Delgamuukw

"WE ARE ALL HERE TO STAY"

HIGHLIGHTS

The following are some of the *significant findings* from the *Delgamuukw* decision:

- The Court found that aboriginal title is an exclusive communal interest or a right to the land itself, encompassing more than hunting and fishing rights. It includes the right to choose the uses to which the land can be put and may include rights to the resources of the land. Aboriginal title is a property interest in land — an exclusive interest which puts the Crown on notice that any disposition of this land that fails to address aboriginal title could face challenge.

- The Court emphasized that aboriginal title encompasses the right to choose what happens on traditional lands. Where lands and resources are subject to aboriginal title, First Nations can now expect to be included in governmental decisions involving the allocation of such lands and resources.

- The principles enunciated by the court on aboriginal title may now permit First Nations to assert claims to the fishery, including commercial fishing, if they can demonstrate that control over water bodies was exercised prior to sovereignty.

- The Court recognized that the exclusive nature of aboriginal title requires the government in allocating resources, where required as part of its fiduciary duty, to reflect the priority of aboriginal title. First Nations now have greater leverage to require governments to listen to their concerns and to provide First Nations fair access to resource development opportunities within traditional territories.

- Comments by the Court about the "inescapable economic component" of aboriginal title means that First Nations can argue for compensation by governments for land uses which infringe on the First Nation's aboriginal title. The amount of compensation will depend on the nature and degree of the infringement. This applies to the provincial Crown as well as the federal Crown.

- The Supreme Court has sent a strong message to trial courts to be more open to evidence in the form of oral histories. Trial courts must now give oral histories and other forms of traditional knowledge appropriate weight in establishing First Nations' use and occupancy of their traditional territories.

- The Court found that aboriginal title can be held jointly by more than one First Nation — two or more First Nations may jointly hold aboriginal title if their joint use of the land meets the test of exclusive possession. Exclusive possession is demonstrated by the ability to exclude others. Furthermore, proving aboriginal title does not necessarily require proof of continuous occupation and use where continuity was broken by disruptions imposed on the First Nation.

- It is now clear that the province does not have the authority to extinguish aboriginal title. Only the federal government has the power to extinguish aboriginal title.

- The Court held that in justifying any infringement of aboriginal title, the Crown has a fiduciary duty to consult in "good faith", which is more than mere consultation. Such consultation must address the concerns of the First Nations affected and may go so far as to require First Nations' consent, for example, to hunting and fishing regulations on aboriginal title lands.

- The Crown has a moral, if not legal duty, to enter into and conduct negotiations dealing with aboriginal title in good faith. This is an imperative duty imposed on the provincial and federal Crown.

- The Court introduced a new and different burden on First Nations seeking to prove aboriginal title. Aboriginal title depends not only on proof of occupation, continuity and exclusivity, but also on the communities' degree of connection with the land and the use of the land by First Nations consistent with having preserved their aboriginal title.

- First Nations wishing to use lands under aboriginal title in ways that conflict with that title must first surrender their aboriginal title and convert the lands into non-title lands. First Nations wishing to maintain their aboriginal title must now ensure that their use of the land and resources does not destroy the unique value of the land to the aboriginal community and can sustain future generations.

- The court identified aboriginal title at one end of the spectrum of aboriginal rights protected under Section 35(1) of the *Constitution Act*. At the other end are activities integral to their aboriginal culture, as well as the right to engage in traditional activities such as hunting and fishing. The rights that First Nations have over lands in their traditional territories will vary therefore from a right to the land itself to the right to use the land for traditional practices.

The *Delgamuukw* decision goes a long way to levelling the playing field for First Nations in their dealings with government.

The following is a more detailed overview of the decision:

"DELGAMUUKW DECISION"

(a) Background

The claim by the Gitksan and Wet'suwet'en was originally for "ownership" and "jurisdiction" over separate portions of 58,000 square kilometres of northern British Columbia (their traditional lands). This was transformed on appeal to a claim for aboriginal title and self-government over the territory claimed. The claim by the Gitksan and Wet'suwet'en was dismissed at trial on the basis that their aboriginal rights had been extinguished by colonial legislation inconsistent with these rights. However, the Court granted a declaration that the plaintiffs

were entitled to use unoccupied or vacant Crown lands subject to the general law of the province.

On appeal, the Court of Appeal declared that the appellants' aboriginal rights were not extinguished by colonial instruments. They did not manifest a clear and plain intention to do so. The Court also granted a declaration that the appellants' had constitutionally protected unextinguished, non-exclusive aboriginal rights which were not ownership or property rights but varied depending on the facts in each case. The Court did not grant other declarations related to jurisdiction or extinguishment by grants of fee simple or lesser interests.

(b) Introduction

In the landmark *Delgamuukw* decision, the Supreme Court of Canada ruled that aboriginal title exists in British Columbia and set out the test for proof of that title. The Court said that it is a right in land which can only be interfered with by the province if such interference is justified and proper compensation is paid. However, the Province cannot extinguish this title. Only the federal government, or the aboriginal people through a process of surrender, can extinguish aboriginal title. Finally, the Chief Justice encourages the parties to resolve these matters through negotiated settlements and not in court.

Although the claim by the Gitksan and Wet'suwet'en was sent back for a new trial, the Court provided some guidance as to the content of aboriginal title and its protection under section 35(1) of the *Constitution Act* to assist in future negotiations or litigation. The Court did not rule on the issue of self-government; that must be reconsidered at trial.

ORAL HISTORY

"... the laws of evidence must be adapted in order that this type of evidence (oral histories) can be accommodated and placed on an equal footing with the types of historical evidence the courts are familiar with ..."

One reason for a new trial was the trial judge's treatment of oral histories as proof of aboriginal title and rights. The Supreme Court found that the trial judge erred in failing to give independent weight to oral histories as proof of ownership, use and occupation, in discounting their recollections of aboriginal life and in refusing to admit evidence as to their territorial holdings. Elders' oral histories will now have to be taken more seriously by the courts as proof of occupation and use.

ABORIGINAL TITLE AT COMMON LAW

"The idea that aboriginal title is <u>sui generis</u> is the unifying principle underlying the various dimensions of that title."

The Court felt it was necessary to clarify its position on aboriginal title at common law. It said that aboriginal title is a special and unique interest in land, but not a fee simple interest. Its content must be understood not only by reference to common law but also must take into account aboriginal perspectives of land holding. Aboriginal title is characterized by the fact that it is based on historic occupation prior to British sovereignty and can only be alienated to the Crown. It has a relationship with pre-existing systems of aboriginal law and is held communally.

CONTENT OF ABORIGINAL TITLE

"... aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes..."

What then is the content of this special interest in land? The Court said it is a right to exclusive use and occupation for a variety of activities, not all of which need be aspects of practices, customs and traditions integral to the distinctive culture of aboriginal societies. In other words, it is not limited to such things as hunting and fishing but, for example, may include using the land in the way Indian Reserves are used for oil and gas exploration and extraction.

However, aboriginal communities claiming title cannot put the lands to uses that conflict with the activities that give rise to aboriginal title in the first place. For example, they cannot strip mine land claimed as hunting grounds or create a parking lot on lands claimed for ceremonial purposes. Such uses would end their entitlement to occupy the land and terminate their relationship with it. In other words, the community cannot put the land to uses which would destroy the inherent and unique value of the land enjoyed by the aboriginal community.

The Court said that if aboriginal nations wish to use the lands in ways that are incompatible with aboriginal title, they must surrender their interests in these lands and convert them into non-title lands.

ABORIGINAL TITLE UNDER THE CONSTITUTION

"Aboriginal title at common law is protected in its full form by section 35(1)."

Aboriginal title, once established, is protected as part of the aboriginal rights recognized and affirmed under section 35(1) of the Constitution Act. Aboriginal rights range from practices, customs and traditions integral to the distinctive aboriginal culture, to rights to engage in a particular activity such as hunting and fishing, to a right to the land itself.

PROOF OF ABORIGINAL TITLE

"Aboriginal title, however, is a <u>right to the land</u> itself."

For an aboriginal group to establish aboriginal title, the land must have been *occupied* prior to sovereignty by physical occupation. Present occupation can be relied on as proof of occupation before sovereignty if there is *continuity* between present and pre-sovereignty occupancy, although an unbroken chain of continuity is not necessary. Finally, the occupation must be *exclusive* at the time of occupation, although as between one or more aboriginal groups, there may be joint aboriginal title as long as those groups have the capacity to exclude others.

"... the aboriginal perspective must be taken into account along side the perspective of the common law."

INFRINGEMENT AND EXTINGUISHMENT OF ABORIGINAL TITLE

"Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified ..."

Aboriginal title is not absolute and can be interfered with by federal and provincial legislation if the test of justification is satisfied. However, only the federal government has the power to extinguish aboriginal title. The province cannot extinguish aboriginal title either by laws of general application or under the *Indian Act*.

The test for justification of infringements on aboriginal title involves two stages:

1. Firstly, any infringement of aboriginal rights or title must be in furtherance of a legislative objective that is compelling and substantial, directed at reconciling aboriginal prior occupation with the assertion of Crown sovereignty.

2. Secondly, it involves an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples.

Examples of valid legislative objectives which would justify interference with aboriginal title are the development of agriculture, forestry, mining and hydro electric power, the general economic development of the interior of B.C., the need to protect the environment and endangered species, the building of infrastructure and the settlement of foreign populations in support of these aims.

At the second stage, however, government must consider three aspects of aboriginal title:

1. The *exclusive* nature of aboriginal title requires the government in allocating resources, where the fiduciary duty requires that aboriginal title be given priority, to reflect that priority by, for example, accommodating the participation of aboriginal people in the development of the resources of B.C. The Court said that the conferring of fee simple title for agriculture purposes and the granting of leases and licenses for forestry and mining must reflect the prior occupation of aboriginal title lands and that economic barriers to aboriginal uses of the lands be reduced.

2. Because aboriginal title encompasses the right to choose what can be done with the land, the fiduciary duty requires involving aboriginal peoples in decisions taken with respect to their lands. The government has a duty to consult which is deeper than mere consultation and which may require the full consent of the aboriginal nation particularly where provinces enact hunting and fishing regulations in relation to their lands.

3. There is an "inescapable economic component" to aboriginal title which suggests that appropriate compensation must be made where that title is infringed. The amount of compensation will vary depending upon the nature and degree of infringement.

"In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed."

"LET'S FACE IT"

The Supreme Court of Canada has sent a strong message that aboriginal title requires a process of good faith negotiation and reconciliation between the Crown and First Nations. Aboriginal rights and title cannot be ignored in the general economic development and settlement of the Province. The resolution of these outstanding issues and competing interests is best achieved by negotiation and not litigation. As the Chief Justice observed, "Let us face it, we are all here to stay."

This Aboriginal Law Bulletin is intended to provide our general comments on new developments in the law. The Bulletin is not intended to be a comprehensive review of all developments nor is it intended to provide legal advice. Readers should not act on information in the Bulletin without seeking specific advice on the particular matters which are of concern to them. The firm will be pleased to provide additional details on request and to disucss the possible effect of these matters in specific situations.

Comments or suggestions on matters covered in this Bulletin are appreciated and should be directed to any member of the Aboriginal Law Practice Group.