a significant one. Indeed, the directive of the Supreme Court of Canada cited above should apply, in appropriate cases, to legal counsel as officers of the court as well as to the court.

5. Collegial Legal Counsel

The final settlement of complex litigation, of any litigation really, rests obviously with decisions made by the parties about their respective interests. Their legal counsel, however, also have a large part to play. Aside from a listing of tasks which would include, among other things, attending all settlement discussions, whether formal or informal, as prepared as possible; conveying unpopular news to clients about the probable outcomes at trial; exploring all avenues for settlement; and being familiar with all documents produced by the parties in discovery, there are some less obvious character traits required for settlement.

One of the most important of these traits is collegiality and frankness with opposing counsel in the settlement process. We all know of the need to treat our opponents with civility, but we must also understand our clients' concerns and objectives to such an extent that we are able to convey them to opposing counsel in as frank a manner as possible within the limits permitted by the solicitor-client privilege. Doing so fosters trust within the settlement context and obviates the need for unnecessary posturing and protracted discussions, and ensures that the settlement process is a true exploration of settlement possibilities rather than an adversarial dress rehearsal for some of the issues at trial.

CONCLUSION

In this paper, the author has attempted to use one case as a model for how the Federal Court can advance the reconciliation of the Crown and the Aboriginal Nations of Canada. Indeed, although most Aboriginal rights and title cases have been, thus far, in the Provincial superior courts, this Court has a unique opportunity to facilitate this reconciliation as the Court responsible to address issues arising between the Federal Crown and Aboriginal Nations in many respects.

⁸ Rule 257, *Federal Courts Rules*, requires that within 60 days of the close of pleadings legal counsel for the parties shall discuss the possibility of settling any or all of the issues in the action and of bringing a motion to refer any unsettled issues to a dispute resolution conference. Rule 263 requires that participants at a pre-trial conference be prepared to address the possibility of settlement of any or all issues in the action.

Based on the evolution of Aboriginal rights litigation, the Courts have come a long way. This is a good time, 14 years after the guidance of the late Chief Justice, for the Crown and Aboriginal peoples to encourage the constructive use of the Court to further advance the reconciliation of the Crown and Aboriginal peoples in this country and thereby assist in fulfilling the mandate of section 35.⁹

⁹ See *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, at par. 32:

The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*....