THE DELGAMUUKW DECISION
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AS LONG AS ABORIGINAL PEOPLE MAINTAIN THEIR RELATIONSHIP TO THE LAND, ABORIGINAL TITLE CONTINUES

On December 11, 1997 the Supreme Court of Canada rendered judgment in *Delgamuukw v. The Queen*. The judgment is of major significance. The case is a victory for aboriginal people as it requires governments to recognize and respect aboriginal title, aboriginal law, and oral histories. It should provide protection and comfort for aboriginal people to affirm and build contemporary legal systems of governance, and to repossess parts of their territories. Moreover, the Court has now affirmed some of the understandings of aboriginal title which the Chiefs and the Elders have been articulating for years. Nevertheless the Court creates a power in the government to interfere with aboriginal title, subject to fiduciary obligations. Fiduciary obligations include a duty of good faith consultation before interference with title. Some cases may require full consent and there will always be an inescapable economic aspect of aboriginal title requiring fair compensation.

Six judges of the Court were involved with the decision. The conclusion of the Court was unanimous. Chief Justice Lamer wrote the majority opinion on behalf of himself and two others; Mr. Justice La Forest wrote reasons on behalf of himself and one other; and Madam Justice McLachlin concurred with the Chief Justice and substantially agreed with the comments of La Forest J.

In the end the Court ordered a new trial. The case would start again. This is because at trial McEachern J. did not accept the oral histories of the Gitksan and Wet'suwet'en

people; in this trial he erred. The original claim was advanced by each House. On appeal, this was amalgamated into communal claims on behalf of each Nation. The original pleadings however were not amended and the Court found that the Crown was prejudiced by this change of position.

We set out below a summary of what the Court said.[1] We separately address the seven major issues which the Court decided. After each issue, we provide our analysis as to what results from the decision.

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[1] Unless otherwise noted, all of the quotes from the judgment are from the opinion of Lamer C.J.

I. ABORIGINAL TITLE

(a) The Ruling of the Court

Ruling #1: Aboriginal Title is an Aboriginal Right Recognized and Affirmed in Section 35(1) of the *Constitution Act, 1982*.

The major distinction the Court made was between aboriginal rights and aboriginal title.

The Court recognized that there is a range of aboriginal rights which are constitutionally protected under section 35. Across the spectrum, what makes the difference is the degree of connection with the land. This spectrum can include:

a) aboriginal rights which involve practices which were integral to the aboriginal society before contact, but no title is proved;

b) site specific rights to engage in certain activities at particular places, but where title is not claimed;

c) aboriginal title which is a right to the land itself.

The Court then dealt with aboriginal title and recognized these basic legal characteristics:

- **Aboriginal title is a right to land** Aboriginal title is a right to the land itself. Aboriginal title is not limited to the right to carry on traditional practices or activities. Rather, aboriginal title is a broad right to the exclusive use and occupation of land for a variety of purposes. Like reserve land, aboriginal title includes the resources on the land, such as oil and gas, timber, etc., and incorporates the contemporary needs of the communities.

- **Aboriginal title is a property interest** Aboriginal title is a property interest which can compete on an equal footing with other property interests.

- **Aboriginal title is a collective right** Aboriginal title is held communally: "..it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community." (para 115)

- **Aboriginal title is *sui generis*** Aboriginal title is a *sui generis* interest in land primarily because its source is aboriginal people's original occupation and not Crown legislation or Crown grant. It must be understood by reference to both common law and aboriginal perspectives.

  > "Another dimension of aboriginal title is its source...it arises from the prior occupation of Canada. What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty whereas normal estates, like fee simple, arise afterward." (para 114)

- **Aboriginal title has limits** The only limitation placed on the content of title is that the land cannot be used in a way which **destroys** the people's relationship to the land. Any such uses are excluded from the content of aboriginal title. An example would be if aboriginal people wanted to pave a parking lot over a hunting ground. This would destroy the sustainability[2] of the hunting ground. Should aboriginal people want to transform the use of their lands, they would be required to conclude a treaty wherein title is exchanged for a different interest in the land.

  The Court emphasizes that this is not a limitation which restricts the use of the land so as to prohibit use of resources or activities that have traditionally been a part of the aboriginal nation's territories and practices..

  > "That would amount to a legal straightjacket on aboriginal peoples who have a legitimate legal claim to the land." (para 132)

  Rather aboriginal title allows for a full range of uses of the land, so long as the people's relationship to the land is able to continue.

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[2] We use the word "sustainability" not in its technical environmental sense or to mean sustenance uses, but in the sense of the land sustaining the peoples.

- **Content of aboriginal title** In summary, the content of aboriginal title can be summarized as follows:

> "Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title." (para 111)

(b) Analysis: Aboriginal Title

1. In deciding that aboriginal title is a right in the land itself, the Court rejected various theories on aboriginal title advanced by Canada and the Province. The rejected theories were:

   - aboriginal title pertains only to those lands which have been intensively occupied by the Nations over the years. In all likelihood the only lands which would qualify under this theory are present day Indian reserves.

   - aboriginal title is a collection of site specific rights where aboriginal people engaged in traditional activities.

In rejecting Crown theories, the Court pronounced that an aboriginal land base, resulting from aboriginal title, is greater than present day Indian reserves, and is not a land base confined to traditional use sites. Such a land base always includes an inescapable economic component.

> "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, the lands held pursuant to aboriginal title have an inescapable **economic component**" (para 166) (emphasis added)

To the extent that these Crown theories of aboriginal title are relied upon for Crown policies and practices, (for example land use policies, traditional use studies etc.) these policies must now be changed to accord with the law.

2. In ruling that aboriginal title includes "non-traditional" uses of the land, such as exploiting mineral rights, the Court has reversed previous decisions such as the *Baker Lake* case. In *Baker Lake*, because aboriginal title was limited to hunting and fishing activities, the aboriginal people were not able to restrain the activities of the mining companies. Now, if aboriginal title is proved, the traditional and contemporary rights to the land must be considered when new development is proposed. This includes a consideration of a right to the minerals themselves.

   This reversal allows aboriginal people greater control of developments on their lands, authorized by the governments, as well as greater benefit from the resources on their territories.

3. Aboriginal title is the right to **exclusive** use and occupation of land for a variety of purposes. However, this broad right is qualified in several ways. The first is the power of the Crown to interfere with aboriginal title, provided the interference can be justified. (We discuss the interference issue below under the heading Infringement) Second, aboriginal title is limited by the qualification that the land cannot be used in a way which destroys the people's relationship to the land. It is that relationship which must be allowed to continue into the future. In other words, the nature of the people's connection to the land must be sustained, for future generations as well as this one.

   It may be argued that because sustainability is a limitation on aboriginal title, this qualification is also a limitation on the title held by the provincial Crown. This argument follows from the Court's findings, discussed below, that aboriginal title is a limitation on the exercise of provincial Crown power, and that the Province has no

power to extinguish aboriginal title. Should the Province exercise its power so as to deny the sustainability of aboriginal title, they will be unlawfully infringing upon and possibly extinguishing aboriginal title. The development of this point may prove to be a real tool in the hands of aboriginal people to protect the land now and for the future.

The flip side of the qualification on aboriginal title is in the Court's pronouncement that should aboriginal people wish to use the land for "non-sustainable" purposes, this would have to be the subject of a treaty. We can envision legal and political debate, now and in the future, over where the line is drawn between sustainable activity involving the land, and non-sustainable uses. For example, is the native connection to the land broken when land is used to build a shopping mall?, a sawmill?, etc. The line is very blurry. However, what is clear is that if the **resources** from the land are used in a contemporary fashion, the use of those resources as an economic base is definitely part of existing aboriginal title.

4. The jurisdiction of aboriginal people to make management decisions involving the use of the land is implied by two characteristics of aboriginal title which have been affirmed. The first is in the description that aboriginal title is a **collective right**, and the Court's statement that "decisions with respect to that land are made by that community." [This means that any member of an aboriginal society cannot simply rely on their title, and cut trees for personal profit. Rather, harvesting of resources relying on aboriginal title must occur in accordance with collective decision making]. Further, the Court has recognized that aboriginal title is ***sui generis***, and that the **source** of aboriginal title is the prior occupation by aboriginal peoples of their land. This ruling affirms and recognizes aboriginal laws and institutions which shape the organized society whose prior occupation is the source of title to the land. The ruling should encourage aboriginal societies to restore, rebuild and create working legal

systems to meet the challenge of managing the contemporary society's relationship to their territory.

The recognition of both a **collective** and ***sui generis*** right has other implications. The Court has defined aboriginal title as rooted in lands which were occupied by aboriginal people prior to the assertion of sovereignty by the Crown. In doing so, the Court expressly rejected a definition of aboriginal title as one derived from Crown legislation or grant. It follows then, that some Indian bands, who are created by the *Indian Act* to form a political unit which is **not** in accord with tribal laws and customs, should not be capable of separating part of the collective title for their own use (especially in treaty making processes) unless of course the whole Nation agrees. This is an extension of the principle, already discussed, that an individual cannot independently harvest the resources of the territory without regard to the laws of the aboriginal nation concerned. Further, insofar as federal legislation, particularly the *Indian Act*, is in conflict with the laws and social structures which are the source of aboriginal title, provisions of such legislation may now be challenged on the basis that they are unconstitutional as an unlawful infringement of aboriginal title.

5. The Court defined a spectrum of rights protected by s.35 which fall short of aboriginal title. The site specific right in particular has implications for the specific claims process. By way of example, if aboriginal people can prove their prior occupation of an old village site, it follows they should be able to meet the test of establishing a s.35 site specific right today to use the land for housing and settlement purposes. However, the federal government does not recognize a lawful obligation to such claims unless the area was first reserved and then illegally cut off. The federal government should be required to reevaluate their Specific Claims policy in light of *Delgamuukw*.

6. The governments may argue that neither the Gitksan and Wet'suwet'en people, nor any other aboriginal nation has **proved** their title; therefore the governments are not bound to abide by the decision. However, we note that the Court suggested that the Gitksan and Wet'suwet'en could prove their title if the oral histories were considered.

> "[The oral histories were used] in an attempt to establish their occupation and use of the disputed territory, an essential requirement for aboriginal title. The trial judge, after refusing to admit, or giving no independent weight to these oral histories, reached the conclusion that the appellants had not demonstrated the requisite degree of occupation for 'ownership'. Had the trial judge assessed the oral histories correctly, his conclusions on these issues of fact might have been very different." (para 107)

7. Given that each aboriginal nation was here first and most can prove that, aboriginal nations and governments should assume the existence of aboriginal title and prepare for a future based on its recognition. Going back to court might be considered to be a last alternative if implementation proves to be impossible. Governments may see a return to court as an excuse to delay meeting the challenge and opportunities which the judgment invites and mandates.

8. The judgment on title has implications for those First Nations who have concluded Treaties. Our analysis on the Treaty issue is still in process, but we address at this time, our opinion that treaty understandings must be revisited in light of the judgement. We use mineral title by way of illustration. *Delgamuukw* is the first time that mineral title has been held conclusively to be an aspect of aboriginal title. Given ordinary rules of contract, if the treaty was intended to address the issue of mineral rights, such rights would have to have been discussed by the parties who concluded treaty, and minds would have to have met on this subject. To the extent that ownership of mineral title was not discussed prior to treaty or at the time, it could be argued that the treaty did not embrace mineral rights which remain today an existing aspect of aboriginal title.

II. ORAL HISTORIES

(a) The Ruling of the Court

Ruling #2: The Court must Recognize and Respect Oral History

- **Oral history, equal footing** In *Van der Peet* the Court established the fundamental principle that the "ordinary rules of evidence must be approached and adapted in light of the evidentiary difficulties inherent in adjudicating aboriginal claims." The Court in *Delgamuukw* built on this ruling by adapting the rules of evidence to ensure that the oral histories are to be given the same credibility and respect as documentary evidence.

  > "This appeal requires us to...adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past." (para 84)
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  > "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 type of historical evidence that courts are familiar with, which largely consists of historical documents." (para 87)

- **Serious error** It is precisely because the trial judge undervalued oral histories that the Supreme Court would not accept the trial judge's findings of facts and a new trial of the case was ordered.

  > "These errors are particularly worrisome because oral histories were of critical importance to the appellants' case. They used those histories in an attempt to establish their occupation and use of the ..territory, an essential requirement for aboriginal title. The trial judge, after refusing to admit, or giving no independent weight to these oral histories, reached the conclusion that the appellants had not demonstrated the requisite degree of occupation for 'ownership'. Had the trial judge assessed the oral histories correctly, his conclusions on these issues of fact might have been very different." (para 107)

(b) Analysis: Oral Histories

1. The Court's recognition of the strength of oral histories is perhaps the most respectful part of the judgment. Less than ten years ago, aboriginal people's oral histories were viewed by the courts as "hearsay" and either not admissible in evidence, or, as was decided by McEachern J., they were admissible, but the court would give no weight to them unless they were corroborated by scientists, or by the written record. As a result, when they came to court what aboriginal people had to say was effectively invalidated, and their history and heritage denied. So, too, their ability to prove their case was diminished. Aboriginal people's histories now must be respected by the courts. This ruling gives meaning to the testimony of so many elders who have passed away, having felt humiliated or disregarded by the court process but whose words break new ground for this ruling to flower.

2. Practically, in terms of proving an aboriginal title or rights case, we can expect that there will be many untutored trial judges who will not know how to give oral histories the proper weight and merit. This will require education of the judges over time. However, should a trial judge refuse to admit or give inadequate weight to the oral histories, their findings of fact stand to be overturned just as the Supreme Court of Canada overturned the findings of the Chief Justice of the Province.

3. One problem which must be addressed is how to educate judges as to what are oral histories, and how they should be interpreted. Without an aboriginal understanding of this issue, judges could fall into the trap of defining oral histories in western legal terms, and miss entirely the significance of how aboriginal collective thought is expressed orally. New court rules and processes should develop to promote the development of evidence from an aboriginal perspective.

4. Trials involving aboriginal rights and title have relied considerably on anthropologists and historians to give opinion evidence, particularly where the weight of oral histories has been in question. The Supreme Court did not address an issue raised about anthropology. The lower court ruled that the anthropologists, called by the Gitksan and Wetsuweten people, studied by a method called "participant observation" which involves living among the aboriginal people. The Court ruled that the anthropologist were so close to the people that their evidence may be biased. On the other hand, Crown anthropologists never talked to the people, but their evidence was preferred. The role of anthropologists, their methodology, and the issue of bias, must still be addressed in later cases.

5. As judges learn to better appreciate and rely upon oral histories, the reliance on experts to translate aboriginal culture and laws should be reduced. Experts will be called on for their focused contribution in keeping with their discipline.

III. PROOF OF ABORIGINAL TITLE

(a) The Ruling of the Court

Ruling # 3: Proving Aboriginal Title

- **Test for proof of title** The test which an aboriginal nation must meet in order to prove that they have aboriginal title to their lands is to show **that their ancestors had exclusive occupation of the lands at the time when the Crown asserted sovereignty. In British Columbia that is at 1846.**

  Relevant evidence which can establish aboriginal title includes evidence of aboriginal laws, physical occupation (past and present), and oral histories.

- **Aboriginal laws** Taking account of the aboriginal perspective includes taking account of aboriginal laws in relation to the land. Such an aboriginal legal system is relevant to prove occupation.

  > "..if at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use." (para 148)

- **Physical occupation in the past** Evidence of physical occupation is relevant to prove possession of the land.

  > "..alongside the aboriginal perspective must be taken into account the perspective of the common law...Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting the resources.." (para 149)

- **Physical occupation today** Occupation of the land can be proved by reference to the people's ongoing connection to the land. If present day occupation is relied on to prove occupation prior to 1846, then the aboriginal nation must show continuity between present and pre-sovereignty occupation.

> "[T]here is no need to establish 'an unbroken chain of continuity' between present and prior occupation. The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title.....In *Mabo*..the Court set down the requirement that there must be 'substantial maintenance of the connection' between the people and the land. [T]his test should be equally applicable to proof of title in Canada." (para 153)

- **Continuity with the past but interference with use of land does not affect claims**

Interruptions in occupancy or use of lands do not necessarily preclude a finding of title.

> "I would like to make it clear that the fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained. The only limitation on this principle might be the internal limits on uses...i.e., uses which are inconsistent with continued use by future generations of aboriginals." (para 154)

The Court endorses the notion that uses of land may be exercised in a contemporary manner.

- **Oral histories** Evidence of the people's relationship to their territories is central to proof. Oral histories, including place names will help prove this relationship which the court must take into consideration, having in mind the perspective of the aboriginal peoples.

> "This appeal requires us to...adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past." (para 84)

- **Overlapping claims** The Court explicitly recognized the possibility of a shared title where two or more aboriginal groups occupy and use the same territory. The Court recommended aboriginal nations having territorial claims which overlap ought to intervene in appropriate court cases or be involved in negotiations.

(b) Analysis: Proof of Title and Evidence

1. The fact that an element of proof of title is present day occupation supports the direction provided by many Chiefs and Elders to their members to repossess and reacquaint themselves with their territories, especially in those specific areas which their ancestors had occupied. Evidence of occupation of land in 1998 and onwards may be as valuable for future generations to assert title, as evidence of past occupation is today.

2. The Court has pointed to the evidence required to prove aboriginal title. Of particular importance is the use of aboriginal laws and oral histories. Over time, as oral histories and aboriginal legal systems become articulated and better appreciated by non-aboriginal decision makers, we can expect a broader cross cultural understanding which will form the foundation of a truer and lasting co-existence.

3. The Court has said that s.35 rights are understood by reference to both common law and aboriginal perspectives. Thus, aboriginal peoples must prove title by reference to their **occupation** of land, a requirement derived from the common law. Proof of title by reference to exclusive occupation has its roots in British Imperialist doctrine which assumes sovereign power to claim lands which are vacant, while attributing value to lands which are cultivated. Proof of exclusive occupation is not a requirement to prove title by non-aboriginal people or the Crown.

   This part of the test must continue to be challenged over time, if we are to achieve true equality among different peoples' relationships to the land. The Court did however reject the government's theory that occupation must be proved by "intense occupation", such as village sites and cultivated fields. Instead, occupation can be proved by reference to aboriginal people's practices, histories, laws, and way of life on the land.

4. There is a strong argument to be made that the evidence to prove occupation should be societal rather than individual. Thus, instead of proving that hunting occurred at a certain place, the emphasis of the evidence should be directed to the societal use of the land. Applying this analysis, it would be relevant to consider the nation's population, where within the territory certain resources were to be found, and how those resources would be needed to support the people on the land. The inclusion of territory as part of aboriginal title would be based on the demonstrated need for that territory to support the people on the land.

5. The recognition of aboriginal title presents a different test than was adopted by the Court for proof of rights. Nevertheless the tests for title and rights share broad similarities. As the Court stated

> "The major distinctions are first, under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy, and second, whereas the time for the identification of aboriginal rights is the time of first contact, the time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land." (para 142)

Thus, the time frame is different to prove aboriginal title than to prove an aboriginal right. Title is proved from 1846 in British Columbia, whereas rights are proved from the time of first contact. It is our opinion that the Court was correct in *Delgamuukw* on this point. The doctrine of continuity requires the Crown to recognize aboriginal title at the time sovereignty is asserted. There is no legal doctrine which supports the conclusion that aboriginal rights are established as a matter of British common law **before** the Crown asserted sovereignty. In the future, the Court may ultimately accept that the correct time frame for both proof of rights and title is 1846 in British Columbia. However, for the present, the difference in the tests remains.

6. If oral history is to form part of the proof of aboriginal title, how are conflicts within the oral history to be resolved? Every society generates internal debate over the

proper interpretation of laws and practices, which in turn may result in conflicts over who is the proper owner or custodian of certain land and resources. We can expect that some oral histories will require debate, validation or resolution between conflicting opinions in the community. In our opinion, aboriginal nations should take the lead in establishing processes to resolve these conflicts before they are brought before non-aboriginal courts.

The same problem arises with respect to overlap issues. Some areas are indeed areas of shared title, and these appropriately might be dealt with as the Court suggests (with both nations present). However, there will be other cases where the title of one aboriginal nation should prevail over the claim of another. Once again, it is preferable that aboriginal nations establish some form of dispute resolution mechanism to address these issues before they are brought to either negotiation with third parties or litigation in non-aboriginal forums or courts.

7. Finally, for many aboriginal nations who are conducting land use studies, the use and occupation definitions which guide those studies are no longer appropriate for the proof of aboriginal title. That does not mean to say that land use and occupancy evidence is not useful; however, in developing evidence appropriate to the proof of aboriginal title, of equal or greater significance are the aboriginal laws, oral histories, and the societal relationship to the land in question.

IV. EXTINGUISHMENT

(a) Ruling of the Court

Ruling #4: Aboriginal Title Not Extinguished

- **Federal power to extinguish must reflect a clear and plain intention** The Court reaffirmed the test for extinguishment set out in *Sparrow*, namely that the Crown's intention to extinguish the rights must be clear and plain. The standard to be met, in order to determine if extinguishment has occurred is a high one.

- **The Province has no jurisdiction to extinguish title** The Court dealt with the question of which level of government has jurisdiction to extinguish aboriginal rights or title. The legal conclusion is that the Province of British Columbia does not have and never had any constitutional power to extinguish aboriginal title. In addition, provincial laws of general application do not extinguish aboriginal rights.

- **Exclusive federal jurisdiction (s. 91(24) and s. 35(1))** Section 91(24) ('Indians and Lands reserved for Indians') of the *Constitution Act, 1867* gives the federal government exclusive jurisdiction to make laws in relation to aboriginal title and other aboriginal rights which relate to land.

  This means that as between the federal and provincial governments only the federal government can make laws in relation to any aboriginal rights which are protected under s. 35(1) of the *Constitution Act, 1982*. The Court ruled that from s.91(24), the federal government has a fiduciary responsibility to "safeguard one of the most central of native interests - their interest in their lands," both on and off reserve, from provincial interference.

  > "..aboriginal rights are part of the core of Indianness at the heart of s.91(24)." (para 181)

(b) Analysis: Extinguishment

1. When this case began, Elders asked "How did the Crown acquire title to our land?". Aboriginal people knew the source of their ownership of their territory, but the source of the Crown's claim had never been established. This question was answered through the government's defence of extinguishment, first raised in the *Calder* case in 1969, and concluded with *Delgamuukw*. During the course of these defences, the Crown argued that aboriginal title was extinguished based on different theories:

    - **Aboriginal title was extinguished by** the assertion of Crown sovereignty, and the establishment of land legislation in the colony before confederation ("blanket extinguishment");
    - **Aboriginal title was extinguished by** the establishment of Indian reserves, and aboriginal people "abandoning" their territories in order to live on these reserves;
    - **Aboriginal title was extinguished by** the creation of land grants by the Province which had the effect of precluding the exercise of aboriginal rights and title at that location.

    All of these extinguishment arguments were defeated. The Court held that aboriginal title exists in British Columbia, it has not been extinguished and that the Province has no power to extinguish aboriginal title. **By this ruling, the Crown has failed to establish any legal basis to justify the dispossession of aboriginal peoples from their land.**

2. Further, in arguing that the Province had power to extinguish aboriginal title through inconsistent Crown grants, the federal government argued that s.91(24) jurisdiction

embraced only the subject matter of Indians on present day Indian reserve lands and did not extend to aboriginal title off reserves. With this limited scope of federal power they argued that the Province controlled lands outside the reserves and could extinguish aboriginal title. This narrow interpretation of the federal power under s.91(24) has been defeated. The Court ruled that the s.91(24) jurisdiction embraces off reserve interests, most notably encompassing the jurisdiction to protect aboriginal title.

3. This ruling has broad consequences. The federal government has jurisdiction to pass laws which will protect aboriginal title off reserve. Such federal legislation will have the effect of creating clear boundaries between the exercise of provincial jurisdiction, and the protection of aboriginal title. The federal government and aboriginal nations should now work together to design appropriate federal legislation.

4. The 1986 Federal Claims Policy which presently is used, among other places, to govern the B.C. Treaty Commission, no longer accords with the law. The Policy is expressly based on the fact that aboriginal title is vaguely defined (it has now been clearly defined); that aboriginal title is probably extinguished (this theory is now unequivocally rejected); and further, that the federal government has no jurisdiction over lands outside Indian reserves in the Province. Canada and the Province have in place an Agreement and enabling legislation creating the B.C. Treaty Commission which have been drafted in accordance with these assumptions. In light of the *Delgamuukw* decision, it is clear that the federal government has a great deal more jurisdiction in respect of lands in British Columbia. The federal government should be required to change federal policy and both governments should be required to revisit the enabling legislation, and the federal/provincial Agreement so as to conform with the *Delgamuukw* decision. Failure to do so may result in a successful legal challenge.

5. In the absense of treaty, provincial Crown title is burdened by aboriginal title, a matter which creates uncertainty for the Province when issuing new grants to land. Acceptable processes must be established with aboriginal people to grant interests in land to third parties, or this uncertainty may be passed to third parties.

6. The federal government must be encouraged to apply *Delgamuukw* in all areas of executive decision making, policy and practice which affect aboriginal title. This would include a reassessment of policy in such areas as fisheries management, and specific claims, to name only a few.

   It is noteworthy that the federal government historically exercised jurisdiction in keeping with the *Delgamuukw* decision when it disallowed a provincial land law in the late 1800's, on the basis that such a law failed to give effect to or respect aboriginal title in British Columbia.

7. Failure by Canada to safeguard aboriginal title may result in a breach of fiduciary obligation. In *Blueberry Indian Band v. Canada* (1995) 4 S.C.R. 344 the Supreme Court of Canada found a breach by the Department of Indian Affairs when officials failed to correct an error (allowing the alienation of mineral rights from the reserve) on becoming aware of it. In other words, the governments could be held responsible if they could have prevented harm to aboriginal title, and failed to do so. The best protection a fiduciary can undertake is to ensure that no breach occurs. These arguments will have greater significance over time if the federal government fails to protect aboriginal title in the face of activities by the Province which could destroy the relationship of aboriginal people to their land, or which fail to properly take into account aboriginal title to the prejudice of the aboriginal nation involved.

8. Aboriginal title may still be extinguished by the federal government if they can evidence a clear and plain intention to do so and if such extinguishment is in keeping

with fiduciary obligations. Given these restrictions, it is difficult to imagine the exercise of federal powers which would meet the standard. The remaining method for the loss of title is by a surrender, which requires the vote of the community and which raises the challenge that community members be fully informed about the power to protect their territories.

V. INFRINGEMENT

(a) The Ruling of the Court

Ruling # 5: Government may infringe aboriginal title but must justify any infringement

- **Test for infringement** The test which the government must meet to justify an infringement has two parts:

> "First, the infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial... (para 161) The second part requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples." (para 162)

(i) Legislative objectives A broad range of legislative objectives can meet the first arm of the justification analysis.

> "The general principles governing justification laid down in *Sparrow*, and embellished by *Gladstone*, operate with respect to infringements of aboriginal title. In the wake of *Gladstone*, **the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad**. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that 'distinctive aboriginal societies exist within, and are part of, a broader social, political and economic community'.. **In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose** and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act

can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis." (para 165)

(ii) Fiduciary standard Once the first step has been met, the courts will then scrutinize government actions to ensure that its fiduciary duty has been met in relation to the particular infringement. The scrutiny will be applied on a case-by-case basis.

> "Three aspects of aboriginal title are relevant here. 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,....and third, that lands held pursuant to aboriginal title have an inescapable economic component." (para 166)
>
> "The exclusive nature of aboriginal title is relevant to the degree of scrutiny of the infringing measure or action. For example, if the Crown's fiduciary duty requires that aboriginal title be given priority, then it is the altered approach to priority that I laid down in *Gladstone* which should apply. 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. By analogy with *Gladstone*, this might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of aboriginal title lands, that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced. This list is illustrative and not exhaustive. This is an issue that may involve an assessment of the various interests at stake in the resources in question. No doubt, there will be difficulties in determining the precise value of the aboriginal interest in the land and any grants, leases or licences given for its exploitation. These difficult economic considerations obviously cannot be solved here." (para 167)

- **Consultation** Since aboriginal title includes the right to choose what are appropriate land uses, aboriginal people should be involved in decisions made with respect to their lands. The government must consult with aboriginal people with respect to land use decisions. Failure to consult is a breach of the Crown's fiduciary duty.

While different circumstances may call for a different degree of consultation, all consultation:

> "..must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations." (para 168)

- **Compensation** Since aboriginal title always includes an economic component, compensation is relevant to justification; there must be compensation for an infringement of title.

> "In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated" (para 169)

(b) Analysis: Infringement

1. The part of the judgment dealing with infringement and justification is the most troubling. It is hard to imagine a legislative objective which will not meet the first arm of the test. Yet, as previously discussed, the rulings on extinguishment clearly establish that the Crown has no legal theory to justify its dispossession of aboriginal people from their territory. Nor does the Court expressly adopt either the old theory of "*terra nullius*" or the repudiated doctrine of discovery to justify the appropriation of aboriginal nations' territories. Yet, the ability of the government to interfere with the exercise of aboriginal title for its own purposes and the benefit of economic development in the hands of third parties is found to be "in principle" the kinds of legislative objectives that could justify infringement. Because of its interpretation of s.35 as a reconciliation of aboriginal and non-aboriginal interests, the Court uses s.35 itself to provide the governments with broad powers of infringement. A new theory of Crown power appears to be surfacing -- one derived from the original sin of

Confederation, as it continues in s.35. It remains open to wrestle with the underlying theories of Crown power as applied to aboriginal nations.

2. The justification standard, seen from the government's perspective, may be interpreted similar to an expropriation power. So long as the government properly consults, and pays for the interference, it can proceed to interfere with aboriginal lands for the benefit of third parties, sometimes without consent.

   In the developing relationship between aboriginal peoples and Canada, it will be necessary to broaden the understanding of aboriginal title and, in the meanwhile, to strengthen the fiduciary relationship, so as to prevent an expropriation mentality from taking hold. The Court in *Delgamuukw* has provided some tools to prevent this result in its discussion of consultation. Where the interference with aboriginal title goes to the heart of aboriginal societies, or where the nature of the interference will in effect be an extinguishment of their ability to exercise aboriginal title, there are strong arguments to say that consultation will require the consent of the aboriginal nations involved. Further, we have already noted our opinion that the use of provincial power to interfere with title is limited. The justification test will be clarified on a case by case basis, but the immediate task is to better define and use the Court's ruling to require that the Crown's fiduciary obligations operate as a true source of protection.

3. While the manner in which the fiduciary duty is engaged will be determined on a case by case basis, in cases where the *Sparrow* priority is engaged, the government will be required to ensure "'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 interests of the holders of the aboriginal title in the land". (para 167) This requirement will strengthen aboriginal involvement in both the processes of resource management and the allocation of the resource.

4. We can expect that the issue of justification and interference will be the subject of treaties, as it is in the interest of all concerned to clarify the boundaries within which neither federal nor provincial legislation can interfere without the consent of the aboriginal nations involved.

5. The Court's comments on consultation go beyond what presently has been the policy of federal and provincial governments. Consultation must be meaningful, in good faith, and with the purpose of addressing the aboriginal interests at stake. The present consultation policies of the government, in our opinion, do not meet this test. Aboriginal nations should consider the development of consultation protocols with federal and provincial governments which will create mutual clarity as to how consultation will occur. If governments and industry prove willing, the Court ruling provides an opportunity for aboriginal people to teach how to meet one another on human terms and to communicate respectfully about issues of mutual concern. In the absence of these protocols or other changes to existing policies and practices, current federal and provincial policy regarding consultation is now open to challenge.

6. Aboriginal nations have not only called for a resolution of the land question for the future, but also compensation for past loss of use and dispossession. This judgment clearly strengthens that position.

7. The affirmation of the principle of compensation applies equally to aboriginal and non-aboriginal people alike; the principle that the Crown cannot expropriate a property interest without compensation.

8. The federal government's current Comprehensive Claims Policy expressly rules out any discussion of past compensation. However, the Supreme Court of Canada has now indicated that compensation is required should aboriginal title be infringed, as a

necessary element of the discharge of fiduciary obligation. Current Claims Policy on this issue is now not in accordance with the law.

9. Further, in dealing with existing and future licences granted by the Crown to third parties, if those licences interfere with aboriginal title, compensation must be negotiated.

10. Finally, it may be in the interest of some aboriginal nations to litigate the issue of compensation in respect of specific areas. This could be done on a case by case basis, without necessarily litigating aboriginal title throughout the whole of the territory, and may provide immediate benefit in respect of lands and resources which have been destroyed as a result of third party activity, or where non-renewable resources have been depleted.

11. The Court did not say how fair compensation is to be arrived at; however these comments are helpful:

> "This is not to say that circumstances subsequent to sovereignty may never be relevant to title or compensation; this might be the case, for example, where native bands have been dispossessed of traditional lands after sovereignty." (para 145)
>
> "...the treatment of 'aboriginal title as a compensable right can be traced back to the *Royal Proclamation, 1763* ...It must be emphasized, nonetheless, that fair compensation...is not equated with the price of a fee simple. Rather, compensation must be viewed in terms of the right and in keeping with the honour of the Crown." (per La Forest J., para 203)

VI. SELF GOVERNMENT

(a) The Ruling of the Court

Ruling # 6: Aboriginal Right to self-government exists but not yet defined

The Court did not endorse the Court of Appeal's decision that the aboriginal right to self-government had been extinguished.

There was insufficient evidence before the Court to allow a determination on this aspect of the claim. The errors made by the trial judge in his treatment of the oral history meant that the Court could not adjudicate on the claim to self-government.

(b) Analysis: Self Government

1. It is significant that the Court chose not to pronounce broad principles governing the aboriginal right to self-government, as they did with aboriginal title. This leaves the development of the law on the nature, content and scope of the aboriginal right to self-government to be determined on a case by case basis where the findings of fact made by a trial judge will govern the issues. The judgment is disappointing on this issue as it was open to the Court to provide a broad legal framework, and it chose not to.

   However, because the extinguishment ruling was overturned, the issue of self-government rights within s.35(1) remains an open issue to be tried. In addition, the findings of the Court on the importance and relevance of aboriginal laws will assist in the assertion and proof of such rights.

VII. NEGOTIATION

(a) Ruling of the Court

Ruling # 7 The Governments should negotiate treaties in good faith

The Court encouraged the parties to negotiate treaties:

> "...the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith....Let us face it, we are all here to stay."

(b) Analysis: Negotiation

1. Some aboriginal nations have attempted, without success, to force governments to negotiate treaties "in good faith". The good faith standard has developed most notably in the field of labour law, and carries with it a standard of conduct that can be supervised by a court, or a judicial process created by statute to do so.

   We are developing our views regarding good faith negotiations. In the interim we raise a number of questions as to whether negotiations presently conducted through the B.C. Treaty Commission meet the good faith standard. Such questions are these:

   - Is it negotiating in good faith if aboriginal nations have not the financial capacity to participate in the bargaining?
   - Is it negotiating in good faith to require surrender of land as a condition of the treaty?
   - Is it good faith negotiation to draw out the negotiations over a long period of time?
   - Is it good faith negotiation to pre-determine such issues as the amount of land available for the settlement, the fact that there will be no past compensation,

the denial of special tax status, the constitutional status of treaty lands, all in advance of the negotiations?

- Is it good faith negotiation to continue to grant interests in the land while the same land forms the subject matter of the treaty discussions?

In our opinion, the governments' conduct in treaty making must now be reassessed in light of the good faith negotiation directed by the Court.

2. The Court implies a duty on the governments to establish a treaty process consistent with its rulings.

3. It may be desirable to establish a new process which would supervise whether specific actions by the government meet the good faith standard both inside treaty discussions and also covering consultation and compensation issues, on an ongoing basis.

CONCLUSION

The judgment reflects the truth that aboriginal Nations are the original peoples of this country, with an ancient relationship to the land, which the Crown is bound to respect. As long as aboriginal peoples maintain their relationship to the land, they have aboriginal title. The judgment should provide the needed protection for First Nations to continue and renew their relationship to their territory: to establish new and contemporary institutions which permit the evolution of their vibrant societies into the future.

The question is raised: how then is the judgment to be implemented? There will be those, particularly in government, who will resist change, strenuously arguing that they agree with the judgment, but policies are already in place to fulfil obligations to consult, or they will say that aboriginal people cannot prove their title. These responses will only continue the toxic relationship corrupted by injustice, from which we all must heal.

Each culture has its own preoccupation. Aboriginal peoples have a great capacity to form a new relationship which can be mutually beneficial to the settlers and to the lands on which we all make our homes.

The judgment should be treated as providing the shape of that new relationship. The courts have clearly articulated what the law is in Canada, what the government must recognize and not ignore, how that recognition is to be manifested, and the tremendous value the oral histories can provide in establishing understandings about aboriginal people and their culture.

However, there is a chasm, at the present, between the Court ruling, the governments' implementation of the Court ruling through all of its bureaucracies and processes, and finally, the improvement of aboriginal peoples' economic position and fulfillment of their culture on the ground.

We require a critical shift of focus in order to implement this judgment. We will probably require federal legislation to protect aboriginal title and to prevent unjustified provincial erosion of rights. We will probably require new institutions to be developed which will supervise good faith negotiations, and deal with such issues as consultation and compensation and treaty making. We will need new initiatives to support aboriginal peoples as they implement and develop living legal systems, and resume, or restore their relationship with parts of their territory. New legal institutions, both within and outside of aboriginal communities, should be developed to address conflicts in oral histories, overlap disputes, as well as aboriginal/crown/third party reconciliation processes, particularly where new interests in land are to be granted.

The real work ahead is to implement the judgment and the promise to aboriginal peoples it contains.