

*Canada's Issues*

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**DELGAMUUKW**

**A PRELIMINARY ANALYSIS**

**OF THE**

**SUPREME COURT OF CANADA'S DECISION  
FOR A DISCUSSION WITH LEGAL COUNSEL FOR  
BRITISH COLUMBIA AND FIRST NATIONS**

**DEPARTMENT OF JUSTICE CANADA**

**MARCH 3, 1998**

## DELGAMUKW - ABORIGINAL TITLE

### 1. What the Supreme Court of Canada said:

- This decision constitutes the Supreme Court's first comprehensive consideration of the legal principles applicable to Aboriginal title.
- The content of Aboriginal title can be summarized by two basic propositions:
  - Aboriginal title is a right to exclusive use and occupation of land which can be used for a variety of activities which are not necessarily practices, customs or traditions integral to the Aboriginal group. (Para. 111)
  - Because Aboriginal title is a *sui generis* interest in land, there are certain inherent limits to the use to which it may be put by the Aboriginal group. In particular, the use must not be irreconcilable with the nature of the group's attachment to the land in question. (Para. 111)

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• The Court also notes that Aboriginal title:

- must be understood by reference to both the Aboriginal perspective and the common law;  
(Para 112)
- is *sui generis* and can only be transferred, sold or surrendered to the federal Crown;  
(Para. 113)
- derives from the historical occupation and possession of Aboriginal lands prior to the  
assertion of British sovereignty; (Para. 114) and
- is held communally. (Para 115)

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## **2. Preliminary Legal Analysis:**

- Case did not find any Aboriginal title in Gitksan and Wet'suwet'en or any other First Nation.
- Court described content and set out test for proof of Aboriginal title.
- Burden of proof on First Nation claiming title.
- Case sent back for re-trial in B.C. Supreme Court.
- The test for exclusive use and occupation is at time sovereignty was established by the Crown.
- Community/ group holding title may be different from groups in B.C.T.C. process.
- There is a spectrum of Aboriginal rights and the test may be higher for Aboriginal title (*Adams/Coté*).

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## DELGAMUUKW - PROVINCIAL EXTINGUISHMENT

### 1. *What the Supreme Court of Canada said:*

- Since 1871, the exclusive power to legislate in relation to "Indians, and lands reserved for the Indians" has been vested with the federal government by virtue of s.91(24) of the *Constitution Act, 1867*. That head of jurisdiction encompasses within it the exclusive power to extinguish Aboriginal rights, including Aboriginal title. (Para. 173)
- Provincial laws of general application could never extinguish Aboriginal rights because the intention to do so would be outside provincial jurisdiction since laws evidencing a sufficiently clear and plain intention to extinguish Aboriginal rights would be laws in relation to Indians and Indian lands. (Para. 180)
- Provincial laws incorporated by reference through s. 88 of the *Indian Act* are not able to extinguish

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Aboriginal rights including Aboriginal title because s. 88 does not evince a clear and plain intent to extinguish. (Paras. 182 and 183)

## ***2. Preliminary Legal Analysis:***

- Canada was able to extinguish pre -1982 where clear and plain intention is evident.
- Canada is still able to justifiably infringe Aboriginal title.
- Notwithstanding the lack of ability to extinguish, provinces can justifiably infringe Aboriginal title.
- Case does not speak to the validity of pre 1982 provincial grants. However, there are statements at B.C.C.A.-level (Macfarlane) which support the validity of such grants. The question of compensation pre-1982 is not addressed by the Court.
- Leaves open the question of imperial and colonial extinguishment.

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## DELGAMUUKW - JUSTIFICATION FOR INFRINGEMENT

### 1. What the Supreme Court of Canada said:

- Aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute. They may be infringed both by the federal and provincial governments. (Para. 160)
- Principles of justification developed in *Sparrow* and *Gladstone* confirmed. (Paras. 161-164)
- Justification still depends on the legal and factual content of the cases.
- The test of justification requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and Aboriginal peoples. (Para. 162)
- With respect to valid legislative objective, Court broadened range of objectives beyond conservation and public safety to include, in appropriate cases, agricultural development, mining, forestry, hydro-electric projects, general economic development and settlement of foreign

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population. (Para. 165)

With respect to the Crown fulfilling its fiduciary responsibility in justifying an infringement:

- Exclusivity of Aboriginal title means government should give appropriate (not necessarily top) priority to Aboriginal title. (Para. 167)
- Involving Aboriginal people in decisions taken with regard to their lands. Consultation is always required and in most cases something "significantly deeper than mere consultation" is needed. Some cases even require consent. (Para. 168)
- Economic aspects of Aboriginal title indicate that fair compensation will ordinarily be required when Aboriginal title is infringed. (Para. 169)

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**2. Preliminary Legal Analysis:**

- • The decision does not impose a legal duty on Canada to prevent infringement of Aboriginal title by others.
- The case does not impose a legal duty on Canada to promote Aboriginal title.
- The fiduciary obligation to justify infringement includes the duty to consult; the duty to consult ranges from "mere consultation" to full consent with the majority of situations requiring "something significantly deeper than mere consultation" but less than consent.

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## **DELGAMUUKW - CONSULTATION**

### **1. What the Supreme Court of Canada said:**

- The Court held that there is always a duty of consultation as part of the justification of infringement of Aboriginal title and that this duty of consultation will vary with the circumstances of each case. (Para. 168)
- The consultation must be in good faith, and "with the intention of substantially addressing the concerns of Aboriginal peoples whose lands are at issue". (Para. 168)
- The Court goes on to say that "in most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal Nation". (Para. 168)

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## **2. Preliminary Legal Analysis:**

- Whether there is a duty to consult with a particular First Nation over a particular matter, and the extent of that duty, must be evaluated on a case by case basis. There is no "one size fits all" answer.
- Even where there is a duty to consult, (i.e., where Aboriginal rights or title can be proven to exist), the duty to consult does not necessarily equal a duty to obtain consent.
- The case does not require the inclusion of consultation as a term in treaties but does not preclude this.

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## **DELGAMUUKW - COMPENSATION**

### **1. What the Supreme Court of Canada said:**

- Fair compensation will ordinarily be required where Aboriginal title is infringed. This, the judgment states, is consistent with the economic aspect of Aboriginal title and the honor and good faith of the Crown. (Para. 169)
- Issues of how to calculate damages for infringement is a difficult one and had not been argued before the Court. The matter was sent back to trial, without detailed directions for the new trial judge. (Para. 169)
- Decision does not comment on the size of the financial component of a treaty, as distinguished from claims for compensation for infringement of Aboriginal title.

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## **2. Preliminary Legal Analysis:**

- Under Canada's current policy, the negotiation of the financial component of treaties is done with reference to the overall interests of the parties, rather than the perspective of one or other of the parties or what might (or might not) be proven in court. A rights based analysis would change the process significantly.
- Some First Nations may not be able to prove Aboriginal rights or title in court, and therefore will not obtain compensation for infringement. They may not be the correct collectivity, or there may be defenses (i.e. extinguishment) to their claim.

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## **DELGAMUUKW - INTERIM MEASURES**

### **1. What the Supreme Court of Canada said:**

- The Supreme Court of Canada did not specifically comment on interim measures in the *Delgamuukw* decision.

### **2. Preliminary Legal Analysis:**

- Canada's existing policies respecting interim measures and the disposition of federal Crown lands may be consistent with the *Delgamuukw* decision for several reasons:
  1. The Court, in *Delgamuukw*, did not call into question the ability of the federal Crown to extinguish Aboriginal rights and title prior to 1982. Thus, the federal Crown's acquisition of lands prior to 1982 may have extinguished any Aboriginal rights or title.

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2. Canada currently consults with respect to dispositions of federal Crown lands in areas where Aboriginal groups claim Aboriginal rights, even though there is no legal obligation to consult unless a First Nation could establish that they have an Aboriginal right that has been infringed by Canada's actions.

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## **DELGAMUUKW - OVERLAPS**

### **1. What the Supreme Court of Canada said:**

- Joint Aboriginal title can be established by demonstrating shared exclusivity to lands. (para. 158)
- If exclusivity cannot be proven, it may be possible to prove shared, non-exclusive, site-specific Aboriginal rights. (para. 159)
- Where a First Nation has commenced legal proceedings to prove Aboriginal title, it may be advisable if other First Nations who claim Aboriginal title over the same territory intervene in the litigation. (para. 185) Negotiations should include other First Nations that have a stake in the territory claimed. The Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. (para. 186)

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## **2. Preliminary Legal Analysis:**

- Joint Aboriginal title may be proven.
- Although the Court noted that negotiations with a First Nation regarding territorial claims should include other First Nations that have a stake in the territory claimed, the Court did not elaborate on the nature and scope of this direction.

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**DELGAMUUKW - SECTION 91 (24)**

**1. What the Supreme Court of Canada said:**

- "Since 1871, the exclusive power to legislate in relation to 'Indians and Lands reserved for the Indians' has been vested in the federal government by virtue of s. 91(24) of the *Constitution Act, 1867*." ( para. 173)
- The jurisdiction conferred to the federal government over "Lands reserved for the Indians" encompasses not only the power to legislate in relation to "reserves" lands but also the power to legislate in relation to:
  - Aboriginal title (para. 174); and
  - other Aboriginal rights which are related to land (i.e. - site-specific Aboriginal rights) but which fall short of Aboriginal title. (para. 176)

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- The jurisdiction conferred to the federal government over "Indians" encompasses the power to legislate in relation to Aboriginal rights which are not tied to land. (para.178)

## **2. Preliminary Legal Analysis:**

- Lands subject to Aboriginal title are "Lands reserved for the Indians" within the meaning of s. 91(24) and thus are within exclusive federal legislative jurisdiction.
- Provincial laws of general application that affect the core of "Indianness" only apply through s. 88 of the *Indian Act* by becoming federal laws. On its face, s. 88 makes no similar provision for "lands reserved for the Indians".
- The Court confirmed that the Provinces can justifiably infringe Aboriginal rights and title.

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**DELGAMUUKW - CERTAINTY****1. What the Supreme Court of Canada said:**

- Aboriginal title is *sui generis*, and cannot be transferred, sold or surrendered to anyone other than the federal Crown. (Para. 113)
- Aboriginal title is a proprietary right in land which encompasses the right to exclusive use and occupation of land for a variety of purposes, which need not be aspects of traditional Aboriginal practices and traditions. (Para. 111)
- Aboriginal title cannot be put to uses that may be irreconcilable with the nature of the occupation of that land and the relationship that Aboriginal group has with the land. (Para. 128) Uses that threaten their future relationship are by their nature excluded from the content of Aboriginal title. (Para. 127)

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- Nothing the Court said about the nature of Aboriginal title "should be taken to detract from the possibility of surrender to the (federal) Crown in exchange for valuable consideration". "If Aboriginal people wish to use their lands in a way that Aboriginal title does not permit then they must surrender those lands and convert them into non-title lands to do so." (Para. 131)
  
- The jurisdiction to accept surrenders of Aboriginal title lies with the federal Crown, as does the jurisdiction to extinguish Aboriginal title. (Para. 175)
  
- Aboriginal title is held communally. (Para. 115)

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## ***2. Preliminary Legal Analysis:***

- It is questionable whether First Nations have the legal capacity to agree to future uses that are irreconcilable with Aboriginal title except by surrender to the Federal Crown. This may have implications for all interests in lands and resources, now and in future, including the interests of First Nations, federal and provincial governments and third parties.
- The court's pronouncements concerning Aboriginal title and section 91 (24) jurisdiction have implications for certainty techniques other than surrender.

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**DELGAMUUKW - LITIGATE/NEGOTIATE****1. What the Supreme Court of Canada said:**

- The Court emphasized in its concluding statement the importance of negotiating instead of litigating: "Finally, this litigation has been long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts." (Para. 186)

**2. Preliminary Legal Analysis:**

- Canada is firmly committed to the treaty negotiation process. However, Canada must consider the appropriateness of conducting treaty negotiations while litigation is ongoing.

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In determining the appropriateness of conducting treaty negotiations in the face of litigation, Canada's considerations include the following:

- Legal considerations
- Prospects for Progress at the Treaty Tables
- Resourcing/Duplication Considerations

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## **DELGAMUKW - DUTY TO NEGOTIATE**

### **1. What the Supreme Court of Canada said:**

- The Crown is under a moral, if not a legal, duty to enter into and conduct negotiations in good faith. (Para 186)

### **2. Preliminary Legal Analysis:**

- While the case does not impose a legal duty on the Crown to negotiate treaties, it strongly suggests negotiation as a sound alternative to litigation.
- Treaty Making is a voluntary process for all of the parties.
- If negotiations are entered into, then the Crown must conduct those negotiations in good faith.

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