

DELGAMUUKW

A SUMMARY OF THE SUPREME COURT OF CANADA DECISION

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What is Delgamuukw all about?



In *Delgamuukw*, the Supreme Court of Canada has decided, for the first time, what Aboriginal title means, how it can be proved and how s. 35 of the *Constitution Act, 1982* protects that title. The Court also decided what governments must do if they want to infringe on Aboriginal title, whether title can be extinguished, and the role for negotiations between government and Aboriginal title holders. Although those issues are decided in the context of First Nations in British Columbia, the case will be of importance to all Aboriginal peoples in Canada.

The case was started in the early 80s by the Gitksan and Wetsuweten peoples, in order to force the B.C. government to acknowledge Aboriginal title and enter into land claims negotiations. The case began after Aboriginal rights were recognized and affirmed in s. 35 of the *Constitution Act*, but the B.C. government still held the position that all Aboriginal rights in B.C. had been extinguished before the province entered Confederation in 1871, and would not acknowledge such rights or negotiate land claims agreements based on them. The Federal Government had been negotiating with the Nishgas since 1974, as a result of the Supreme Court's decision in the *Calder* case, but no real progress could be made, because B.C. would only participate as observers.

The *Delgamuukw* case started on behalf of 51 hereditary chiefs, the heads of most of the houses of the Gitksan and Wetsuweten peoples. Those chiefs asked the Court to rule that they had ownership and jurisdiction of 133 individual parcels of land, which together comprise about 58,000 square kilometres in northwest B.C. The Chiefs made no claim respecting fee simple interests in land which had been granted before their action was filed.

Delgamuukw at Trial

The whole claim was dismissed by trial Judge Alan McEachern of the B.C. Supreme Court after one of the longest trials in Canadian history. He accepted the Province's argument that all such Aboriginal title and rights were extinguished by laws enacted by the Colonial Legislature of British Columbia, before 1871. He also decided that if all Aboriginal rights had not been extinguished, the Chiefs would only have Aboriginal rights to use a portion of their claimed territories for villages or traditional harvesting activities. He ruled that the Chiefs could not have jurisdiction over their lands, because Canada's *Constitution Act, 1867* assigned all legislative jurisdiction to the federal or provincial governments. He therefore concluded that the provincial government could grant interests in crown lands and resources, to satisfy its own

legislation and political priorities, and that the government only had a fiduciary duty to consider allowing Aboriginal peoples to engage in traditional harvesting activities over those lands and resources which were not needed by third parties.

Judge McEachern's decision caused great concern among Aboriginal leaders across the country. The 51 hereditary B.C. Chiefs appealed the decision to the highest court in British Columbia.

Delgamuukw at the B.C. Court of Appeal

The B.C. Court of Appeal overruled Judge McEachern's decision that all Aboriginal rights were extinguished before 1871. By a majority of 3 to 2, the Appeal judges rejected the claim for ownership and jurisdiction, and agreed with Judge McEachern's ruling that there were harvesting rights in a portion of the claimed territory. (Two judges upheld the original claims for Aboriginal title and self-government rights.) The Court of Appeal did not review the decision on the nature of the Crown's fiduciary duties.

The Gitksan and Wetsuweten peoples then went on to appeal that decision to the highest court in Canada for a final ruling. There is no appeal from a decision of the Supreme Court of Canada. The BC First Nation Summit participated in the appeal at the Supreme Court of Canada as an intervenor, to support the Gitksan and Wetsuweten people and to represent the position of all B.C. First Nations concerning Aboriginal title.

Delgamuukw at the Supreme Court of Canada

The Supreme Court of Canada decided unanimously, on December 11, 1997, in two judgments on behalf of 6 judges, that they could not decide all the factual and legal issues raised by the action, and therefore they ordered a new trial. They reached that conclusion for several reasons:



- Judge McEachern made fundamental errors by giving no real weight to the Indian peoples' evidence of their oral histories. Therefore the complex issues of fact raised by the case, e.g. the extent of the territory, would need to be decided in a new trial.
- In the Supreme Court of Canada, the Gitksan and Wetsuweten peoples reframed their case, as a collective claim for Aboriginal title and self-government rights, asserted by their peoples as a whole, rather than the individual hereditary chiefs. The Supreme Court of Canada judges said that this amendment of the claim, to assert collective tribal rights, was so different from the claim by individual hereditary chiefs made at trial, that it would not be fair to the governments to decide it on appeal without an opportunity for them to present contrary evidence at a new trial.
- The claims to jurisdiction or self-government rights were made in very broad terms at trial, contrary to the approach to self-government rights which was recently set

out by the S.C.C. in the *Pamajewon* decision. Therefore those issues could only be decided on the basis of new evidence and arguments in a new trial.

However the Court did decide a large number of very important issues of general law, about the nature and effect of Aboriginal title, how it can be proved, whether provincial laws can extinguish Aboriginal title or rights, and the Crown's authority and related fiduciary duties in relation to Aboriginal title which is recognized and affirmed by s. 35 of the *Constitution Act, 1982*.

If a new trial is held, those issues of principle will not be reconsidered. Rather the new trial will be to decide how these principles apply to the Gitksan and Wetsuwoten people. The following is a brief summary of the decisions of the Supreme Court of Canada.

Oral Evidence



The Supreme Court recognized that the laws of evidence work against Aboriginal people. Judge McEachern's way of dealing with oral evidence and histories was fundamentally wrong. If applied generally, his approach would cause Courts to consistently and systematically undervalue the oral histories of Aboriginal peoples, contrary to the recent decisions of the Supreme Court.

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

The Court held that even if oral history cannot conclusively establish occupation of the land at the date when the Crown asserted its sovereignty over the territory, it may still be relevant to demonstrate that current occupation has its origins prior to the assertion of sovereignty by the Crown.

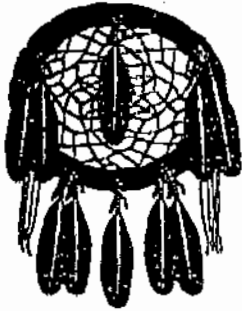
Aboriginal Title

This was the main issue in *Delgamuukw*. What does it mean for Aboriginal people if they have Aboriginal title to land? The Supreme Court answered this question in great detail. Their answer will have far reaching effects on future treaty negotiations and on all Aboriginal people who claim Aboriginal title to their lands.

Aboriginal title is a right in land which includes the right to exclusive use and occupation of the land.

Aboriginal title has often been described in law as "sui generis" - this simply means that it is different from other types of legal titles.

The following attributes make Aboriginal title unique:



1. Aboriginal title arises from Aboriginal people's occupation of land prior to the assertion of British sovereignty over that land. This distinguishes Aboriginal title from other titles which have their origins in grants made by the Crown after the assertion of the Crown's sovereignty.
2. Aboriginal title is a collective right to land held by all members of an Aboriginal nation. It cannot be held by individual Aboriginal persons.
3. Aboriginal title is inalienable - it cannot be transferred, sold or surrendered except to the Crown.
4. Aboriginal title is a legal interest in land, a right to the land itself. It is therefore more than the right to engage in activities which may themselves be Aboriginal rights. It is not a mere licence to use or occupy land. Aboriginal title can compete with other types of proprietary interests.
5. Aboriginal title encompasses the right to the exclusive use and occupation of the land for a variety of purposes. Those purposes include using the land for contemporary economic activities. Permissible uses are not restricted to uses which were elements of traditional practices.
6. Aboriginal title also includes mineral rights.
7. Aboriginal title is meant to protect the Aboriginal people's relationship with their land. Aboriginal title lands cannot be put to uses which are irreconcilable with the Aboriginal people's attachment to the land, now or in the future. As examples of this principle, the Court said that a hunting area could not be strip mined, or an area of ceremonial or cultural significance may not be converted to a parking lot. The land cannot be used in a manner which might threaten the Aboriginal people's relationship with their land.
8. Aboriginal title is a legal interest in land, a right to the land itself, but it is not an absolute right. Aboriginal title is a legal burden on the Crown's title. This means that neither the Crown nor the Aboriginal title holders have full or clear title to lands and resources. Both the Aboriginal title holders and the Crown are subject to, and qualified by, each other's interest in the land which is encompassed by Aboriginal title.

"Three aspects of aboriginal title are relevant . . . First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to Aboriginal title have an inescapable economic component."

What is the test for proving Aboriginal title?

The Court affirmed that the test for proof of Aboriginal title is use and occupancy.

- the land must have been occupied by the Aboriginal people prior to the date when the Crown asserted its sovereignty over the territory. (That date for B.C. is 1846).
- if present occupation is relied on as proof of occupation at the date the Crown asserted its sovereignty over the territory, there must be a continuity between present occupation and the Aboriginal people's occupation at that time.
- at the date the Crown asserted its sovereignty over the territory, the occupation by the Aboriginal people must have been exclusive.

Proof of occupancy must include proof of physical presence on the land and may include a recognition of the Aboriginal people's traditional laws in relation to that land. Physical occupation may be established in a variety of ways, including the construction of dwellings, cultivation of lands, and regular use of definite tracts of land for hunting, fishing or using its resources. Account must be taken of the Aboriginal group's size, manner of life, material resources and technological abilities and the character of the lands claimed.

"In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title."

If present occupation is relied on as proof of occupation at the date the Crown asserted its sovereignty over the territory, then there must be proof of continuity between present-day occupation and occupation at the date the Crown asserted its sovereignty over the territory. This does not mean an unbroken chain of continuity. However there must be "substantial maintenance of the connection" between the people and the land. The nature of the occupation may change between the date the Crown asserted its sovereignty over the territory and the present.



At the date the Crown asserted its sovereignty over the territory, occupation must have been exclusive. Exclusive occupation means the Aboriginal people asserted the right to exclude others from the land. This could be shown by actual practices of excluding others or allowing shared uses, or by Aboriginal laws which allowed others to use the land with permission, or prohibited trespass or uses of the land by others.

This does not mean that other Aboriginal groups were never present on the claimed lands. The test is whether the Aboriginal title holder had the intention to retain exclusive control. Proof of such intention would include an examination of the Aboriginal people's laws or customs regarding about who could use the territory. This requirement of exclusive occupation does not preclude the possibility of a joint or shared Aboriginal title.

"Shared exclusive possession is the right to exclude others except those with whom possession is shared. There clearly may be cases in which two aboriginal nations lived on a particular piece of land and recognized each other's entitlement to that land but nobody else's."

The court recognized the possibility that two or more Aboriginal groups may have occupied the same territory and used the land communally as part of their traditional way of life. In cases where two or more groups have accommodated each other in this way, it may be possible to find joint occupancy which could result in shared Aboriginal title. Such joint title would arise from shared exclusivity between one or more Aboriginal groups who intended to exclude others except those with whom they shared the Aboriginal title.

What can Aboriginal title lands be used for?



The content of Aboriginal title is the right to exclusive use and occupation of the land for a variety of purposes. Uses of the land which are protected by title are not restricted to activities which reflect practices, customs and traditions which were a central and significant part of an Aboriginal people's culture, as was required in the *Van der Poel* case to prove an Aboriginal right to engage in particular activities.

The right to use the land held under Aboriginal title includes mineral rights.

"... lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place."

Aboriginal title lands have an important non-economic component. They have an inherent and unique value. The uses to which those lands can be put also have an inherent limitation. The community cannot put the land to uses which would destroy that value. If Aboriginal peoples wish to use their lands in a way that Aboriginal title does not permit, then they must surrender their Aboriginal title to those lands, and convert them into non-aboriginal title lands to do so.

Infringement of Aboriginal Title must be Justified

Aboriginal title and rights are not absolute. They may be infringed or interfered with, both by the federal and provincial governments. However any infringement must be justified. The SCC defined two principles that government must satisfy if the courts are going to allow government to interfere with Aboriginal title. The court lays out a two part justification test.

1. Any infringement requires a compelling and substantial legislative objective. Legitimate objectives could include conservation, the pursuit of economic and regional fairness, reliance of non-Aboriginal groups on a resource, and economic development including forestry, mining, hydroelectric power and

agriculture. Other objectives which justify infringing Aboriginal title include environmental protection and settlement of non-Aboriginal peoples

2. Any infringement must be consistent with the fiduciary relationship between the Crown and the Aboriginal peoples.

The content of the Crown's fiduciary duty in particular cases will reflect the nature of Aboriginal title. Because of the fiduciary relationship, when government authorizes the infringement of the aspect of aboriginal title which encompasses exclusive use and occupation, (e.g., by itself granting third party rights) government must be able to demonstrate that both the process of allocating the resource, and the allocation itself, reflect the prior interest of the Aboriginal people with title. This might mean that government accommodate the participation of Aboriginal people in the development of resources, e.g., by an appropriate allocation to them of lands and resources for economic purposes, or by a lowering of barriers, such as licence fees, to participation for Aboriginal peoples.



"What is required is that the government demonstrate 'both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest' of the holders of aboriginal title in the land."

Also because of the fiduciary relationship, when government infringes the aspect of title which encompasses a right to choose to what uses land will be put, government must be able to demonstrate that aboriginal people were involved in those decisions taken with respect to their lands.

"There is always a duty of consultation and in most cases, the government's duty will be significantly deeper than mere consultation."

By way of example this may mean that Aboriginal peoples participate in the development of resources and the granting of leases and licenses for forestry and mining. The fiduciary relationship may be satisfied by the involvement of Aboriginal peoples in decisions taken with respect to their lands.

The duty of consultation will vary with the circumstances. But even when the minimum acceptable standard is consultation, that consultation must be in good faith and must intend to substantially address the concerns of the Aboriginal peoples whose lands are at issue.

"Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."

Aboriginal title has an economic aspect. This means that compensation is relevant to the question of justification. Fair compensation will ordinarily be required when Aboriginal title is infringed.

Self-Government

The Court decided this was not an appropriate case to decide general principles about self-government. If those issues are to be decided in this case, it must be after a new trial. However the Court acknowledged an important point about Aboriginal self-government when they found that a second source of Aboriginal title is the relationship between the common law and pre-existing systems of Aboriginal law. This recognition of previous Aboriginal systems of law may prove to be important in future litigation on self-government.

• *Extinguishment*

Prior to 1982, Aboriginal title could be extinguished by legislation of the federal government under s. 91(24) of the *Constitution Act, 1867*, if the legislation was clearly and plainly intended to extinguish Aboriginal title.

After 1982, Aboriginal title is protected by s.35(1) of the *Constitution Act* and any infringement of such title by legislation of the federal government (extinguishment would of course be an infringement) must meet the justification test.

Provincial laws of general application cannot now and never could extinguish Aboriginal title or other Aboriginal rights. A provincial law cannot, by means of s.88 of the *Indian Act*, extinguish Aboriginal title.

Conclusion

The Supreme Court of Canada believes that *Delgamuukw* provides a solid constitutional base upon which negotiations can take place. The purpose of such negotiations is the reconciliation of Aboriginal societies within the basic fabric of Canadian society. The Court stated that while they were ordering a new trial, they hoped that the principles laid out in this case will make a new trial unnecessary.

*" . . . 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 . . . 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."*

This summary of *Delgamuukw* was prepared by the law firm of Pape & Salter as a general summary and is not a legal opinion.

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MEMORANDUM

January 7, 1998

TO: First Nations Summit Task Group
FROM: Arthur Pape
RE: Implications of *Delgamuukw* decision for B.C. Treaty process

The Supreme Court of Canada's decision in *Delgamuukw* (December 11, 1997) impacts in a positive way on a number of issues respecting the B.C. Treaty process. We have briefly described some of those below, for discussion purposes. The Summit Task Group may want to consider arranging for full legal opinions on some of those issues.

1 INTERIM MEASURES:

1.1 The decision provides new ways to challenge the validity of existing provincial regimes which authorize the alienation or development of land and resources (minerals, oil and gas, forests and other renewable resources) which are subject to aboriginal title:

- Current regimes are based on the assumption (or statutory requirement in some cases) that the Crown has unencumbered title to the land or resource to be alienated or developed;
- Current regimes treat First Nations as mere "stakeholders", on a par with third parties, municipalities and provincial or federal government departments;
- The SCC has clarified that, pursuant to s. 109 of the *Constitution Act, 1867*, First Nations are the legal owners of a proprietary interest in their territories, which encompasses the exclusive right to occupy and use lands and resources for a wide range of First Nations purposes, including contemporary economic uses. The Crown's title is encumbered by that unique First Nations interest, which means that the Crown's title is qualified by, and subject to, aboriginal title. The Crown must therefore act accordingly.

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taking appropriate care to not alienate or damage the territorial interests of the First Nations

- Current regimes require, at their highest, "consultation" with First Nations,
- Current regimes do not include a requirement to address the substance of First Nations' concerns, or to involve them in planning on high impact issues, or to obtain consent for those decisions which affect First Nations most profoundly,
- According to current provincial policy, "consultations" are only required with respect to specific sites where First Nations have pursued traditional activities, whereas aboriginal title is an interest in the territory as a whole, which includes an obligation to protect the First Nation's ability to maintain their connection and reliance on their territory and its resources;
- Existing regimes do not require any allocation of lands or resources to meet the future economic, cultural or spiritual preferences or needs of the First Nations;
- Existing regimes do not provide for compensation to First Nations for the authorization of third party rights or interests which infringe on aboriginal title.

1.2 The decision therefore requires the provincial government to develop new mechanisms for authorizing the alienation or development of land and resources, in order to satisfy the Crown's fiduciary duties in respect of aboriginal title:

- In many cases such mechanisms could be developed by the development of new provincial policies, procedures or regulations;
- If new mechanisms are to be successful, they must be developed through government-to-government negotiations with First Nations;
- Such negotiations probably need to be done on a province-wide basis, for implementation according to the circumstances of particular First Nations;
- The province may take the position that such changes would require legislative change. Such claims will need to be carefully assessed, because of the increased delays and political complications if legislative change is required;
- The provincial government may not be prepared to make the required changes only on the basis of the SCC's decision, and therefore a co-ordinated strategy for litigation and political action may be required.

1.3 The decision provides a foundation for the development of mechanisms for the withdrawal from alienation of some lands and resources, pending final agreements.

- Such mechanisms have been used in negotiations in the Yukon and Northwest Territories, to ensure the integrity and stability of the negotiation process. Based on preliminary selections of lands through negotiations by particular First Nations and government, particular areas, parcels and resources have been withdrawn from alienation to third parties, pending final agreements;

- There are statutory mechanisms which could be used for such withdrawals in British Columbia;

- Such mechanisms would complement the types of regulatory mechanisms discussed above in 1.2;

- It is our opinion that some such withdrawal mechanisms are required to satisfy the Crown's fiduciary obligations, because of the pace of alienation and development in B.C. The SCC's decision provides a legal foundation for such a mechanism, because it recognizes the First Nations' unique proprietary interest in their territories, and a requirement that provincial grants of rights to third parties be made under a regime which provides for allocations of lands and resources to satisfy the First Nations' own needs and preferences.

- If such withdrawal mechanisms are to be successful, they must be developed through government-to-government negotiations with First Nations;

- Such negotiations probably need to be done on a province-wide basis, for implementation through negotiations with particular First Nations.

2 SUBSTANTIVE ISSUES FOR B.C. MODERN TREATIES:

The SCC's decision may impact on a number of issues to be negotiated in B.C. Treaties, including the following.

2.1 The approach to certainty:

- The SCC's discussion of the role of surrenders may cause government to have a renewed concern about how to achieve certainty, including whether some form of "surrender" is required. In our view, an approach based on the non-assertion of inconsistent rights will be more effective and secure for all parties, and more consistent with the whole of the SCC's decision.

2.2 Provisions for co-management of lands and resources:

- The SCC's decision recognizes the Crown's responsibility to involve First Nations in decisions involving the alienation or development of territorial lands and resources, because of aboriginal title;
- This portion of the decision provides legal support for First Nations' proposals to have an appropriate and effective role in the management of their territorial lands and resources as a whole, rather than be limited to such roles only for lands and resources which they will retain for their exclusive use and occupancy.

2.3 Principles of compensation for past infringements on aboriginal title:

- The SCC's decision provides a legal foundation for First Nations' positions that they are owed compensation for past infringement of their aboriginal titles,
- The decision therefore opens up the need for a principled discussion of the approach to calculating and negotiating such compensation.

2.4 Principles on the nature and amount of First Nation lands and resources to be secured by treaties:

- The SCC's decision defines aboriginal title as a proprietary interest in the territory and its resources, which provides the foundation for a wide range of uses, including mineral rights and other contemporary economic uses, by the First Nation, to the exclusion of others. The decision therefore requires the Crown to provide for an allocation of lands and resources to meet the future economic, cultural or spiritual preferences and needs of the First Nations;
- Those aspects of the decision provide a legal foundation for negotiating the amount and types of interests in lands and resources which should be allocated for retention by the First Nations, pursuant to modern treaties.

2.5 Overlap Agreements:

- The SCC's decision makes it clear that more than one First Nation can have title to the same lands, and that First Nations can also have aboriginal rights respecting lands to which one or more other First Nations have aboriginal title;
- As a result, we would expect governments to be very concerned to ensure that all overlapping claims have been tabled and dealt with in any modern treaty.