

DELGAMUUKW

BACKGROUND

How the decision affects us...

It is argued that *Delgamuukw* is perhaps the most important judicial decision to impact the field of Aboriginal Affairs in British Columbia. It has become the subject of much discussion and debate, particularly amongst Local Governments. The following article attempts not to render an opinion on the judgement, but rather to provide some much needed clarity to this most timely and important topic.

What was the origin of the case?

On October 24, 1984, 51 Gitksan and Wet'suwet'en hereditary chiefs launched a court action against Canada and British Columbia in the B.C. Supreme Court to recognize their ownership of and jurisdiction over 58,000 square kilometres in the Skeena watershed in northwestern B.C.; their right to govern traditional house territories; and to receive compensation for loss of lands and resources. Gitksan hereditary chief *Delgamuukw* was named as the main plaintiff in the court action.

The hereditary chiefs and elders gave testimony in their own language about their culture and relationship with the land. The trial was one of the longest in Canadian history, lasting for 374 days and accumulating a transcript of 26,000 pages.

In 1991, trial judge Allan McEachern (now Chief Justice of The Supreme Court of B.C.) found that the Gitksan and the Wet'suwet'en had established some subsistence Aboriginal rights in large parts of the territory, but no ownership and jurisdiction over it. Further, the judge found that legislation in pre-colonial B.C. had extinguished those subsistence rights. Nonetheless, the judge determined that the Crown should allow the Gitksan and Wet'suwet'en to exercise certain aboriginal subsistence rights, which were not constitutionally protected, until the Crown land was dedicated to other purposes.

The hereditary chiefs appealed and on June 25, 1993, the B.C. Court of Appeal dismissed their claim to title but strengthened the law around Aboriginal rights. The Court found that the Gitksan and Wet'suwet'en people have "unextinguished non-exclusive aboriginal rights, other than a right of ownership," to much of their traditional territory.

In June 1994, *Delgamuukw* was given leave to appeal by the Supreme Court of Canada but decided to temporarily set aside the action in an attempt to enter into treaty negotiations with B.C. and Canada. When negotiations bogged down and B.C. then Canada withdrew from negotiations, the hereditary chiefs resumed the appeal.

Why is December 11, 1997 significant?

The Supreme Court of Canada handed down its decision on *Delgamuukw* on December 11, 1997. The Court did not rule on the claim to ownership. It instead ordered the case back to trial for a determination of the aboriginal title question for two significant factors:

- ✓ a conversion of the 51 individual claims advanced at trial to two communal claims at the Court of Appeal level was a barrier to the court determining the merits of the appeal; and,
- ✓ the trial judge at the B.C. Supreme Court erred in his treatment of various kinds of oral history evidence brought forth by the Gitksan and Wet'suwet'en to prove their claim. As a result, the court said that the trial judge's factual finds could not stand.

However, before making this order, the Supreme Court of Canada concluded by emphasizing that negotiation is the best approach to reconcile competing interests.

What about Aboriginal title?

Before recommending it go back to trial, the Court outlined a test to prove Aboriginal title. In part, it requires that the aboriginal group making the claim

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prove it held exclusive occupation prior to the time of British sovereignty. In British Columbia, the time of sovereignty was 1846 when the Oregon Boundary was resolved and the Treaty of Oregon signed.

While the court did not define the test for occupation, some factors demonstrating occupation may be dwelling construction, field enclosure, regular use of the land for hunting or fishing, and the First Nations' ability to exclude others from the land. The court also allows for joint title by separate First Nations, if they occupy the land in common and recognize each other's entitlement to the exclusion of others.

The Court also permitted the use of oral histories as evidence for proving title, but the burden of proof would continue to lie with the particular First Nation.

Finally, The Supreme Court stipulated that the Crown – including the Province of B.C. – may infringe upon aboriginal title for valid legislative objectives, including, but not limited to, settling foreign populations and instituting economic development projects that are compelling and substantial. However, two conditions were laid out: consultation and compensation.

What about consultation and compensation?

The Supreme Court's decision in *Delgamuukw* confirmed government's fiduciary obligation to Aboriginal peoples. In other words, the court

outlined the responsibilities of governments if they wanted to infringe upon Aboriginal title for legislative objectives. The court did not make specific reference to the actions of Local Governments.

The court concluded that in most cases the Aboriginal group should be involved in the decision-making process around a proposed infringement. The purpose of this involvement is to allow Aboriginal people to have a say in the uses to which their lands are put.

Such involvement is to be in good faith, and with the intentions of substantially addressing the concerns of the aboriginal people whose lands are at issue.

In short, *Delgamuukw* clarified that compensation would be relevant to the question of justification and that "the amount of compensation payable will vary with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated."

Local Governments and First Nations

The court did not make specific reference to the actions of Local Governments in the decision. Local Governments believe that consultation with First Nations should be a part of a larger public consultation process as mandated by the *Municipal Act*. However, many regional and municipal governments are voluntarily choosing to seek increased Aboriginal involvement when decisions relevant

to those communities are made. An example of this is may be a Regional growth Strategy, or Emergency Preparedness.

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COMMONLY USED TERMINOLOGY

Aboriginal title: The right to exclusive use and occupation of land. Aboriginal title gives those who possess it the right to use the land for various activities, including activities that are not Aboriginal rights.

Limits: A group may not use Aboriginal title lands for purposes that are irreconcilable with the nature of the group's attachment to the land. For example, if a First Nation has traditionally used a piece of land for hunting, the group may not strip mine it, thus destroying its value for hunting.

Held in Common: Aboriginal title is held by an Aboriginal group as a whole.

Sui generis: Aboriginal title is sui generis, meaning that it is unique or of its own kind or class. Aboriginal title does not exist because of anything done by the Crown, but is legally enforceable.

Inalienable: An Aboriginal group can transfer their Aboriginal rights only to the federal Crown.

Section 35: Aboriginal title is a one of the Aboriginal rights recognized and protected by Section 35 of the Constitution Act, 1982.

For more information on Local Government initiatives with First Nations, please contact:

The Fraser Valley Treaty Advisory Committee at
1-800-528-0061; tlittle@fvrd.bc.ca; or
www.fvrd.bc.ca/TAC/tac

The Lower Mainland treaty Advisory Committee at:
604-451-6160; ddidluck@gvrd.bc.ca; or
www.gvrd.bc.ca/LMTACO/lmtac