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ABORIGINAL TITLE: THE SUPREME COURT OF CANADA DECISION IN *DELGAMUUKW* v. *BRITISH COLUMBIA*

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INTRODUCTION

In December 1997, the Supreme Court of Canada issued a groundbreaking ruling containing its first definitive statement on the content of Aboriginal title in Canada. The decision in *Delgamuukw* v. *British Columbia*[1] also describes the scope of protection afforded Aboriginal title under subsection 35(1) of the *Constitution Act, 1982*; defines how Aboriginal title may be proved; and outlines the justification test for infringements of Aboriginal title.

This paper provides a summary review of selected noteworthy findings in the Supreme Court decision on Aboriginal title. The review is preceded by background information on common law Aboriginal title and the constitutionalization of Aboriginal rights by subsection 35(1) of the *Constitution Act, 1982*, concepts that meet in the *Delgamuukw* ruling. The prior judgments of the British Columbia courts are also briefly canvassed.

BACKGROUND

A. Pre-*Delgamuukw* Definitions of Aboriginal Title

British and Canadian courts have sought to define the nature of the legal interest in the land of Canada's Aboriginal peoples for many years. Under now long-established general principles developed in the case law, the Aboriginal interest in land may be surrendered or alienated only to the federal Crown, at which point it passes to the provincial Crown (assuming surrender outside the territories) as an unencumbered Crown title.

Of more immediate relevance, the courts had, by the 1970s, begun to acknowledge the existence of Aboriginal legal rights in the land other than those provided for by treaty or statute. In particular, the 1973 decision of the Supreme Court of Canada (the Court) in

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(1) [1997] 3 S.C.R. 1010.

Calder v. *The Attorney General of British Columbia*[2] ruled that "Indian title"[3] was a legal right, independent of any form of enactment, and rooted in Aboriginal peoples' historic "occupation, possession and use" of traditional territories. As such, title existed at the time of first contact with Europeans, whether or not it was recognized by them.

Although some subsequent case law provided a certain amount of guidance as to how the existence of this common law Aboriginal title might be established,[4] it was less than fully informative as to the scope or content of title. In the 1984 case *Guerin* v. *The Queen*,[5] four members of the Court described it as a unique interest in land "best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered." In its 1988 decision in *Canadian Pacific Ltd.* v. *Paul*,[6] the Court affirmed that its analysis of Aboriginal title to that point led to the "inescapable conclusion … that the Indian interest in land is truly *sui generis* [the only one of its kind]. It is more than the right to enjoyment and occupancy, although, … it is difficult to describe what more in traditional property law terminology."

B. Section 35 Interpretation

The constitutionalization of Aboriginal rights by subsection 35(1) of the *Constitution Act, 1982* created a new legal framework for addressing longstanding Aboriginal claims, including claims to Aboriginal title. Because the provision recognizes and affirms, but does not define, the "existing Aboriginal and treaty rights" of the Aboriginal peoples of Canada, the task of determining the nature and scope of these rights has fallen to the courts.[7]

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(2) [1973] S.C.R. 313.

(3) It is only relatively recently that the courts ceased using the term "Indian" - appearing in subsection 91(24) of the *Constitution Act, 1867* and the *Indian Act* - as both subject and descriptor, in favour of the more inclusive "Aboriginal people(s)" and "Aboriginal." The term "Aboriginal" refers to the original inhabitants of a territory. Section 35 of the *Constitution Act, 1982*, defines the "Aboriginal peoples of Canada" to include Indian, Inuit and Métis.

(4) See, in particular, the Federal Court of Canada (Trial Division) decision in *Hamlet of Baker Lake* v. *Minister of Indian Affairs*, which set out cumulative criteria relating to Aboriginal title: [1980] 1 F.C. 518, additional reasons at [1981] 1 F.C. 266.

(5) [1984] 2 S.C.R. 335.

(6) [1988] 2 S.C.R. 654.

(7) Parliamentary Research Branch publications providing a more comprehensive review of Aboriginal rights issues are *Aboriginal Rights* by Jane May Allain, Current Issue Review 89-11E, *Aboriginal Fishing Rights: Supreme Court Decisions* by Jane May Allain, Background Paper 428E, October 1996.

The Court's section 35 Aboriginal rights decisions prior to *Delgamuukw* largely involved Aboriginal fishing rights. General interpretive principles stated in the Court's groundbreaking 1990 decision, *Sparrow* v. *R.*,[8] and refined in subsequent rulings through 1996[9] include the following:

- The purposes of subsection 35(1) are to recognize the prior occupation of North America by Aboriginal peoples, and to reconcile that prior presence with the assertion of Crown sovereignty;
- In subsection 35(1), the term "existing" refers to rights that were "unextinguished" in 1982, *i.e.*, not terminated or abolished;
- Subsection 35(1) rights may limit the application of federal and provincial law to Aboriginal peoples, but are not immune from government regulation;
- The Crown must justify any proven legislative infringement of an existing Aboriginal right;
- Aboriginal rights may be defined as flowing from practices, traditions and customs that were central to North American Aboriginal societies prior to contact with Europeans;
- In order to be recognized as Aboriginal rights, such practices and traditions must — even if evolved into modern form — have been integral to the distinctive Aboriginal culture;
- Subsection 35(1) protection of Aboriginal rights is not conditional on the existence of Aboriginal title or on post-contact recognition of those rights by colonial powers;
- Aboriginal title is a distinct species of Aboriginal right;
- Self-government claims are subject to the same analytical framework as other Aboriginal rights claims;[10]
- Aboriginal rights cases are to be adjudicated by the application of principles to facts specific to each case rather than on a general basis;

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(8) [1990] 1 S.C.R. 1075.

(9) These include, notably, the "trilogy" of B.C. commercial fishing rights decisions (*R.* v. *Van der Peet*, [1996] 2 S.C.R. 507; *R.* v. *N.T.C. Smokehouse Ltd.,* [1996] 2 S.C.R. 672; *R.* v. *Gladstone*, [1996] 2 S.C.R. 723) as well as Quebec fishing rights cases (*R.* v. *Côté,* [1996] 3 S.C.R. 139, *R.* v. *Adams*, [1996] 3 S.C.R. 101).

(10) See *R.* v. *Pamajewon,* [1996] 2 S.C.R. 821, a case raising self-government issues in relation to high-stakes gambling.

- Courts should approach the rules of evidence in Aboriginal rights matters, and interpret the evidence presented, conscious of the special nature of Aboriginal claims and of the evidentiary difficulties associated with proving a right or rights originating when there were no written records.

As outlined below, the land issues raised in the *Delgamuukw* case provided an opportunity for the Court to apply and adapt these principles to Aboriginal title as a "distinct species" of constitutional Aboriginal right.

PRIOR PROCEEDINGS

A. The Claim

In 1984, 35 Gitxsan and 13 Wet'suwet'en Hereditary Chiefs instituted proceedings against the Province of British Columbia. They claimed, both individually and on behalf of their respective Houses, ownership (unextinguished Aboriginal title) and resulting jurisdiction (entitlement to govern by Aboriginal laws) over separate portions of territory in northwest British Columbia totalling 58,000 square kilometres. The plaintiffs acknowledged the underlying title of the Crown to these lands, but asserted that their claims constituted a burden upon that title. Alternatively, the plaintiffs claimed unspecified Aboriginal rights to use the territory. Compensation for lost lands and resources was also sought.

The province counter-claimed, arguing that the plaintiffs had no right or interest in the land, and that their claim for compensation ought to be against the federal government.

B. The British Columbia Courts

1. Decision at Trial

In March 1991, Chief Justice McEachern of the Supreme Court of British Columbia issued a sweeping and highly controversial ruling[(11)] dismissing the plaintiffs' claims to Aboriginal title, self-government and Aboriginal rights in the territories at issue. Reduced to its essence, the 400-page decision:

- considered the concept of title as interchangeable with that of Aboriginal rights, and characterized the latter as limited to those "arising from ancient occupation or use of land, to

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(11) (1991), 79 D.L.R. (4th) 185.

hunt, fish, take game animals, wood, berries and other foods and materials for sustenance and generally to use the lands in the manner they say their ancestors used them";

- held that prior to the *Constitution Act, 1982*, Aboriginal rights existed at the pleasure of the Crown and could be extinguished at will provided the intention to do so was clear;

- found that Aboriginal rights (title) had been extinguished in the claimed, unceded territory at issue by pre-Confederation enactments intended to convey unburdened title to settlers and thus inconsistent with subsisting Aboriginal title;

- gave little weight to the plaintiffs' evidence in the form of oral history of attachment to the land;

- held that title to the land became vested in the Imperial Crown upon its assertion of sovereignty over the mainland colony of British Columbia in the early or mid 19th Century, and indicated that, in any event, the plaintiffs' post-contact ancestors had not exercised jurisdiction over the territory even before that assertion;

- ruled that since its entry into Confederation in 1871, the Province of British Columbia had title to the soil of the province, the right to dispose of Crown lands unburdened by Aboriginal title, and the right to govern the province within the terms of section 92 of the *Constitution Act, 1867*;

- acknowledged that the provincial Crown did have a fiduciary obligation to permit the plaintiffs, subject to the general law of the province, to use unoccupied Crown lands for subsistence purposes until such time as they were put to another purpose, and not to limit such use arbitrarily;

- dismissed the province's counterclaim.(12)

Under Chief Justice McEachern's reasoning, the Aboriginal title and Aboriginal right of self-government claimed by the plaintiffs had been erased over a century previously, and as such were precluded from qualifying as "existing" rights under subsection 35(1) of the *Constitution Act, 1982.* His ruling was seen by many as seriously at odds with Supreme Court of Canada rulings dealing with constitutional Aboriginal and treaty rights, and was also criticized for its apparent bias in both tone and analytic approach.(13)

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(12) The action against the federal Crown, which had been joined as a defendant for procedural reasons, was also dismissed.

(13) For a more exhaustive review of the reasons for decision of the B.C. Supreme Court, see the Parliamentary Research Branch publication prepared by Wendy Moss and entitled *B.C. Aboriginal Title Case (Delgamuukw* v. *The Queen)*, Background Paper 258E, May 1991.

2. Decision on Appeal

The scope of the trial court's negative findings was somewhat attenuated by the June 1993 decision of the British Columbia Court of Appeal.(14) In it, the five members of the appellate panel were unanimous in rejecting McEachern J.'s finding of "blanket extinguishment" of all the plaintiffs' Aboriginal rights by colonial or provincial enactments,(15) but differed as to the merits of other elements of his decision.

In the end, a 3-2 majority of the Court of Appeal allowed the appeal only on the above point, issuing a declaration that the Gitxsan and Wet'suwet'en "have unextinguished non-exclusive aboriginal rights, other than a right of ownership or a property right," which were protected by the common law and, since 1982, by subsection 35(1) of the *Constitution Act, 1982,* in a large portion of the area claimed. The precise scope, content and consequences of these rights of use and occupation were not defined by the majority, which referred those issues back to the trial judge for determination, while recommending that the parties resolve their differences through consultation and negotiation. All other aspects of the plaintiffs' claim were dismissed. In the view of the dissenting justices, on the other hand, the plaintiffs' Aboriginal rights to Aboriginal title or to land and their rights of self-government had not been extinguished by the assertion of either British or Canadian sovereignty. They, too, urged settlement of outstanding issues by negotiation and political accommodation.

C. The Treaty Process

In March 1994, the Gitxsan and Wet'suwet'en and the Province of British Columbia were granted leave to appeal and cross-appeal the decision of the British Columbia Court of Appeal to the Supreme Court of Canada. The parties then requested and obtained an adjournment of proceedings to enable them to seek a negotiated treaty settlement. In February 1996, the Province of British Columbia suspended negotiations with the Gitxsan owing to "fundamental differences ... over aboriginal rights." The province's Minister of Aboriginal Affairs considered there was "little chance of progress in negotiating … with the Gitxsan without

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(14) (1993), 104 D.L.R. (4th) 470.

(15) It is worth noting that the blanket extinguishment argument advanced before the trial judge on behalf of the Social Credit administration was abandoned on appeal by the newly elected government of the New Democratic Party.

further direction from the Supreme Court of Canada."[16] Subsequent to this breakdown, litigation was resumed. Despite some progress in their negotiations with the province to that point, the Wet'suwet'en remained parties to the proceedings.

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The Court heard arguments in the case on 16 and 17 June 1997 and released its decision on 11 December 1997. Although the six members of the Court taking part in the judgment[17] were unanimous in their conclusions, distinct sets of reasons issued by Lamer C.J. (Cory, McLachlin and Major JJ. concurring) and La Forest J. (L'Heureux-Dubé J. concurring, with McLachlin J. in substantial agreement) differed somewhat as to the appropriate methodology to be used for proving Aboriginal title. Only the former set of reasons is considered below.

A. Preliminary Issues Requiring New Trial (par. 73-108)[18]

Lamer C.J. considered that the Court was precluded from dealing with the merits of the Gitxsan and Wet'suwet'en claims for two reasons. First, the individual claims originally brought by each House had been amalgamated into two communal claims, but had not been formally amended. Because this procedural defect was prejudicial to the province's rights as a litigant, the correct remedy was a new trial.

Second, a new trial was necessary so that the complex and voluminous factual evidence in the case could be assessed in accordance with principles having specific application to Aboriginal claims such as those of the Gitxsan and Wet'suwet'en.[19] In essence, these

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(16) Ministry of Aboriginal Affairs, *News Release*, "Province Suspends Treaty Negotiations with Gitxsan [*sic*]," 1 February 1996, available *via* ministry web site at http://www.aaf.gov.bc.ca/aaf/news/1996/fe0196nr.htm.

(17) Sopinka J. heard arguments in the case but did not take part in the judgment.

(18) Par. 1 through 72 introduce the claim, provide a summary historical overview of the Gitxsan and Wet'suwet'en people, and review the judgments of the B.C. courts.

(19) See heading "Section 35 Interpretation" (p. 2).

principles require trial courts to adapt the rules of evidence in light of difficulties of proof intrinsic to the adjudication of Aboriginal claims,

> 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 … [and which] play a crucial role in the litigation of aboriginal rights (par. 84).

Lamer C.J. found that the trial judge's treatment of the various forms of oral history presented by the plaintiffs to prove traditional occupation and use of the territories claimed had failed to satisfy these principles which, as he noted, had been formulated subsequent to the trial decision.(20)

B. Aboriginal Title in Canada (par. 109-139)

The Chief Justice disagreed with both parties' characterization of Aboriginal title, that of the Gitxsan and Wet'suwet'en for being too broad, that of the province for being too narrow. In his view, the content of Aboriginal title "lies somewhere in between" (par. 111).

1. Features of Aboriginal Title (par. 112-115)

Lamer C.J. identified the *sui generis* [*i.e.*, unique] nature of Aboriginal title as the unifying principle underlying its various dimensions. These are:

- inalienability, in that lands held pursuant to Aboriginal title may be transferred or surrendered only to the Crown: this does not mean, however, that Aboriginal title "is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests" (par. 113);

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(20) For instance, the implications of the trial judge's failure to give one form of oral history any independent weight, or of casting doubt on its authenticity, would be that such histories "would be consistently and systematically undervalued by the Canadian legal system, in contradiction of the [Court's] express instruction to the contrary" (par. 98). Similarly, his expectation that a second form would furnish conclusive or precise evidence of pre-contact Aboriginal activities would "be almost an impossible burden to meet" (par. 101). Finally, the effect of the trial judge's rationale for excluding a third form of evidence based on oral history "may be that a society with such an oral tradition would never be able to establish a historical claim through the use of oral history" (par. 106).

- source, in that Aboriginal title arises from (1) occupation of Canada by Aboriginal peoples prior to the *Royal Proclamation of 1763*: under common law principles, the physical fact of occupation is proof of possession in law; and (2) the relationship between common law and pre-existing systems of Aboriginal law;

- communal nature, in that Aboriginal title is a collective right to land held by all members of an Aboriginal nation.

These features cannot be explained fully under either common law rules of real property, or property rules of Aboriginal legal systems.

2. Content of Aboriginal Title (par. 116-132)

a. Includes right to exclusive use/occupation of the land for various purposes (par. 116-124)

The Chief Justice cited three grounds for rejecting the province's restriction of Aboriginal title to the right to use the land only for activities arising from practices or traditions that were integral to the distinctive culture of the group claiming title. First, the Canadian case law in the field made it clear that Aboriginal title is not limited to such uses. Second, legal principles governing the Aboriginal interest in reserve lands and in lands held pursuant to Aboriginal title are the same and, under the *Indian Act*, the uses and benefits to which reserve lands can be put are very broad, and in no way confined as suggested. Third, the *Indian Oil and Gas Act* providing for oil and gas exploration on surrendered reserve lands presumes that the Aboriginal interest in land includes mineral rights, which are themselves included in Aboriginal title. Lands held pursuant to Aboriginal title should be capable of the same forms of non-traditional exploitation.

b. Land use must be compatible with the nature of attachment to the land (par. 125-132)

Lamer C.J. described limits on the content of Aboriginal title as reflecting its *sui generis* nature. In relation to prior occupation as the source of Aboriginal title, the applicable law seeks both to determine historic rights and "to afford legal protection to prior occupation in the present day" in "recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time" (par. 126). Since continuity of relationship also applies to the future, lands subject to Aboriginal title cannot be put to uses that are "irreconcilable with the nature of the occupation of that land and the relationship that the

particular group has had with the land which together have given rise to aboriginal title in the first place" (par. 128). For example, a group successfully claiming Aboriginal title to land that was occupied as a hunting ground may not use the land in such a way as to destroy its value for hunting.

In the Chief Justice's view, these considerations are also relevant to the inalienability of lands held pursuant to Aboriginal title, in that alienation would terminate both entitlement to occupy the land and any special relationship with it. Inalienability suggests that the lands in question are more than a commodity. Rather, they hold inherent value for the community with Aboriginal title and cannot be put to uses by that community that would destroy that value.

Significantly, Lamer C.J. emphasized that this general limitation on the use of lands does not restrict land use to traditional activities, since this would amount to a "legal straitjacket" on those having a "legitimate legal claim to the land." That is, a full range of uses of the land may be undertaken, subject to the "overarching limit" arising from the special nature of the Aboriginal title in the land in question (par.132).

The Chief Justice also noted that nothing in this approach precludes the surrender to the Crown of lands held pursuant to Aboriginal title; in fact, such lands must be surrendered and converted into non-title lands if Aboriginal peoples wish to use them in a manner incompatible with their title.

3. Aboriginal Title and Section 35 (par. 133-139)

Delgamuukw confirmed that common law Aboriginal title, recognized as a common law Aboriginal right prior to 1982, was "constitutionalized … in its full form" by section 35 of the *Constitution Act, 1982* (par. 133).(21)

Lamer C.J. reiterated the Court's previous findings describing Aboriginal title as distinct from other Aboriginal rights under subsection 35(1) "because it arises where the connection of a group with a piece of land was of a central significance to their distinctive culture" (par. 137). The degree of connection with the land is pivotal in determining the scope of constitutional Aboriginal rights claimed. At one end of the spectrum of rights are those practices or traditions integral to a distinctive Aboriginal culture, but where the use and occupation of land

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(21) The Chief Justice further noted that constitutionalization of common law Aboriginal rights does not signify that these rights exhaust the content of subsection 35(1) (par. 136).

on which the activities occur do not support a claim of Aboriginal title. In the middle, such traditional activities may be intimately related to a specific piece of land, so that a group is able to demonstrate a "site-specific" right to engage in those activities, but not to establish title to that land. Both forms of activity are protected by subsection 35(1). Finally,

> At the other end of the spectrum, there is aboriginal title itself. … [A]boriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. … What aboriginal title confers is the right to the land itself. (par. 138) (emphasis added)

C. Proof of Aboriginal Title (par. 140-159)

The Chief Justice noted that assessment of Aboriginal title claims required adaptation of the Court's existing "test" for Aboriginal rights claims relating to activities on the land. Aboriginal title, on the other hand, is a right to the land, which may itself be used for activities that, being "parasitic on the underlying title," need not be individually protected by subsection 35(1) (par. 140). Both tests, however, shared broad similarities.

1. The land must have been occupied prior to sovereignty (par. 144-151)

a. Applicable Time Frame (par. 144-145)

Lamer J. concluded that the period prior to contact, used in adjudicating Aboriginal rights claims to engage in activities, is an inappropriate time frame in Aboriginal title cases:

- Because Aboriginal title is a burden on the Crown's underlying title, which was gained only upon the Crown's assertion of sovereignty, it follows that Aboriginal title crystallized at that time;
- Under the common law, the act of occupation or possession suffices to ground Aboriginal title without proof that the land was integral to Aboriginal society prior to contact;
- The date of sovereignty can be established with greater certainty than the date of contact;

Later circumstances may be relevant to title, for instance in cases of dispossession of traditional lands occurring after sovereignty.

b. Occupancy (par. 146-151)

To Lamer C.J., both the common law and the Aboriginal perspective on land, including but not limited to Aboriginal legal systems, are relevant for purposes of establishing occupancy. With respect to the former, the fact of physical occupation proves legal possession of the land, which in turn grounds title to it. Such occupation can be established in many ways, including construction, cultivation and resource exploitation; when assessing whether occupation is sufficient to ground title, factors such as the size, manner of life, resources and technological capacity of the claiming group should be considered. Furthermore, since the requirement of pre-sovereignty occupation is sufficient to establish the central significance of the land to the culture of the claiming group, the test for Aboriginal title need not explicitly include the latter element.

2. In certain cases, there must be continuity between present and pre-sovereignty occupation (par. 152-154)

In recognition of the potential scarcity of conclusive evidence of pre-sovereignty occupation, the Chief Justice stipulated that a group claiming Aboriginal title may prove such occupation through evidence of present occupation, supplemented by evidence of continuity. The claiming group need not establish "an unbroken chain of continuity," but rather "substantial maintenance of (their) connection" with the land (par. 153). Provided this substantial connection has been maintained, a claim to Aboriginal title need not be precluded by alterations in the nature of the occupation between sovereignty and the present.

3. Occupation must have been exclusive at sovereignty (par. 155-159)

Lamer C.J. noted that this requirement, like occupation, is proved with reference to both common law and Aboriginal perspectives. Thus, notwithstanding the common law principle of exclusivity linked to fee simple ownership, the test for exclusive occupation in Aboriginal title claims must consider the context of the Aboriginal society in question at sovereignty. In this light, exclusive occupation can be demonstrated, depending on the circumstances, even if other Aboriginal groups were present on or frequented the lands claimed. In addition, the exclusivity requirement need not preclude the possibility of joint title shared between two or more Aboriginal nations, for instance where more than one group shared a

particular piece of land, recognizing each other's entitlement to the exclusion of others. Moreover, evidence of non-exclusive occupation may still establish shared, site-specific Aboriginal rights short of title, for example on lands adjacent to those subject to a title claim and shared for hunting by a number of groups.

D. Justification of Infringements of Aboriginal Title (par. 160-169)

1. General Principles (par. 160-164)

a. The infringement must further a compelling/substantial legislative objective (par. 161)

The Chief Justice reiterated his view that substantial legislative objectives are those directed at the purposes underlying the constitutionalization of Aboriginal rights, *i.e.*, recognition of Aboriginal peoples' prior occupation of North America, and reconciliation of that occupation with the Crown's assertion of sovereignty. The latter purpose is particularly relevant at the justification stage: because Aboriginal societies are part of a broader community over which the Crown is sovereign, limitations on Aboriginal rights will sometimes be justified in the pursuit of objectives of importance to the community as a whole, and are a necessary part of the reconciliation of Aboriginal societies with the broader community.

b. The infringement must be consistent with the fiduciary relationship (par. 162-164)

The nature of the Crown's fiduciary duty toward Aboriginal peoples depends, in Lamer C.J.'s view, on the legal and factual context at issue. While that duty may sometimes demand that Aboriginal interests be given priority, in other contexts it may involve further questions such as whether the infringement is minimal, whether fair compensation is available, and whether the Aboriginal group has been consulted. The degree of scrutiny of infringing measures required by the fiduciary duty will also vary depending on the nature of the Aboriginal right at issue.

2. Application to Aboriginal Title (par. 165-169)

a. A broad range of legislative objectives may justify infringement (par. 165)

Lamer C.J. held that most of these objectives relate to reconciling Aboriginal peoples' prior occupation with the assertion of Crown sovereignty, and thus, to the situation of Aboriginal societies within the broader Canadian community:

> (T)he 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. (par. 165)

The question of whether an infringing measure is related to such objectives will require assessment on a case by case basis.

b. The nature of the fiduciary duty is determined by the nature of the title (par. 166-169)

The Chief Justice pinpointed three aspects of Aboriginal title as relevant in this respect. First, the right to exclusive occupation and use of the land influences the degree of scrutiny of infringing actions. For instance, a fiduciary duty requiring that Aboriginal title be given priority does not entail an absolute requirement, but rather a government demonstration that the process of resource allocation and the actual allocation reflect the prior interest of the holders of Aboriginal title. Examples of such a demonstration include accommodating Aboriginal participation in resource development, conferral of fee simple or resource exploitation authorizations that reflect prior occupation, reduction of economic barriers to Aboriginal uses of their lands, and so forth. This issue may involve an assessment of the various interests at stake in the resources; difficulties in determining the value of the Aboriginal interest in the land may also be expected.

Second, the fact that Aboriginal title includes the right to choose the uses of land suggests that the fiduciary relationship may be satisfied by involving Aboriginal titleholders in decisions respecting their lands. While the Crown always has a duty of consultation, the nature and scope of that duty vary with the circumstances. Lamer C.J. stressed that even in rare cases

of minor infringement, "when the minimum acceptable standard is consultation, this 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" (par. 168).

Third, as a result of the "inescapably economic aspect" of Aboriginal title, fair compensation will ordinarily be required to fulfil the Crown's fiduciary duty when Aboriginal title is infringed. The amount of compensation will vary according to the nature of the Aboriginal title in question, the severity of the infringement, and the extent to which Aboriginal interests are accommodated.

E. Right of Self-Government (par. 170-71)

The Chief Justice observed that the need for a new trial precluded the Court from dealing with this aspect of the plaintiffs' claim. Furthermore, under the Court's previous case law, self-government claims "cannot be framed in excessively general terms" as had been done in the present case (par. 170).

F. British Columbia's Cross-Appeal (par. 172-183)

Lamer C.J. rejected the province's claim that it had enjoyed the power to extinguish Aboriginal rights, including Aboriginal title, from the time it joined Confederation in 1871 until the entrenchment of subsection 35(1) in the Constitution. His reasons include findings that:

- Subsection 91(24) of the *Constitution Act, 1867* gave the federal government exclusive legislative authority in relation to "Indians, and Lands reserved for Indians," which encompasses the jurisdiction to legislate in relation to Aboriginal title, including its extinguishment;

- Subsection 91(24) also protects a "core of Indianness" that falls within the scope of federal jurisdiction and encompasses the whole range of Aboriginal rights protected by subsection 35(1): laws purporting to extinguish those rights are thus beyond the provinces' legislative authority;

- Although, under the terms of section 109 of the *Constitution Act, 1867*, underlying title to lands in the province vested with the provincial Crown, the provision makes provincial

ownership subject to "any Interest other than that of the Province" in those lands: Aboriginal title is such an interest;

- Provincial laws of general application, *i.e.*, which do not single out Indians for special treatment, do apply to Indians and Indian lands, but may not have the effect of extinguishing Aboriginal rights, in part because such laws would be unable to satisfy the "clear and plain intent" standard for the extinguishment of rights without exceeding the province's jurisdiction;

- Section 88 of the *Indian Act* incorporates by reference provincial laws of general application which would not otherwise apply to Indians, but does not allow these laws to extinguish Aboriginal rights: not only does the provision not contain the required "clear and plain intent," but its explicit reference to treaty rights suggests a clear absence of intention to undermine Aboriginal rights.

G. Conclusion and Disposition (par. 184-186)

Lamer C.J. allowed the appeal in part, dismissed the province's cross-appeal, and ordered a new trial. He explicitly did not encourage a resumption of litigation, however, advising the parties to settle their dispute through negotiations instead. In the Chief Justice's view, "[t]hose negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith." Negotiated settlements "with good faith and give and take on all sides" would, he concluded, achieve the reconciliation purpose of subsection 35(1) (par. 186).

COMMENTARY

The Supreme Court of Canada's *Delgamuukw* decision was expected to have significant, if undetermined, repercussions on the future negotiation and settlement of comprehensive land claims based on Aboriginal title, land use policy and Aboriginal title litigation in those regions of the country where traditional Aboriginal lands have not been ceded by treaty. These include not only most of British Columbia, but also, for example, parts of Quebec and Atlantic Canada.

Delgamuukw continues to represent a momentous affirmation of the existence and constitutionally protected status of Aboriginal title in Canada. It seems important, however, to underscore the fact that the Court did not rule on the merits of the Gitxsan and Wet'suwet'en

Aboriginal title claim. The effects of its decision are therefore more directive than conclusive. *Delgamuukw* provided government, Aboriginal claimants, and the lower courts with comprehensive new guidelines for the future settlement or litigation of the Gitxsan and Wet'suwet'en and other comprehensive land claims.

In practical terms, the various parties' responses to the *Delgamuukw* decision remain to be fully played out in terms of policy developments, negotiation processes and the frequency of recourse to the judicial system. Given the history of land claim negotiations, the fact that the Court recommended that ongoing land claim disputes be resolved through negotiation offers no assurance that its guidelines will in fact facilitate the negotiation process or preclude litigation in relation to individual claims. On the other hand, the *Delgamuukw* ruling provided a compelling impulse to the parties to reaffirm the treaty process through negotiation.

In short, the *Delgamuukw* decision established an unprecedented theoretical framework that represents the basis for developing the law of Aboriginal title in Canada, rather than the culmination of the law's development. The law of Aboriginal title will continue to evolve as principles of the *Delgamuukw* framework are implemented.

CHRONOLOGY OF DEVELOPMENTS

The concluding portion of this document lists some noteworthy post-December 1997 developments that are related, directly or indirectly, to the Supreme Court of Canada's *Delgamuukw* ruling.

January 1998

- The British Columbia Treaty Commission (BCTC)[22] urged federal and provincial governments and First Nations to "work together to re-invigorate the treaty process or face

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(22) In B.C., the treaty-making process and governing principles for negotiations were set out in the BC Claims Task Force Report of 1991 and incorporated in the tripartite Treaty Commission Agreement of 1992. In accordance with the terms of the Agreement, federal and provincial statutes were enacted to establish the British Columbia Treaty Commission. The BCTC is responsible for facilitating treaty negotiations in the province, not including the recently concluded Nisga'a negotiations. It accepts First Nations into the treaty making process; assesses when the parties are ready to start negotiations; allocates funding, primarily in the form of loans, to First Nations; monitors and reports on the progress of negotiations; identifies problems and offers advice; and assists the parties in resolving disputes. Two of the BCTC's five Commissioners are appointed by the First Nations Summit, while

the likelihood of increased economic uncertainty through litigation and renewed confrontation." The then Chief Commissioner characterized the *Delgamuukw* decision as "already having a major impact on the B.C. treaty process" in which approximately 50 B.C. First Nations were engaged. He acknowledged both that "[n]ew mandates and approaches, given the complexity of issues facing [the parties], won't happen overnight," and that *Delgamuukw* could be seen by First Nations as "strengthening their positions and lowering the traditional barriers to litigation as an alternative to negotiation."(23)

February 1998

- The BCTC noted that the two levels of government and the First Nations Summit, the Aboriginal party to the creation of the BCTC regime, had agreed to collaborate in identifying changes to the treaty process that might be required by the *Delgamuukw* ruling. In its view, all parties involved recognized that "the Supreme Court left many questions unanswered which are best answered through negotiations. A court may declare aboriginal title to a specific area, but there will still be a need to negotiate jurisdiction and to reconcile aboriginal and non-aboriginal interests."(24)

March 1998

- The federal Minister of Indian Affairs and Northern Development, the B.C. Minister of Aboriginal Affairs and the Grand Chief of the First Nations Summit Task Group announced the anticipated joint review of the B.C. treaty process in light of the *Delgamuukw* ruling, with the principal objective identified as "finding ways to expedite the reconciliation of the interests of Canada, British Columbia and First Nations." The parties also agreed on the need to engage third parties and business leaders in a broader dialogue about the Supreme Court ruling. A senior-level committee was mandated to meet over a two-month period to

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Canada and British Columbia each appoints one. The Chief Commissioner is appointed by agreement among the parties. The present Chief Commissioner, Miles Richardson, began a three-year term in November 1998.

(23) British Columbia Treaty Commission, *News Release*, "Treaty Commission Urges Changes to Safeguard Treaty Process," Vancouver, 28 January 1998. The text of this and other BCTC documents are available online at http://www.bctreaty.net/.

(24) British Columbia Treaty Commission, *Newsletters*, "Supreme Court Decision Underlines Need for Negotiation," Vancouver, February 1998.

examine the decision's impact on the treaty process and to "improve the treaty process to achieve the agreements necessary for economic and social stability in B.C."[25]

- The Confederacy of Nations of the Assembly of First Nations (AFN) adopted resolutions calling, in part, for implementation of *Delgamuukw* principles through reform of federal comprehensive land claims policies, and for the replacement of "offensive" federal laws and policies by measures consistent with the Court's directions in *Delgamuukw*.[26]

April 1998

- The treaty process review commenced, with senior officials for Canada, B.C. and First Nations meeting in two three-day sessions, during which working groups were established on specific issues. Issuing from this round, the participants agreed to recommend an Action Plan to their Principals for review. Topics addressed in this plan included Aboriginal title, accelerated negotiations on certain treaty components, capacity-building, and certainty.[27]

May 1998

- Participants in the annual Business at the Summit forum of First Nations and non-Aboriginal businesspeople acknowledged that the *Delgamuukw* decision had increased uncertainty about investing in B.C. They also, however, saw the ruling as supportive of developing partnerships between Aboriginal and non-Aboriginal communities.[28]

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(25) Government of Canada, Government of British Columbia, First Nations Summit, *News Release*, "Canada, British Columbia and First Nations Agree to a Joint Review of the B.C. Treaty Process," Vancouver, 13 March 1998.

(26) Resolutions 2/98 and 3/98 of 11 March 1998, affirmed in June 1998 by AFN General Assembly Resolution 34/98. All AFN resolutions are available online at http://www.afn.ca/eng_main.htm

(27) Department of Indian Affairs and Northern Development (DIAND), *Backgrounder*, "Increased Federal Government Support for British Columbia Treaty Negotiations," 7 July 1998. The text of this and other documents issued by DIAND are available online at http://www.inac.gc.ca.

(28) Federal Treaty Negotiation Office, "Business Opportunities Abound in Post-*Delgamuukw* Environment," *Treaty News*, June 1998, available online at http://www.inac.gc.ca/pubs/treaty/june98/index.html.

June 1998

- The Leader of the Opposition called on the federal government to enact legislation to end uncertainty resulting from the *Delgamuukw* decision, and establish rules on Aboriginal title.(29)
- In its annual report, the BCTC named the *Delgamuukw* decision as the defining event of 1997-98, and identified some matters that were under discussion in the tripartite review, such as recognition that land, resource and cash issues should be addressed earlier in the treaty process, and the need to improve the current-six stage process. In addition, the BCTC stated that overlapping claims and the implications of *Delgamuukw* for consultation processes and interim measures were also outstanding issues requiring the parties' attention:

> *Delgamuukw* has escalated First Nations' demands for a role in dealings by government over lands and resources within their territories. There are too many First Nations in the process for that to be achieved through treaties alone. Other means must be found. *Delgamuukw* suggests consultation processes become negotiation processes so that interim measures and economic development agreements become treaty building blocks.

  The BCTC urged the parties to re-establish the tripartite review process, which was described as being at a standstill owing to B.C.'s decision to engage Canada and the First Nations Summit Task Group in bilateral talks. It further noted that, while nearly all First Nations in the B.C. treaty process preferred negotiation, they also "expect government mandates and approaches to change in response to *Delgamuukw*."(30)

July 1998

- In what was described as the first court case to deal with B.C. land claim issues since *Delgamuukw*, the British Columbia Court of Appeal upheld the denial of an interlocutory injunction to the Kitkatla Band, which had sought to prevent logging on land to which they claim title, pending a trial on the title question. In making its decision, the Court took the position that nothing in the *Delgamuukw* ruling had changed the law relating to injunctions. Of central importance to the Kitkatla Band's case was the scope of the provincial Crown's

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(29) Office of the Leader of the Opposition, *News Release*, "Time to Legislate an End to Delgamuukw Uncertainty," Ottawa, 8 June 1998.

(30) British Columbia Treaty Commission, *Annual Report 1998,* "Challenges - Delgamuukw Decision Defining Event of 1997," Vancouver, June 1998.

obligation to consult in cases where Aboriginal title is asserted but not yet established. The B.C. courts recognized this as a serious issue.(31)

- In keeping with the parties' recognition of the need to address issues related to First Nations' capacity, the federal government announced the formation of a thirteen-person Capacity Panel with representation from Aboriginal communities (interior and coastal), the resource sector, the BCTC and other fields.(32) The role of the Panel is described as

> [looking] at existing programs and, through consultation with industry and First Nation communities, [identifying] capacity enhancement needs. Based on this information, the panel will: (1) make recommendations on how current programs might be readjusted to better fit the needs; (2) … identify areas where there are gaps between current programs and capacity enhancement needs; (3) … identify joint opportunities to enhance First Nation capacity to negotiate and implement treaties and manage land and resources; and, (4) … assess funding requirements for additional capacity initiatives.(33)

The Panel was expected to present its recommendations to the Minister of Indian Affairs and Northern Development by the end of 1998. The federal government indicated that, over the next three to five years, resources would be made available to support initiatives recommended by the Panel; basic financial support to assist First Nation capacity-building would be approximately $3 million per year.(34)

September 1998

- In an Accord Between the Province of British Columbia and The Hereditary Chiefs Of The Wet'suwet'en People, the parties agreed to address issues raised by the *Delgamuukw* ruling and to "reinvigorate" treaty discussions. The agreement includes commitments to work together in resource planning and development and economic development; focus on economic development as a priority for two existing bilateral working groups studying lands and resources and human services; collaborate on job training and development initiatives;

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(31) *Kitkatla Band* v. *British Columbia (Minister of Forests)*, [1999] 2 C.N.L.R. 170. See text under June 1999 heading and associated footnote.

(32) Department of Indian Affairs and Northern Development, *News Release*, "Canada Demonstrates Commitment to Revitalizing Treaty Process," Vancouver, 7 July 1998.

(33) *Backgrounder*, note 27.

(34) *Ibid.*

possibly involve local government and industry in bilateral discussions; and ensure that Canada's fiduciary obligations with respect to activities resulting from the Accord are fulfilled.(35)

- A Reconciliation Agreement Between Her Majesty In Right Of British Columbia And The Hereditary Chiefs Of The Gitxsan was also signed to enable the parties to deal with issues related to the *Delgamuukw* decision. The Agreement provides for three levels of discussion: between B.C. and the Gitxsan on issues such as wildlife and habitat management, forestry, mining and economic development; between Canada and the Gitxsan in areas such as fisheries, capacity-building and compensation; and among B.C., Canada and the Gitxsan on trilateral matters, subject to Canada's agreement to resume treaty discussions on the basis of the Gitxsan framework agreement reached in July 1995 before negotiations were suspended.(36)
- The B.C. government released operational guidelines designed to assist provincial ministries and agencies, particularly in the land and resource sectors, to meet the *Delgamuukw* requirement for consultation of First Nations on proposed Crown land activities that might infringe Aboriginal title. The process does not involve a determination of the existence of Aboriginal title, which must be proved by First Nations. In announcing these guidelines, the provincial Minister of Aboriginal Affairs commented that "[t]his is not the province's comprehensive response to *Delgamuukw*. We will continue to discuss consultation requirements … with First Nations organizations and the federal government."(37)

October 1998

- The BCTC reported the parties' agreement to continue the tripartite review process on issues including Aboriginal title and certainty, the role of the BCTC, consultation, negotiation financing for First Nations and interim measures. On the last issue, the BCTC reiterated its

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(35) Government of British Columbia, Ministry of Aboriginal Affairs, *News Release*, "Agreement Reinvigorates Treaty Discussions with Wet'suwet'en," Smithers, B.C., 14 September 1998. The text of this and other documents issued by the provincial Ministry are available online at http://www.aaf.gov.bc.ca/aaf/.

(36) Government of British Columbia, Ministry of Aboriginal Affairs, *News Release*, "Agreement Renews Treaty Discussions with Gitxsan First Nation," Hazelton, B.C., 15 September 1998.

(37) Government of British Columbia, Ministry of Aboriginal Affairs, *News Release*, "Province Releases First Nations Consultation Guidelines for Government Staff," Victoria, 29 September 1998. See *Consultation Guidelines* at Ministry website under *Delgamuukw* heading.

view of the importance of negotiated interim measures agreements as a means of balancing interests pending the conclusion of treaty negotiations, and listed recent agreements. The BCTC also commented on challenges associated with negotiating such agreements on land and resource issues, and the parties' recognition of "the importance of coming to arrangements to deal with [these matters] where they are key to the negotiation of treaties."(38)

- The BCTC also noted that both the Nisga'a Final Agreement and the *Delgamuukw* decision signal the importance of resolving overlapping land claims and reported that a number of First Nations had concluded agreements on boundaries or agreed on a process for resolving overlaps, with other agreements pending. In addition, a 1997 First Nations Summit protocol to assist First Nations to resolve overlaps was being studied, while the parties agreed to include the overlap issue in their tripartite review. The BCTC proposed that agreements in principle be signed only if key guidelines in the area of overlapping claims were followed.(39)
- BCTC Commissioners indicated that no B.C. First Nations had officially left the treaty process since the *Delgamuukw* decision, although several were pursuing litigation concurrently.(40)

December 1998

- Based in part on *Delgamuukw*'s affirmation of the economic aspect of Aboriginal title and its assertion that "fair compensation [would] ordinarily be required" for infringements of title, the AFN Confederacy of Nations adopted a resolution calling on the federal and provincial governments to "adopt new treaty mandates that explicitly recognize that they will negotiate fair compensation for past and present infringements of Aboriginal title as a substantive issue in the B.C. treaty process."(41)

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(38) British Columbia Treaty Commission, *Newsletter*, "Interim Measures Keep Peace," Vancouver, October 1998.

(39) *Ibid.*, "Overlap Agreements A Must in Treaty Negotiations."

(40) *Ibid.*, "Commissioners Respond to Questions About Treaty Process."

(41) Resolution 72/98 of 9 December 1998.

January 1999

- The Post-*Delgamuukw* Capacity Panel formed in July 1998 submitted its Final Report to the Minister of Indian Affairs and Northern Development.(42) Focusing on means to expedite negotiations in substantive areas, as well as to address the need for capacity building, the Panel recommended, *inter alia*, that governments offer settlements of land, resources and cash more quickly, where the parties agree; that the parties undertake additional analysis of issues such as the staged implementation of treaty benefits, the usefulness of interim measures, and the sharing of benefits flowing from business arrangements; and that the parties study the possibility of reaching agreements on land, resources, cash and aspects of governance, and deferring other, less pressing issues. In a further key proposal, the Panel recommended the "establishment of a 7 - 9 member, First Nation majority, stand-alone committee to review and recommend proposals for capacity building initiatives, and the utilization of an existing delivery system to maximize efficiencies and minimize administrative costs."(43) The Panel declined to outline criteria for the evaluation of proposals for capacity initiatives, because of its view that such criteria would more appropriately be developed by the proposed committee.

February 1999

- In the context of a conference on "*Delgamuukw*: One Year After," the AFN British Columbia Regional Vice-Chief claimed that the Court's decision had not changed the federal and provincial approach to treaty negotiations. In his view, "[i]t's time for aboriginal people to get organized around *Delgamuukw* and around the fact of our title and then the governments will be compelled to deal with us in a meaningful way." Professor Frank Cassidy, who chaired the conference, was also quoted as stating that federal and provincial governments were using treaty negotiations to undercut *Delgamuukw*.(44)

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(42) The *Post-Delgamuukw Capacity Panel Final Report* is available online *via* the DIAND website.

(43) *Ibid.*, Executive Summary.

(44) Ian Dutton, "B.C. Ignoring Court, Natives Say: Negotiators Don't Recognize Title Despite Delgamuukw, Leader Charges," Victoria *Times Colonist*, 19 February 1999, p. A3.

- Following a joint meeting to discuss outstanding issues associated with the *Delgamuukw* decision, DIAND and the AFN "agreed that the *Delgamuukw* policy review process would be ongoing and inclusive."(45)

March 1999

- The British Columbia Supreme Court ruled on the question of whether the Crown's "moral" obligation to negotiate treaties in good faith, affirmed by the Chief Justice in *Delgamuukw*, was also a legal obligation. The case against Canada and B.C. by the Gitanyow First Nation,(46) which had been engaged in treaty negotiations since 1993, had been initiated in the context of the imminent conclusion of the Nisga'a Final Agreement, which recognizes as Nisga'a territory portions of the territory in the Nass watershed that are claimed by the Gitanyow.(47) The Court held that, while the federal and provincial Crowns were not under an obligation to enter into treaty negotiations with the Gitanyow, as they had done so their fiduciary obligations toward Aboriginal peoples resulted in "a duty to negotiate in good faith" that was binding on all Crown representatives.(48) The Gitanyow case raised the overlap issue that affects many claims in British Columbia, as underscored by the BCTC. In deciding a preliminary procedural matter in the case, the Supreme Court judge noted that "myriad Court applications seem inevitable unless the treaty negotiation process deals with overlapping claims." In his view, "if the parties fail to deal with [this] conspicuous problem, they may well face Court imposed settlements which are less likely to be acceptable to them than negotiated settlements."

April 1999

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(45) "Delgamuukw National Process," *Backgrounder*, undated, available online *via* the AFN web site under "Links."

(46) The Gitanyow are culturally Gitxsan.

(47) The Gitanyow sought declarations (1) that in undertaking to negotiate a treaty with the Gitanyow, and in proceeding with those treaty negotiations, the federal and provincial Crowns are obliged to negotiate in good faith and to make every reasonable effort to conclude and sign a treaty with the Gitanyow, and (2) that for the federal and provincial Crowns to conclude a treaty with the Nisga'a "or to allow the designation for any purpose related to the Nisga'a Treaty over lands and resources in respect of which Gitanyow, Canada and British Columbia are involved in a treaty process until treaty negotiations with the Gitanyow are concluded" would be contrary to the Crown's duty to negotiate in good faith, significantly undermine the Gitanyow claim to "overlapping" territory in the Nass Valley and nullify the Gitanyow treaty process. The Gitxsan and Tahltan First Nations also claim territory in the Nass watershed.

(48) *Gitanyow First Nation* v. *Canada*, [1999] 3 C.N.L.R. 89, par. 70-75.

- Canada and British Columbia appealed the Gitnayow ruling on the basis, *inter alia*, that subjecting the treaty process to court supervision could turn negotiations into an avenue for litigation.
- The federal Minister of Indian Affairs announced a three-year, $15-million investment to finance initiatives for enhancing the capacity of British Columbia First Nations to take part in land and resource management negotiations and consultations. British Columbia also committed $2 million for the 1999-2000 fiscal year. In keeping with the recommendation of the Post-*Delgamuukw* Capacity Panel, a nine-person Capacity Initiative Council (CIC) was also formed. Composed of a majority of First Nations representatives, together with representatives from business and the labour sector, the CIC is to assess project proposals and recommend funding allocations, based on guidelines it establishes for defining the criteria and conditions that determine eligibility for funding. Any B.C. First Nation with an unresolved land claim may respond to the CIC's call for proposals, whether or not it is involved in the BCTC process. Capacity enhancement proposals to be considered for funding may pertain to individuals, institutions, or businesses.(49)
- Canada, British Columbia and the Sechelt Indian Band signed the first Agreement-in-Principle (AIP) to be reached under the BCTC process.(50)

May 1999

- At a Fraser Institute conference on "The *Delgamuukw* case: Aboriginal Land Claims and Canada's Regions," academics, politicians and Aboriginal leaders expressed a range of opinion on the present and potential impacts of the Court's ruling.(51) For example, while participants generally agreed that British Columbia remained the region most directly affected by the decision, the possibility that it might enable non-B.C. First Nations to re-negotiate existing land surrender treaties was also raised. The ruling was variously characterized as "an invaluable lever" for Quebec's Aboriginal communities, as having created an unworkable regime for reconciling economic development and Aboriginal rights

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(49) Department of Indian Affairs and Northern Development, *News Release*, "Canada Invests $15 Million to Enhance First Nations' Capacity to Participate in Land and Resource Negotiations and Consultations," Vancouver, 15 April 1999; *Backgrounder*, "British Columbia Capacity Initiative," 15 April 1999; Federal Treaty Negotiation Office, "$15 million invested in B.C. Capacity Initiative," *Treaty News*, June 1999, available online at http://www.inac.gc.ca/pubs/treaty/june99/invest.html.

(50) A summary of the Sechelt AIP is available online *via* the DIAND or provincial Ministry website.

(51) Conference information may be found at http://www.fraserinstitute.ca/.

in British Columbia, as a victory for Aboriginal people, and as a "recipe for bureaucratic paralysis." Other views advanced included a proposal that federal legislation be enacted that would "come very close" to extinguishing Aboriginal title, as long as compensation was provided. It was also argued that *Delgamuukw* had not destroyed British Columbia's ability to govern, since the decision enables governments to infringe Aboriginal title.(52)

June 1999

- The Gitanyow and the federal and provincial governments agreed to resume active treaty negotiations on an accelerated basis and to place in abeyance the second question raised by the Gitanyow case against the federal and provincial Crowns: whether the signing of the Nisga'a Final Agreement was contrary to the Crown's duty to negotiate in good faith with the Gitanyow in light of their overlapping claim.(53)
- Lack of consultation with the affected Klahoose First Nation led to the withdrawal of a Sunshine Coast forestry development plan by the British Columbia Ministry of Forests and International Forest Products Ltd., and to their agreement not to log the area in question for a minimum five-year period. The Ministry further agreed to consult the Klahoose on future forestry management decisions. Acknowledging that the Ministry is responsible for ensuring that Aboriginal peoples are consulted on development issues involving their traditional territories, a forestry official noted that First Nations have varying expectations with respect to the *Delgamuukw* consultation requirement, and that it is not simple for the Ministry to ensure that all its legal obligations are met.(54)

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(52) Peter O'Neil, "Delgamuukw Decision 'to Have Wide Fallout' on Native Claims: The Ruling on a B.C. Aboriginal Land Action Is Strengthening Rights Elsewhere, Experts Say," *Vancouver Sun*, 27 May 1999, p. A4; "Delgamuukw Decision 'an Unworkable Regime': A B.C. Liberal MLA Says the Ruling Has Created a Flawed System in Trying to Reconcile Aboriginal Rights and Economic Projects," *Vancouver Sun*, 28 May 1999, p. A6.

(53) Subsequent developments are outlined under November 1999.

(54) The scope of the *Delgamuukw* consultation requirement has been and continues to be raised in numerous court cases; see, for example, *Kitkatla Band* v. *British Columbia (Minister of Small Business, Tourism and Culture)*, [1999] 1 C.N.L.R. 72 (B.C.S.C.), in which the Court found the duty to consult had not been met, reversed on other grounds in *Kitkatla Band* v. *British Columbia (Small Business, Tourism and Culture)*, File Nos. VO3364 and V03385, 19 January 2000 (B.C.C.A.); *Chief Councillor Alice Munro* v. *British Columbia (Minister of Forests) et al.*, File No. A981672, 9 July 1998 (B.C.S.C.); *Halfway River First Nation* v. *British Columbia (Ministry of Forests)*, File Nos. CA023526 and CA023539, 12 August 1999 (B.C.C.A.), affirming [1997] 4 C.N.L.R 45 (B.C.S.C.).

- The BCTC Annual Report, noting that the full impact of *Delgamuukw* is not yet known, commented that "[o]ne result of the decision is enough uncertainty on all sides to make treaty negotiations a more attractive option than litigation." In this respect, it reported that recommendations developed through the tripartite review process were under consideration, and described the focus of the review as being

> to find ways to accelerate negotiations around land, resources, cash and the financial components of treaties. First Nations who are borrowing large sums of money to finance their treaty talks have become frustrated. As negotiations drag on, they see the resources in their territories being depleted or alienated and they fear there will be little left with which to meet their treaty expectations. They are seeking assurance that treaties will leave them better off than they are now. *Delgamuukw* and its confirmation of aboriginal title heightened First Nations' expectations that their concerns would be addressed. Resolving issues around land and resources sooner rather than later will restore confidence in the treaty process.

  The BCTC further observed that *Delgamuukw* made it clear that a single cash payment to individual Aboriginal people is not an option for resolving treaty issues, because Aboriginal title is held by groups, not individuals. Therefore governments must settle claims with First Nations that hold title, rather than with First Nation members.(55)

- The Report commented that a "statement of mutual recognition" might satisfy, at least in part, *Delgamuukw*'s clear directive that treaty negotiations must reconcile Aboriginal title with Crown title, and noted that a joint statement by Canada, British Columbia and the First Nations Summit was expected. The BCTC again stressed that the need for effective interim measures underscored in *Delgamuukw* "has become more pressing."(56) It predicted that an anticipated interim measure cost-sharing agreement between the provincial and federal governments would "ease the way to treaties" for First Nations, and protect their interests pending the conclusion of treaties.(57)

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(55) British Columbia Treaty Commission, *Annual Report 1999,* "The Legal and Political Landscape after Delgamuukw," Vancouver, June 1999.

(56) *Ibid.*

(57) British Columbia Treaty Commission, *News Release*, "Several Treaties with First Nations within Reach, Says Treaty Commission Annual Report Card," Vancouver, 24 June 1999.

- The BCTC underscored First Nations' need for "adequate funding to negotiate on an equal footing with Canada and British Columbia," and further observed that "[t]he increase in First Nations in Stage 4 [37 B.C. First Nations were then in AIP negotiations] and the shrinking total budget, has resulted in significantly decreased allocations." Forecasting that $38.4 million would be required to support First Nations' negotiations during the 2000-01 fiscal year, the BCTC said it had "informed Canada and BC that, without more funding, many First Nation treaty offices and research efforts will falter. Even those First Nations nearing completion of agreements in principle or otherwise making progress in negotiations will find it difficult if not impossible to sustain the pace of negotiations."(58)
- The survey of B.C. First Nations in the BCTC process indicated that negotiations with the Wet'suwet'en Nation were proceeding, while the Gitxsan had not yet resumed tripartite negotiations.(59)
- Reactions to the BCTC's Annual Report were mixed. Leaders of the First Nations Summit welcomed the Report's findings related to the need for increased funding to support negotiation and improved interim measures, and requested a meeting with the federal Minister of Indian Affairs and the provincial Minister of Aboriginal Affairs to discuss these issues.(60) The President of the Union of B.C. Indian Chiefs reportedly stated that 45% of the province's Aboriginal people disagree with the treaty process, which he described as leading to extinguishment of title and greater economic uncertainty for First Nations. In his view, the *Delgamuukw* ruling clearly recognized the existence of Aboriginal peoples' legal interest in and title to B.C. land and resources.(61)

July 1999

- The Capacity Initiative Council established in April 1999 approved 74 of 167 applications for funding in fiscal year 1999-2000. The successful proposals, which are eligible for

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(58) British Columbia Treaty Commission, *Annual Report 1999*, "Negotiation Funding Inadequate."

(59) *Ibid.*, "First Nations in Stage 4."

(60) "First Nations Summit Urges Governments to Implement Recommendations Contained within the 1999 BC Treaty Commission Annual Report," Canada News-Wire, Vancouver, 25 June 1999.

(61) "Smooth Road Expected for Aboriginal Treaties," *Regina Leader-Post*, 25 June 1999, p. C9. The positions of the UBCIC on Aboriginal Title and Rights and related issues are available online at: http://www.ubcic.bc.ca/publications.htm

funding at the same levels over the following fiscal year, were allocated various amounts up to $75,000, with a total commitment of $5 million. The moneys were to be distributed monthly as of October 1999, contingent upon the recipients' meeting accountability requirements through regular reports. Many of the approved projects fall under the heading of land and resource management, and are designed to build capacity for post-treaty management, as well as to enable First Nations to deal better with current consultation matters.(62)

- The AFN General Assembly resolved to initiate the "*Delgamuukw* Implementation Process" to "review the 1986 federal Comprehensive Claims policy with a view to developing an alternative approach which is based on recognition of Aboriginal title consistent with the *Delgamuukw* decision." The resolution was based, in part, on the AFN's view that the "Government of Canada refuses to change the Comprehensive Claims policy to recognize Aboriginal title in conformity with the *Delgamuukw* case," but rather "continues to use the AFN/DIAND National *Delgamuukw* Review as an excuse for not changing its Comprehensive Claims policy," As a result, the review "has become prejudicial for those First Nations who assert Aboriginal title and who want the *Delgamuukw* decision implemented."(63)

September 1999

- A B.C. Chiefs' Report, released concurrently with a meeting of the First Nations Summit, called on Aboriginal leaders to begin considering alternatives to the B.C. treaty process in light of disagreement between Aboriginal and government parties on issues of compensation and Aboriginal title.(64)
- Following unsuccessful negotiations to obtain a provincial logging permit, members of the Westbank First Nation carried out unlicensed logging on Crown lands to which it claims title in south-central British Columbia. This initiative was seen by some as the tip of the iceberg

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(62) Federal Treaty Negotiation Office, "First Nations Receive Funds to Improve Lands and Resources Capacity," *Treaty News*, November 1999, available online at http://www.inac.gc.ca/pubs/treaty/nov99/funds.html

(63) Resolution 5/99, 22 July 1999.

(64) Kim Pemberton, "Immediate Benefits Planned for Natives," *Vancouver Sun*, 16 September 1999, p. A10.

of Aboriginal dissatisfaction with the province's perceived failure to address the implications of the *Delgamuukw* decision.(65) In an unprecedented alliance, both the Union of British Columbia Indian Chiefs and the First Nations Summit endorsed Westbank logging activities,(66) as did numerous other local, regional and national Aboriginal groups.(67) First Nations in various parts of the province declared intentions to follow the Westbank example; some, citing *Delgamuukw*, did so. The province petitioned the British Columbia Supreme Court for orders directing Westbank loggers to comply with a stop-work order issued by the Minister of Forests but, on 28 September, the Court ruled that a court would first have to deal with conflicting issues of Aboriginal and Crown title. At the Court's request, the Westbank First Nation voluntarily ceased logging activity. The province sought leave to appeal the ruling.(68)

- The B. C. Cabinet approved "Treaty-Related Measures" to "revitalize the existing B.C. treaty process and ensure [Canada] contributes its fair share to making treaty negotiations work." It called on the federal government to follow suit and finalize cost-sharing arrangements. Government documentation suggested that "Treaty-Related Measures" might advance the

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(65) For example, it was also reported that the Gitxsan, likening their situation to that of the Westbank, planned to go to court to argue their right to cut timber, based on *Delgamuukw* principles. In March 1999, the Forest Appeals Board had ruled, in relation to a 1995 charge of trespassing on Crown land to log and a substantial fine, that the Forests Ministry had failed to take into account the rights of the Gitxsan: "Gitxsan to Court in Dispute on Logging," *Vancouver Province*, 10 September 1999, p. A29.

(66) "First Nations Summit Passes Unanimous Resolution in Support of Westbank First Nation," Canada News-Wire, 15 September 1999.

(67) Prominent among these was the Carrier Sekani Tribal Council, whose Chiefs were engaged in seeking to prevent major forestry companies from transferring into their traditional territory in the absence of interim forestry measures that would protect their interests prior to an eventual treaty settlement. In their view, *Delgamuukw* confirmed their title to the forest resource, and "they will not sit by while their members remain unemployed and they go into debt negotiating for empty lands": Carrier Sekani Tribal Council, *News Release*, "CSTC Supports Westbank First Nation's Title to Their Forests," Prince George, 29 September 1999.

(68) Chuck Poulsen, "Both Sides in Logging Dispute Hope for Solution," *Kelowna Daily Courier*, 22 September 1999; "Court Weighs Logging Dispute," *Brantford Expositor*, 24 September 1999, p. A9; Kim Pemberton, "Court Turns Down Victoria Bid to Stop Westbank Logging," *Vancouver Sun*, 28 September 1999, p. A4; Suzanne Fournier, "Westbank Nation Logs Key Victory: Judge Refuses to Halt Timber Cutting on Land in Dispute," *Vancouver Province,* 28 September 1999, p. A11; "Westbank Band Scores Court Victory," *Victoria Times Colonist*, 28 September 1999, p. A1; Kim Pemberton, "Province Appeals Logging-Ban Ruling: A Judge Refuses to Grant a Request to Force an End to Cutting, but the Westbank Band Stops Voluntarily," *Vancouver Sun*, 29 September 1999, p. B8.

treaty process more effectively than the interim measures policy for which the province had assumed the full cost. It described the measures as "designed to help expedite treaty negotiations. They also help the province meet its legal obligations arising from *Delgamuukw* and related court cases, resolve conflicts over land and resource use, and facilitate economic development. They could also include land and resource protection."(69) At least some B.C. Aboriginal leaders viewed the announced measures as unlikely to renew the treaty process.(70)

October 1999

- B.C. Interior First Nations leaders planned to travel to the United States and Europe to argue for a boycott of B.C. forest products that are, they allege, illegally taken from Aboriginal lands. A Council of Forest Industries spokesperson acknowledged that such a boycott threatened the industry.(71)
- The First Nations Summit convened an extraordinary special assembly to address B.C. First Nations' disappointment with treaty negotiations and perceived lack of commitment to the treaty process on the part of both levels of government. Grand Chief Edward John described the negotiation process as at a "crossroads." In his view, "[t]he governments continue to come to the ... table with unilateral preconditions that are clearly unacceptable ... and it flies in the face of the principles of good faith negotiations."(72)
- At the special assembly, the B.C. Minister of Aboriginal Affairs announced that treaty-related measures would include:

    - a commitment to table agreement-in-principle offers expeditiously;
    - a provincial contribution of $20 million towards a Treaty-Related Measures fund, cost-shared 50-50 with the federal government;

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(69) Government of British Columbia, Ministry of Aboriginal Affairs, *News Release*, "Cabinet Approves Measures to Revitalize Treaty Negotiations," Victoria, 29 September 1999.

(70) Suzanne Fournier, "B.C. Resources Overture Brushed Off by Natives," *Vancouver Province*, 1 October 1999, p. A44.

(71) "B.C. Chiefs Seek Lumber Boycott Abroad: Leaders of Three Interior Bands Are Going to Washington, New York and Geneva in a Bid Launch an International Campaign against the Purchase of B.C. Wood...," *Vancouver Sun*, 21 October 1999, p. B7.

(72) British Columbia Treaty Commission, *Newsletter*, "Changes to Treaty Process May Spur Negotiations," Vancouver, November 1999.

- a willingness to resume discussions with the First Nations Summit on the issue of achieving certainty through treaty settlements;
- a commitment to listen to First Nations views on revenue sharing, co-management and compensation; and
- an invitation to First Nations and the forest industry to discuss the establishment of a First Nations steering committee on access to timber.(73)

Addressing the issue of compensation, the Minister acknowledged First Nations' belief that treaties "are intended as settlements of past claims," and stated the province's willingness to discuss the issue with the other parties to negotiations.(74)

- Following the assembly, the First Nations Summit remained critical of both levels of government, citing the issue of compensation(75) and the ongoing alienation of traditional lands and resources. The BCTC Chief Commissioner remarked that the First Nations in attendance had not voted to suspend the treaty process, suggesting that they were not prepared to leave a process it had taken so long to obtain. He noted that "[a]fter *Delgamuukw*, the parties agreed to make changes to invigorate the treaty process. Those changes will affect treaty negotiations in the coming months and test the political will of the parties. It is too early to tell if those changes will be sufficient to bring about agreements."(76)

November 1999

- The British Columbia Supreme Court granted the petition of the Minister of Forests for interlocutory relief to prevent a number of First Nations from continuing to log on Crown land, pending determination of their claim to Aboriginal title and a right to log.(77) In a related case, the Court ordered that the dispute between the provincial Ministry of Forests and the Westbank First Nation be sent to trial on an expedited basis rather than being dealt

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(73) Government of British Columbia, Ministry of Aboriginal Affairs, *News Release*, "Treaty Measures Offer Resource Opportunities for First Nations," North Vancouver, 29 October 1999.

(74) Honourable Dale Lovick, Speech to First Nations Summit, North Vancouver, 29 October 1999.

(75) The First Nations Summit has identified compensation as a key issue in treaty negotiations, and has cited governments' lack of willingness to discuss it as a negotiation item as one of the reasons underlying the lack of progress in the treaty process: see British Columbia Treaty Commission, *Newsletter*, "Compensation a Key Issue in Negotiations," Vancouver, November 1999.

(76) British Columbia Treaty Commission, *Newsletter*, note 72.

(77) *British Columbia (Minister of Forests)* v. *Okanagan Indian Band*, [1999] B.C.J. No. 2545 (Q.L.), 12 November 1999.

with by way of summary hearing. In the judge's view, a trial was necessary owing to the complexity of issues of accommodation and justification described in *Delgamuukw* that also arose in this case. Furthermore, "[t]he question of the [First Nation's] title is not uncontested. It is clear ... that the [Crown] is not prepared ... to concede that the [First Nation has] title or rights over the area claimed and will challenge such claims."(78)

- The BCTC reported that the federal and provincial governments had agreed to the following statement on Aboriginal and Crown title:

> The parties agree to the negotiation of treaties respecting the following principles:
>
> 1. The parties recognize that Aboriginal title exists as a right protected under section 35 of the *Constitution Act, 1982*.
> 2. Where Aboriginal title exists in British Columbia, it is a legal interest in the land and is a burden on Crown title.
> 3. Aboriginal title must be understood from both the common law and Aboriginal perspective.
> 4. As acknowledged by the Supreme Court of Canada, Aboriginal people derive their Aboriginal title from their historic occupation, use and possession of their tribal lands.
> 5. The parties agree that it is in their best interest that Aboriginal and Crown interests be reconciled through honourable, respectful and good faith negotiations.(79)

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(78) *British Columbia (Minister of Forests)* v. *Westbank First Nation*, File No. 46440, 12 November 1999.

(79) British Columbia Treaty Commission, "The Treaty Commission's Role in the Review," *After Delgamuukw: The Legal and Political Landscape*, Vancouver, November 1999.