

British Columbia after the *Delgamuukw* Decision: Land Claims and other Processes

GURSTON DACKS

Department of Political Science

University of Alberta

Edmonton, Alberta

Contrairement aux attentes initiales, la décision *Delgamuukw* de la Cour Suprême, en 1997, n'a pas engendré d'accord concernant les revendications territoriales en Colombie Britannique. Au lieu de cela, la décision a durci les positions des deux gouvernements et des Premières Nations engagés dans l'élaboration du traité de la Colombie Britannique. L'impasse à laquelle on a abouti a laissé aux Premières Nations un sentiment de frustration. Afin de refréner ce sentiment et d'intégrer plus pleinement les Premières Nations dans la vie de la province, les gouvernements ont mis en place des mesures économiques temporaires et la province consulte maintenant de manière constante les Premières Nations relativement aux activités de développement sur des terres sur lesquelles les autochtones peuvent avoir des droits. Cet article examine les frustrations des Premières Nations et l'effet de ces mesures.

Contrary to initial expectations, the Supreme Court's 1997 *Delgamuukw* decision has not produced land claims settlements in British Columbia. Instead, the decision hardened the positions of the two governments and the First Nations engaged in the British Columbia treaty process. The resulting impasse has frustrated the First Nations. To contain these feelings and to integrate First Nations more fully into the life of the province, the governments have implemented interim economic measures, and the province now actively consults First Nations concerning development activities on lands on which they may hold Aboriginal rights. The paper considers the impact of these policies and the frustrations of First Nations.

On 11 December 1997, the Supreme Court of Canada delivered its long-awaited decision in the case of *Delgamuukw v. British Columbia*. British Columbians and others initially received the decision as a transforming event in the history of Aboriginal-Crown relations. For its part, the First Nations Summit of BC, representing the many First Nations actively negotiating land claims settlements in what is known as the British Columbia treaty process, informed the federal government that the decision confirmed Aboriginal title to all of BC and “complete

authority, jurisdiction and decision making in our territories and over our resources.”¹ Mel Smith, constitutional advisor to earlier BC governments, shared this general analysis, but not any enthusiasm for it. In his judgement, the decision “drastically undermined the Crown ownership of 94 per cent of the land mass of BC” and severely limited the province’s ability to make policy regarding land and resources.²

Five years post-*Delgamuukw*, it is possible to assess the validity of these early reactions. This

paper, based on interviews with First Nation and governmental officials, will examine the impact of the *Delgamuukw* decision on the politics of land claims negotiations in British Columbia.³ It will argue that, far from transforming land claims negotiations in British Columbia, the *Delgamuukw* decision both enabled and compelled the federal and provincial governments to maintain their existing negotiating mandates and to resist First Nations' efforts to cause them to improve government offers at the negotiating table. Two factors explain this inflexibility. First, the expansive characterization that the Court gave to Aboriginal title makes it extremely valuable, where it can be proven to exist. It would be very expensive, both politically and financially, to offer First Nations enough compensation to gain their surrender of this title or even their consent that it be limited. Second, the Court's judgement did not definitively compel the governments to change their offers. In the absence of this compulsion they compared the costs and benefits of changing versus maintaining their negotiating positions and concluded that the latter was simply the lower cost option. To compensate for the lack of flexibility in their bargaining positions and to encourage the integration of First Nations into the province's mainstream economy, both governments expanded their efforts to promote First Nations economic development. Also, the provincial government intensified its consultations with First Nations on questions concerning land use and resource developments on lands to which the First Nations might have rights or title. In this way, during the term of the New Democratic government of British Columbia, the *Delgamuukw* decision strengthened processes integrating British Columbia's First Nations into the provincial economy and political system. However, it failed to accelerate the negotiation of land claims.

THE *DELGAMUUKW* DECISION

In the case as the Supreme Court received it (*Delgamuukw* 1997), 51 hereditary chiefs of the

Gitskan and Wet'suwet'en First Nations claimed Aboriginal title over portions of British Columbia totaling 58,000 square kilometres, and a right of self-government.⁴ For technical reasons, the Court declined to rule on the claim for self-government. Moreover, it did not provide any general guidance for future cases involving this question (*ibid.*, paragraphs 170 and 171). It also ruled that flaws in the presentation of the case in the lower courts prevented it from considering the appeal of their judgements regarding Gitskan and Wet'suwet'en title, and that a new trial would be required if the appellants' claim were to be properly addressed (*ibid.*, paragraph 77).⁵

While the Court did not resolve the specific issues in this case, it did articulate a number of principles that are fundamental to understanding the nature of Aboriginal title and the jurisdiction of governments regarding it.⁶ These principles importantly affect First Nations-Crown relations in general and land claims negotiations in particular. The Court affirmed that Aboriginal title is a property right to the exclusive use and occupation of land, and that it is protected under s. 35 (1) of the *Constitution Act, 1982*. The Court ruled that First Nations could use their lands for purposes beyond those associated with their traditional practices and customs. As Aboriginal title extends to the resources on the land, such purposes could include the development of oil, gas, and other mineral resources (*ibid.*, paragraphs 117, 133).

The Supreme Court thus confirmed that Aboriginal title is a right that potentially attaches to particular pieces of land. This position logically leads to the question, "Where does Aboriginal title actually exist?" The Court ruled that any Aboriginal group asserting title must demonstrate that its ancestors exclusively occupied the land in question prior to the date of the assertion of British sovereignty. In the case of British Columbia this is 1846. Also, if part of the proof of this prior occupation is present-day occupation, there must be evidence of a continuity between the occupancy before 1846 and that of today, although the record of continuous occupation might well be broken. In such instances,

evidence of ongoing cultural values or systems of Aboriginal law related to the land can constitute continuity (ibid., paragraphs 143-151).

If Aboriginal title is confirmed over certain lands, that title is not absolute. In the view of the Court, “the purpose of s. 35 (1) is to reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty.” Therefore, Aboriginal rights in general and Aboriginal title in particular may be infringed by either the provincial or the federal government, provided that such infringement is justified. Following the Court’s opinion in the *R. v. Sparrow* case (1990) infringement is justified if it is “in furtherance of a legislative objective that is compelling and substantial.” Also, it must be “consistent with the special fiduciary relationship between the Crown and aboriginal peoples” (*Delgamuukw*, paragraph 161). In other words, any infringement must respect the governments’ responsibility for the well-being of Canada’s Aboriginal peoples. For example, there should be as little infringement as is necessary to accomplish the government’s goal. Fair compensation should be paid. The Aboriginal people whose title is being infringed should be consulted concerning the infringement. The Court saw a broad range of government goals as potentially justifying infringements of Aboriginal title. These include

the development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment and endangered species, the building of infrastructure and the settlement of foreign populations to support those aims (ibid., paragraph 165).

The Court also turned its attention to the ultimate infringement of Aboriginal title — its extinguishment. It affirmed that the federal government has the authority to extinguish Aboriginal title, provided that such an action satisfies the test described above and that the government clearly expresses its intention to extinguish title (ibid., paragraph 175). In other

words, legislation inconsistent with Aboriginal title could not be interpreted as “implicitly” extinguishing it; the government’s intention must be clear. The Court also ruled that the provincial government does not have, and never had, the authority to extinguish Aboriginal title (ibid., paragraphs 180-181).

The *Delgamuukw* decision also extended very important principles contained in recent judgements concerning the significance of oral testimony. The Court declared that the oral testimony of Aboriginal persons on questions such as historical fact and Aboriginal traditions should be given the same credibility and weight as documentary evidence (ibid., paragraphs 78-88). This maxim should greatly benefit Aboriginal peoples by enabling them to present their own understandings, particularly as articulated by elders, of such questions as the meaning and spirit of treaties as against the documentary record, which reflects the understanding of non-Aboriginal governments. Indeed, oral testimony is likely to figure very significantly in litigation currently under way, such as that of the Samson First Nation in Alberta against the Government of Canada (Flanagan 2000, p. 156). Of particular relevance to this paper, the heightened status of oral evidence should make it easier for Aboriginal peoples to demonstrate the continuity of their cultural attachment to particular parcels of land, hence their Aboriginal title to it.

The Court closed its decision by urging governments and Aboriginal peoples to negotiate rather than to litigate questions of title in order to avoid lengthy, costly, and exhausting legal processes and to more effectively pursue a new and satisfactory relationship between the Crown and Canada’s original inhabitants.

GOVERNMENTAL RESPONSES TO THE *DELGAMUUKW* DECISION

The *Delgamuukw* decision poses enormous potential problems for governments with jurisdiction over Crown lands that may be burdened by Aboriginal title. These involve all areas of Canada in which

Aboriginal title has not been explicitly extinguished, most usually by land cession treaties. These areas include most of British Columbia and the Atlantic provinces and parts of Yukon, Quebec, and Ontario, as well as the special case of the southwest portion of the Northwest Territories.⁷

Natural resource development figures prominently in the economic planning of the governments of these areas. However, the very expansive description of Aboriginal title that forms the heart of the *Delgamuukw* decision jeopardizes these plans. By increasing the value of title, it increases the amount of compensation that the governments must offer First Nations to induce them to give up their title and thus facilitate government policies of promoting resource extraction. If Aboriginal title is not terminated, the Court's view that Aboriginal peoples must receive compensation if their titles are infringed could require governments to share royalties and other resource rents (*Delgamuukw*, paragraph 169). Particularly for British Columbia, which is heavily dependent on natural resource rents, and most of which is subject to Aboriginal title claims because it is not covered by treaties (Tennant 1990), these payments could be so substantial as to affect the balance of the province's budget. To these sums must be added the cost of compensation required when the building of infrastructure such as roads and pipeline rights-of-way infringes title. Indeed, some projects may be found to infringe unjustifiably on an Aboriginal title and may be prevented from proceeding. The likelihood of the courts or governmental policy processes producing this outcome is hard to judge. However, even if it occurs relatively rarely, governments may find their economic development strategies frustrated because private developers may delay or abandon potential projects because of uncertainties that could affect the security and profitability of their investments. These include uncertainties concerning the identity of the regulators with whom they will have to interact after the settlement of claims, and how they might modify existing regulatory regimes.

The governments have responded to these considerations in ways related both to the process of land claim discussions and to the substance of the positions they bring to these discussions. Regarding process, the governments have welcomed the Supreme Court's endorsement in *Delgamuukw* of negotiation as the best way to resolve the land claims issue. This matches their preferences to avoid the uncertainties that arise when First Nations turn to litigation. To foster successful negotiations, the governments, in conjunction with the First Nations participating in the British Columbia treaty process, undertook a study of the First Nations' capacity to engage in the negotiations. One result of this study was that in the Spring of 1999 the federal government made \$15 million available over a three-year period to assist the First Nations in undertaking the research, training, and consultations necessary for them to manage and ideally to accelerate their participation in the treaty process.

However, this funding relates to process, not to negotiating mandate. Regarding this fundamental issue, the federal and provincial governments changed their positions only minimally.⁸ Because the *Delgamuukw* decision did not confirm the actual existence of Aboriginal title on any particular area or parcel of land, it did not alter the status of any of the lands under negotiation. Because, so far, no Aboriginal title has been confirmed, the decision does not currently compel governments to pay a First Nation compensation for infringement of Aboriginal title. As a result, it does not at present impose costly burdens on either government. In addition, the governments believed, for reasons that will be discussed later in this paper, that it will be very difficult for First Nations to prove their title in court. For these reasons, they did not feel pressed to alter the basic positions that they brought to the various land claims negotiating tables, particularly in view of the elevated price tag of offers likely to be acceptable to First Nations post-*Delgamuukw*.

The land claims policy of the two governments comprises five basic elements. The first and most

fundamental of these is the view that the purpose of the negotiations is to create the basis for a successful relationship between the Aboriginal peoples of British Columbia and the governments of the province and Canada. In other words, the negotiations are not about compensating First Nations for past, present, and future infringements on Aboriginal rights or title. To proceed on this latter basis would require establishing the location of all Aboriginal titles in the province. Compensating First Nations for past resource use in these locations would require agreeing on the cash value of these resources, and on the harm done to individual First Nations by the extraction of these resources. Because the symbolic and financial importance of these subjects to both governments and Aboriginal peoples makes agreement regarding them very unlikely, the question of compensation would inevitably be resolved through litigation. This would delay the settlement of claims for years and cost enormous sums of money. Construing the negotiations as exercises in relationship building rather than compensation for infringements of rights or title may be a reasonable position to take. However, this approach limits the impact of the *Delgamuukw* decision on the governments' bargaining positions, because they are not based on the value of Aboriginal title.

The second important element of the governments' claims policy is the limitations they have set on their negotiating mandates. The NDP government of British Columbia took the position that, because First Nations people account for 5 percent of the total population of the province, First Nations should hold no more than 5 percent of the land of the province at the end of the treaty process. The new Liberal government is most unlikely to take a more generous position on this question.⁹ To First Nations in BC this position is unacceptable because they argue it would not confirm their ownership of enough land to provide them with a viable economic base for the future — an outcome of the process that they consider fundamental. In addition, as noted above, the governments have not used the concept of compensation for past resource extraction as a basis for

deciding the financial and land components of their negotiating mandates.

Third, the governments have maintained their position on the final and fixed content and meaning of Aboriginal title after a land claim is settled. The governments' goal in claims negotiations is to end the great uncertainty that surrounds the concept of Aboriginal title and that limits their authority to develop Crown land. Their approach to "certainty" is that the documents establishing land claims settlements will articulate 100 percent of the rights to land and resources that the First Nation signatories possess. While these rights may derive from Aboriginal title that "flows through" the settlement, the enjoyment of rights, including title, will be no more than is stipulated in the settlement itself. The governments have insisted that First Nations with settled claims will not be able to turn to the courts in the future to attempt to expand their enjoyment of their rights. The governments insist on this principle to prevent First Nations from taking any action after settling their claims that might limit governmental authority or negate the certainty that is the governments' basic goal in negotiating land claims. First Nations have difficulty distinguishing this position from the former government insistence that claims settlements should extinguish Aboriginal rights and title. They strongly resist such an outcome because they see it as denying their identity and their primordial relationship to the land and the Creator.

The three positions just described form the core of the mandates of the governmental negotiators at the claims tables. The governments have adopted two additional policy measures that, among other purposes, serve to relieve the pressure on government-First Nations relations caused by the great distance separating them in their negotiations. The first of these relates to what are termed "interim measures." In the words of the British Columbia Treaty Commission (2000), the independent body responsible for facilitating the treaty negotiations,

Treaty negotiations ... take time. Meanwhile trees are still being cut, ore is being mined and fish

are being caught. First Nations, who are taking on substantial debt to negotiate treaties, are increasingly frustrated that they are not sharing enough in the benefits of those resources in their traditional territories (p. 37).

Interim measures could alleviate this frustration and ensure First Nations that, when their claims settlements confirm their ownership of their lands, these lands have not been stripped of their resources. They could do this by establishing moratoria on resource development of lands tentatively identified as part of claims settlements. They could also establish agencies to manage resource development on which representatives of First Nations would participate in a significant manner. In the fall of 1999, the federal and British Columbia governments indicated a willingness to agree to such “treaty-related measures” in order to protect resources on lands that all parties have agreed will be selected under the treaty settlements and to enable the relevant First Nation to begin to participate in resource management related to these lands before the ownership is actually transferred (Canada. Federal Treaty Negotiations Office 1999). The federal government also agreed to jointly fund these measures, a significant contribution and change of policy on its part. The limitations of these measures are that they will only apply to the small fraction of British Columbia that First Nations will hold as a result of their settlements, and that it takes a great deal of time to finalize the land selections that are the precondition for these measures. As very few negotiations have reached the stage of confirming First Nations’ land selections, few such measures have yet been confirmed.

What did happen was that the Government of British Columbia, supported by the federal government, broadened its definition of “interim measures” well beyond the treaty-related matters described above. A statement by the BC Ministry of Aboriginal Affairs describes interim measures in these terms:

We need to make sure that the business and economy of the province are able to run as smoothly as possible while treaties are being negotiated....

[Interim measures] encourage aboriginal and non-aboriginal interests to take cooperative approaches to identifying, conserving and enhancing natural resource interests in traditional territories. They can also ensure that First Nations have the opportunity to benefit from resource development in their area.¹⁰

During the last year and a half of the BC New Democratic government, 60 agreements came into existence (British Columbia Treaty Commission 2001, p. 4). These include:

- \$400,000 to support the participation of the Kaska Dena in forest management in their lands and the training of their members for jobs with local forestry companies;
- \$200,000 to create a tourism marketing strategy and offer a tourism training program for the Sliammon First Nation;
- \$8 million for economic development among First Nations of Clayaquot Sound, as well as an advisory role for them and non-Aboriginals concerning resource management and land-use planning;
- \$250,000 for training and finding jobs in the oil drilling industry for Treaty 8 First Nations students;
- up to \$1.3 million to help the Nuu-chah-nulth First Nation effectively operate new shellfish tenures.¹¹

The governments clearly hope that, in addition to promoting First Nations’ economic development, these interim measures will build support for the BC treaty process by giving First Nations’ leaders

something to show their people by way of benefits from participating in the process.

The final major element of governmental policy related to the claims process also rests on multiple motives. The former NDP government of British Columbia engaged, and the new Liberal government continues to engage, in a process of consultation with First Nations concerning land use and resource development. This consultation helps to improve the province's relations with First Nations, which have been strained by the lack of progress in claims negotiations, and it fulfills the province's legal obligations. The *R. v. Sparrow* and *R. v. Van der Peet* decisions of the Supreme Court established the principle that governments can infringe upon Aboriginal rights if such infringements are justifiable, and identified a test for determining if they are justifiable in individual cases. In response, the British Columbia government created a consultation process to carry out its obligations relating to the justification of its activities on Crown land, including permits for the activities of private sector developers and resource users (British Columbia Ministry of Aboriginal Affairs 1998). This process first assesses the likelihood that the activity (road or culvert construction, or a decision, for example, to grant a mining permit) being contemplated may infringe upon an Aboriginal right or title. If a consideration of a variety of factors leads to the conclusion that consultation is not needed, the project can be authorized. If there is a possibility that a right or title of any significance is at issue, the responsible government agency will ask the relevant First Nation or Nations for evidence of any right or title it may possess and for its views on how the proposed activity might affect this right or title. Based on the information provided, the agency will decide, probably in consultation with other agencies of the provincial government such as Justice and Aboriginal Affairs, the likelihood that Aboriginal title or rights do exist for the land that will be affected by the proposed activity. Again, if the answer is negative, the project can be approved immediately. If a

potential exists for an Aboriginal right or title to apply, the agency decides whether the proposed activity will infringe the right or title. If not, the project can proceed. If an infringement will occur, then the agency must decide whether the infringement is justifiable. If it is deemed not to be justifiable, the project should be rejected. If it is justifiable, then the project can proceed, perhaps with compensation to the First Nation affected.

The *Delgamuukw* decision increased the priority attached to this process in several ways. First, it extended the process beyond the consideration of rights, which *Sparrow* and *Van der Peet* addressed, to also include Aboriginal title. This involves a much more valuable interest in land and resources than other rights convey. Second, confirming the concept of Aboriginal title underscored the responsibilities of the provincial government; this title conflicts with the province's ownership of its lands and resources much more than does the subject matter of *Sparrow*, which only involved fishing, a federal jurisdiction. Thus, *Delgamuukw* so clearly asserted the obligation of governments to consult on possible infringements that the British Columbia government now does so partly in the hope that this consultation will help it prove in future litigation that its actions met the test of justifiable infringement set out by the courts. Since *Delgamuukw*, British Columbia has greatly expanded the amount of resources it invests in its consultation process. However, First Nations complain that it imposes a heavy burden on them by asking them to divert their limited staff resources to respond to a large number of requests for information. They also feel that the process has not significantly limited resource development activities that conflict with their rights and title.¹² Most importantly, believing that they possess title to the land, many First Nations are reluctant to participate in a process that assumes that British Columbia possesses that title.

The BC consultation process represents a measure of recognition of Aboriginal rights and title,

but it does not amount to the co-management of lands and resources that many British Columbia First Nations seek. The Government of British Columbia has been willing to go as far in this respect as agreeing to arrangements with First Nations for cooperative management of wildlife. However, a considerable number of First Nations want also to share with the province management authority concerning resource development on lands to which they will not hold title after the settlement of their claims, that is, on portions of the other possibly 95 percent of British Columbia.¹³ They seek this co-management because their wildlife harvesting rights will benefit them very little if the wildlife have been driven away by inappropriate resource development decisions. The province has rejected these wishes, preferring to maintain control over the resource development that is so important to its economic strategy and so central to its motivation for settling land claims. However, consultation and interim measures appear to reflect a wish on British Columbia's part and on the part of the federal government to foster positive relations with First Nations away from the treaty process. In the meanwhile, they maintain their existing positions at the claims negotiating tables confident that the *Delgamuukw* decision has not weakened the legal basis on which these positions rest.

THE FIRST NATIONS' RESPONSE TO *DELGAMUUKW*

In contrast, the First Nations of British Columbia believe that the *Delgamuukw* decision has greatly strengthened their political position. First and foremost is its symbolic significance. It has confirmed their deeply held conviction that they possess Aboriginal title on their traditional lands and vindicated their determination over many decades in asserting their rights and title. Second, they believe that the new significance that the Court attributed to oral testimony will make it easier for them to persuade the courts that they hold Aboriginal title to specific areas. This consideration and the depth

of their belief in the reality of their Aboriginal title causes them to believe that proving Aboriginal title will be easier than the governments of Canada and British Columbia appear to believe it will be. Third, the Court's observations that Aboriginal title includes minerals and other resources such as forests, and that infringement of this title requires compensation, suggest that their title has a considerably higher value than was previously thought. They therefore initially expected that *Delgamuukw* would lead the two governments to increase the land and cash components of the land claims settlements they were offering. They also expected the governments to compensate them for decades of resource extraction on lands that they believe are theirs. That the governments have not done so, preferring the approach outlined above, strikes them as fundamentally unjust and inconsistent with the legal responsibility of the Crown to treat them honourably.

Indeed, these aspects of the *Delgamuukw* decision may strengthen the resolve of the approximately one-third of British Columbia First Nations not presently negotiating their land claims to continue to shun the British Columbia treaty process. The decision has certainly not stampeded additional BC First Nations into the treaty process corral. In June of 1997, before the decision, the BC Treaty Commission had accepted statements of intention to negotiate their land claim from 50 British Columbia First Nations. By September of 2001, almost four years after the release of the *Delgamuukw* decision, this number had dropped to 49.¹⁴ The First Nations outside the treaty process have avoided it for several reasons. First and most important, they reject the ultimate purpose of the process, which is to circumscribe their rights and title. It makes no difference to them that the terms of their reduced rights and title might be more favourable than they would have been before *Delgamuukw*. Their political thinking focuses on the goal of having their rights and title affirmed, hence they are unwilling to expose themselves to a process in which their rights and title might be diminished. They reject even

experimenting with the process because they are also leery of the cost of negotiating their claims. In particular, they do not want to share the problems of many First Nations that have accumulated heavy debts to the federal government in the form of loans to finance their participation in the negotiations.¹⁵ By not getting started on the process, they can avoid being manipulated by it when it reaches the point where they may feel pressured to accept an unsatisfactory settlement because they will have no means to repay these debts should they not settle. Further, they have felt that the favourable evolution of Supreme Court decisions relating to Aboriginal rights points to their being able to get a better deal by waiting than by settling. The Court's position on compensation may lead them to believe that they can obtain more money by seeking compensation for infringement of title than they could negotiate from the governments for extinguishing it, or subsuming it under the terms of a settlement.

In general, First Nations believe that the *Delgamuukw* decision should cause the governments not only to alter their negotiators' mandates, but much more broadly, to review their policy and legislative framework concerning Aboriginal rights and title. For example, the Confederacy of Nations, the policy-making body of the Assembly of First Nations, passed a resolution in 1998 on *Delgamuukw* principles that asserted:

WHEREAS many of the foundations of federal legislation, policy and practice related to Aboriginal title are now of questionable legality in light of s. 35 of the *Constitution Act 1982*, and the Supreme Court's decision in *Delgamuukw*, and;

WHEREAS the "Comprehensive Claims Policy" of Canada is inconsistent with the legal principles set forth by the Supreme Court of Canada in *Delgamuukw*...

THEREFORE BE IT RESOLVED THAT the Confederacy of Chiefs ... adopt the following principles:

...Aboriginal Title and Crown title coexist, therefore the objective of negotiations should be to reconcile pre-existing Aboriginal title with the Crown's presence...

... Offensive federal legislation, policy and practice must be withdrawn and replaced with measures that recognize and affirm Aboriginal Title, consistent with the Supreme Court of Canada's directions in *Delgamuukw*.¹⁶

At a minimum, First Nations seek a fundamental symbolic change to the comprehensive claims¹⁷ policy of the Government of Canada. Instead of describing Aboriginal title as unclear and uncertain they want it to affirm the strength and character of their title as set out by the Court (Canada. Minister of Indian Affairs and Northern Development 1987, p. 5). In addition, they want both orders of government to pursue a new approach to negotiations that would embody the Court's judgement that "the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith" (*Delgamuukw*, paragraph 176). Good faith can embrace a large number of concepts such as not unreasonably protracting negotiations, maintaining a consistent bargaining position, and limiting the number of preconditions or non-negotiable items brought to the table. Good faith would be promoted if the governments accepted an impartial body such as the Aboriginal Lands and Treaties Tribunal suggested by the Royal Commission on Aboriginal Peoples to resolve disputes within the treaty process. This would avoid situations in which governments simply prescribe the process and its constraints (Canada 1996, Vol. 2, Part 1, pp. 93-94). In addition, First Nations believe that the Court's judgement that the federal government is responsible for protecting Aboriginal interests in land (*Delgamuukw*, paragraph 176) should lead the federal government to consider legislation and administrative procedures to protect these interests from unfair provincial government actions that might harm them.¹⁸ The First Nations also want the two governments to engage much more vigorously in the development of interim

measures and to expedite the negotiations process by investing more money in developing the staff resources that are needed if the process is to accelerate.

STRATEGIC CHOICES

In view of the divergence of goals and understandings of their respective legal positions, it is not surprising that the First Nations of British Columbia and the BC and federal governments are a long way from completing any claims settlements through the BC treaty process. The first three stages of the British Columbia treaty process are significant, but largely procedural. As of the summer of 2001, 47 of the 49 First Nations in the BC treaty process had completed them and reached the stage of negotiating agreements in principle, the fourth and penultimate step in the process (not counting the post-treaty implementation phase). However, it is a measure of the difficulties facing the process that, of the three agreements in principle that have been initialled, one failed to be ratified by the members of the First Nation involved, another has not been put to a ratification vote because the First Nation has had concerns about the province's forestry policy and the third, although ratified, is in abeyance as the First Nation reconsiders its terms (British Columbia Treaty Commission 2001, pp. 11-12). This means that the very challenging task of concluding agreements in principle remains to be accomplished. Then the parties must complete the fifth phase — negotiating the vast array of technical and legal details that will transform an agreement in principle into a draft treaty settlement.

That, after eight years, so much work still remains to be done before treaties are achieved does not itself prove that the process has failed. British Columbia has learned a great deal about negotiating claims, and some understandings have been reached. Moreover, the land claims settlements that were completed elsewhere in Canada in the last decade have taken about 20 years to negotiate.

However, the difficulties encountered by the most advanced of the negotiations suggest that the process is in trouble, a view expressed by the British Columbia Treaty Commission (2001).

As they struggle to respond to this impasse and to define a new and successful relationship among themselves, First Nations and the two governments must decide how they will play the two interrelated tactical options, litigation and negotiation, that are available to them. These options are interrelated in that events that alter the strength of the legal positions of the various parties may well alter their negotiating strength. The First Nations of British Columbia believed that the *Delgamuukw* decision would enhance their bargaining power at the various negotiating tables that comprise the BC treaty process, and they have been proven wrong. A possible response to this frustration is to litigate again in the hope that further favourable court decisions will finally compel the governments to amend negotiating positions. For example, if the courts decide that several First Nations do enjoy Aboriginal title over portions of British Columbia and if these portions are extensive and rich in resources, then the governments, and particularly the Government of British Columbia, will face the huge costs of sharing title with the First Nations that are noted above. The anticipation of future similar decisions could lead the provincial government to make very considerable concessions at the bargaining table in order to settle claims and thus reduce the amount of land subject to Aboriginal title.

The decision to litigate will be made on a First Nation by First Nation basis. Depending on the strength of their claim, the value of the lands in question, the tenor of the courts' previous judgements and the costs borne by First Nations in pursuing title in earlier court actions, some First Nations may shy away from the very expensive process of litigating, particularly in view of the pressing alternative purposes, such as social improvement, on which litigation costs could be spent. Still, negotiating under the present rules and against the

existing mandates that the governments have given their negotiators has not produced results that are acceptable to the First Nations. They may be driven to litigate for lack of alternative tactics. In preparation for this contingency, they are considering ways of applying the principles of *Delgamuukw* and earlier cases that reduce their risk of losing in court (McNeil 1999). BC First Nations have already brought a large number of cases to court related to their rights, and several intend to bring cases concerning title.

Both the rigidity of the negotiating positions of the governments of Canada and British Columbia since *Delgamuukw* and the interviews conducted for this study reveal that the governments anticipate that it will be very difficult for First Nations to win these cases and prove their Aboriginal title in court. Several aspects of the judgement are likely to prove particularly problematic for First Nations. For example, the Supreme Court set out the following test for the proof of Aboriginal title:

In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation and (iii) at sovereignty, that occupation must have been exclusive (*Delgamuukw*, paragraph 143).

This test presents several significant problems for First Nations seeking legal confirmation of their title. The first relates to the meaning of the term, "occupation." What kinds of relationships with an area of land and what intensity of use are sufficient to lead to the judgement that a First Nation had occupied it before the assertion of Crown sovereignty over British Columbia in 1846? Most compelling would be evidence of physical occupation in the form of the construction of dwellings, enclosure of fields or use of specific areas for wildlife harvesting. In addition, the Court indicated that the

existence in 1846 of Aboriginal laws relating to the lands in question would be relevant. It will not be impossible for First Nations to prove the existence of land-related laws 160 years ago. However, it will be challenging to marshal oral evidence about the nature of the systems their ancestors used to organize their relationships with the lands they occupied. To succeed, First Nations will also have to educate the judiciary to appreciate that their traditions, while perhaps not embodying certain structural features of non-Native legal systems, nonetheless should be considered functionally equivalent to relevant non-Aboriginal legal systems, and hence proof of title.

Also, while the Court has suggested the types of evidence of physical occupation that would point to title, procedural difficulties with the process of the lower court hearings prevented it from judging the actual facts of the case. Therefore it was not able to suggest the thresholds for the types of evidence that would be adequate for proving title. It may be that the relationship of a First Nation to its lands will be adequate to establish certain rights, such as the right to hunt, fish or conduct spiritual ceremonies, but not be sufficient to meet the more demanding test for proving title. In such a circumstance, the First Nation would have some access to the land confirmed by the courts, but would not benefit from the economic component of the land nor be able to govern it, as would be the case if actual title were confirmed.

Similar questions relate to the issue of the extent of the lands over which the Aboriginal title of a First Nation will be recognized. For example, government may argue that the coastal peoples of British Columbia in historic times were almost exclusively oriented toward the sea and that the forest at their backs appeared to these Aboriginal people to be a very difficult environment whose resources more than a few hundred metres from the coastline were too inconvenient to harvest. If a court accepted such a rendering of history, the result could well be to affirm Aboriginal title to a narrow strip of coastline and to deny a First Nation access to the forest and other wealth beyond.

Another set of questions relates to the requirement of continuity. The Court has accepted that it may be very difficult for a First Nation to demonstrate pre-sovereignty occupation. It has therefore ruled that present-day occupation of land may serve as evidence, so long as there also exists evidence of an ongoing cultural relationship and attachment of the First Nation to the land in question (*Van der Peet*, paragraph 62). The problem that may arise for First Nations is demonstrating this cultural relationship. If, for example, First Nations practices for sharing and managing traditional lands have succumbed to the competition for resources from non-Aboriginal users and the pressure of government regulation of lands deemed for over a century to belong to the Crown, it may be difficult for the First Nation to meet the standard for continuity set by the Court. It also remains to be seen how the courts will address the cases of First Nations that may have moved or been moved from their traditional lands.

Additional problems confront First Nations. One is that government policies over the last century and more have confined First Nations to very small areas of land. To the extent that current occupation will be a major factor in determining the extent of lands to which Aboriginal title may be confirmed, the First Nations are likely to receive on this basis title over much less land than they require to thrive and far less than they consider to be their traditional territory. Moreover, overlapping claims by neighbouring First Nations will complicate the challenge of proving title.

All of these uncertainties concerning the proof of title encourage the federal and British Columbia governments to anticipate that the principles enunciated by the Court in its decision on *Delgamuukw* will not make much difference in practice. They anticipate that Aboriginal title will be recognized only over modest areas of land, and that this recognition will be a long time in coming. Bolstering this confidence is their calculation that First Nations will be reluctant to test the Aboriginal title waters for fear that an unfavourable judicial decision will

weaken their position at the claims negotiating tables. This reticence may dissipate the momentum that the *Delgamuukw* decision created in favour of First Nations' claims. Because a court judgement accepting a claim for title would heighten this pressure, the governments hope that such a legal claim will be slow enough coming to dampen First Nations' expectations. If the governments have enough time to achieve a few claims settlements, these may lead to further First Nations' settlements. This, in turn could enable them to re-energize the BC treaty process and avoid extensive litigation.

Even if a few First Nations pursue litigation and are successful, the two governments can delay raising their negotiating offers by taking advantage of the variation in the details of individual claims and the circumstances of individual First Nations. They may argue that judgements favourable to particular First Nations reflect their particular circumstances, rather than establishing general rules about title. This would compel a considerable number of First Nations to take their claims to court. The governments might try to protract these court cases, raising the financial burden they impose on First Nations and delaying their outcome. Thus it may well take a very considerable number of lengthy court cases to apply the *Delgamuukw* principles with sufficient clarity to enable the parties to anticipate how the legal system will judge particular claims. What this means is that it may take a long time before court judgements actually do affect bargaining by increasing the payoff for First Nations from litigating with such certainty that the governments will find they must increase their offers to match the likely value of the outcome of litigation. Even then, the governments might insist on litigation, in which they might have a chance of disproving title, over negotiated, extremely expensive settlements.

Governments can take considerable comfort in the *Delgamuukw* decision. While their resources are not endless, they are better able to fight a war of legal attrition than are most First Nations. Moreover, the governments are in an excellent position

to influence the First Nations' calculations as they contemplate the appropriate balance between litigation and negotiation. When the governments commit themselves to the principle of interim measures and to seeking new understandings with First Nations on the crucial question of certainty and when they build the First Nations' negotiating capacity, they are contributing to the successful outcome of the British Columbia treaty process. At the same time, they are also encouraging the First Nations to stay at the negotiating table and out of court.

LOOKING TO THE FUTURE

The governments of Canada and British Columbia seem confident that they do not need to offer First Nations more at the land claims negotiating tables, provided that they can contain the frustrations that the First Nations feel as a result of this lack of movement. Looking to the future, they can anticipate that, while First Nations are now vigorously litigating on a variety of other issues, legal uncertainties and the enormous cost of bringing litigation on Aboriginal title will limit the ability of First Nations to use the courts to capitalize on the promise of title that they see in the *Delgamuukw* decision. The federal and former British Columbia governments hoped that what they considered an active and responsive provincial program of consultation on land use and a well-funded set of interim measures would help keep the participating First Nations in the treaty process and provide enough tangible benefits to First Nations to avoid confrontations. In the longer term, such policies could buy enough time to enable claims settlements ultimately to be reached. With or without settlements, they could contribute to the development of a new British Columbia, one in whose public policy processes and economy First Nations are more fully integrated than at present.

However, this outcome is far from assured; the *Delgamuukw* decision has made the politics of the treaty process and of First Nations-Crown relations

more volatile. It has created an atmosphere of uncertainty, anxiety, and tension in the province. It has made resource developers unsure whether they can continue to rely on their accustomed assumptions in weighing the risks of investing in the province. This has led many British Columbians dependent upon this investment to worry that a consequent drop in resource activity will affect their livelihoods. It undoubtedly influenced some voters who expected that the Liberals would resist First Nations' claims much more vigorously than had the New Democrats to support the Liberal Party in the 2001 provincial election

What remains to be seen is just how aggressively the new government of British Columbia will confront First Nations and their Aboriginal claims. The government has committed itself to treaty negotiations, to treaty-related measures, interim measures and to integrating British Columbia First Nations into the mainstream economy.¹⁹ Moreover, even though the government is confident that the *Delgamuukw* decision would put it in a strong position should it wish to do so, there are compelling reasons for it not to bargain harder in the treaty process than its predecessors did. Important among these reasons is the simple and not adequately recognized fact that the New Democrats took a relatively tough line in offering no more than 5 percent of the province to First Nations, in denying compensation for past infringements of rights, and in refusing to compensate for future infringements until rights were confirmed by the courts. These terms offer rather little compared with the long-term promise of the treaty process to build a reasonably healthy and stable relationship between governments and First Nations, and advance the First Nations economically and socially. Protracting negotiations also makes tactical sense; if settlements acceptable to the province cannot be reached, bargaining less aggressively could discourage First Nations from litigation or confrontation.

A decision by the new provincial government to abandon the negotiating process or drive First

Nations away from it by lowering the existing level of its offers — offers that First Nations already consider inadequate — could have several consequences. Such a course of action will probably lead First Nations to litigate title, and it will heighten social tensions, exacerbate the uncertainties facing resource development in the province, and inflame Crown-First Nations relations. In this regard, the provincial government's decision not to fund any new interim measures, while continuing to endorse them in principle, weakens the treaty process. Moreover, its insistence on holding a referendum on the claims process poses a severe threat to the process.

These actions are particularly damaging because the *Delgamuukw* decision raised expectations among all First Nations, both those actively involved in negotiating their claims through the BC treaty process and those who stood outside it. However, no claims have been settled through the treaty process. (The Nisga'a settlement flows out of an earlier process and was too far advanced to be affected by the *Delgamuukw* decision). Indeed, the *Delgamuukw* decision delayed negotiations significantly while both sides reviewed it to determine whether to alter their bargaining positions and First Nations considered whether they might be wiser to leave the process in favour of pursuing further litigation or the kind of compensation for infringements of their title that *Delgamuukw* anticipated. While the Government of British Columbia continues to actively consult BC First Nations on the impact of proposed developments in areas in which they may hold Aboriginal title, the First Nations seem not to feel that this consultation has significantly slowed the pace of resource development or protected their basic interests. In the face of what they consider to be a modest policy response to *Delgamuukw* by government, and the slow pace of negotiations, First Nations' frustration has grown considerably.

It is difficult to anticipate the long-term legacy of the *Delgamuukw* decision. *Delgamuukw* has increased the intensity of First Nations-Crown

relations, but it has not reshaped claims negotiations. On an optimistic note, it has helped focus the attention of politically aware British Columbians on the need to address the material interests of First Nations. It has intensified the efforts of provincial government departments to involve First Nations in land use and resource development planning that certainly represent an advance over past practice and could produce significant benefits for First Nations. Similarly, interim measures and joint ventures between private enterprises and First Nations may build a basis for considerable future collaboration.²⁰ This could foster change at the social and cultural levels that may contribute as much to future policy change as will negotiation or litigation. However, these developments will not address the basic question of title and the sense of identity that attaches to it, and their promise could be erased by aggressive action on the part of the provincial government as it responds to the intensified tensions that are part of the legacy of *Delgamuukw*.

The Court clearly hoped that its decision in *Delgamuukw* would encourage the parties to negotiate more successfully than they have so far. The Court's expansive interpretation of Aboriginal title may have been intended to accomplish this, by increasing the pressure on government to negotiate flexibly in order to avoid litigation that might convey huge benefits to First Nations. Certainly, in closing his judgement, the former Chief Justice explicitly encouraged the parties to negotiate:

Ultimately, it is through negotiated settlements ... that we will achieve ... a basic purpose of s. 35 (1) — “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.” Let us face it, we are all here to stay.

However, *Delgamuukw* did not produce a revision of governmental negotiating positions. If the impasse continues and, depending on the evolution of the new provincial government's claims-related policies, First Nations-Crown relations may evolve in a variety of directions. A universal trend is not

likely because the circumstances and strategies of the First Nations of British Columbia diverge so greatly. Some, whether or not they take part in the treaty process, may focus their resources on improving their immediate well-being through interim measures and integrating into the provincial economy. Others may attempt to resurrect the treaty process, either through further litigation, campaigns of direct confrontation or lowering their expectations about the content of their settlements, in effect accepting the governments' offers. Only time will reveal how this process unfolds and the long-term contribution of the *Delgamuukw* decision to its outcome.

NOTES

The author thanks the officials of First Nations' organizations and the public servants of the governments of British Columbia and Canada who generously shared their time and insights during the interviews on which this paper is largely based, as well as the anonymous reviewers of this paper.

The term, "First Nations" refers to groupings of individuals who are identified by the *Indian Act* as "registered Indians." The term "Aboriginal peoples" refers to the full range of indigenous peoples in Canada including non-Status Indians, Métis and Inuit, as well as First Nations.

¹For details on the treaty process and its origins see McKee (2000) and the BC Treaty Commission Website www.bctreaty.net/. The Summit statement is quoted in *The Globe and Mail*, 17 February 1998, p. A18.

²*The Vancouver Sun*, 28 February 1998, p. A28.

³A total of 25 individuals were interviewed, either in November of 1999 or February of 2001, in Victoria, Vancouver, and Ottawa. These included five officials of First Nations' organizations in British Columbia and the Assembly of First Nations; six federal officials from Indian and Northern Affairs Canada and the Department of Justice; nine British Columbia public servants from the departments of Energy and Mines, Aboriginal Affairs, Forests and the Attorney-General and five staff members of the British Columbia Treaty Commission, who took part in a group discussion. About two-thirds of the interviews

were conducted in November of 1999. The remaining third were conducted in February of 2001. While the interviews were open-ended, they were designed to obtain the views of the respondents on a common set of questions concerning the impact of the *Delgamuukw* decision on their activities and, in their opinions, on First Nations-government relations and land claims negotiations in British Columbia. The interviews averaged approximately an hour and a half.

Other views on this subject may be found in British Columbia Treaty Commission (1999) and Lippert (1999).

⁴The traditional lands of these First Nations lie in the Skeena and Bulkley River watersheds in northwestern British Columbia. Delgamuukw, also known as Earl Muldoe, was the first chief to be named on the list of the appellants.

⁵The lower court decisions and a variety of issues they raised are discussed in Culhane (1998).

⁶Patrick Macklem (2001) reviews the important issues in this decision. Other reviews and commentaries on the *Delgamuukw* decision and its legal implications include Bankes (1998); Henderson (2000); Joffe (2000); Lambert (1998) and McNeil (1999). The Assembly of First Nations maintains an extensive Web-based collection of research and opinion papers on the implications and implementation of the *Delgamuukw* decision. See <www.delgamuukw.org>. Of particular interest is a variety of summaries of the decision and commentaries by legal practitioners, available at <www.delgamuukw.org/links/summaries.htm>.

⁷While this area is covered by treaties, disagreement between the federal government and the Dene of the region concerning the intent of these treaties has led the federal government to negotiate comprehensive claims settlements as if no treaties applied to this region.

⁸This paper describes the policies of the New Democratic government of British Columbia until it lost power in mid-2001. The prospects for the treaty process under the new Liberal government of British Columbia will be discussed briefly in the closing section of this paper.

⁹The committee of the Legislative Assembly making recommendations for the referendum on the land claims process discusses limits on the land component of claims settlements in terms of the principle of "affordability" rather than any specific level of "proportionality." British

Columbia. Legislative Assembly Select Standing Committee (2001), pp.15-16.

¹⁰Quoted from "Information about Interim Measures," information sheet, issued by the BC Ministry of Aboriginal Affairs.

¹¹Taken from "Interim and Treaty-Related Measures since February 2000," press release issued by the BC Ministry of Aboriginal Affairs in 2001.

¹²Lawrence and Macklem (2000) support this view.

¹³Personal interview, Stewart Phillip, President, Union of British Columbia Indian Chiefs, Vancouver, October 1999.

¹⁴Data for 2001 were provided by the BC Treaty Commission.

¹⁵As of the middle of 2000, these debts amount to about \$120 million. *The Vancouver Sun*, 31 May 2000, p. A2.

¹⁶Resolution 3/98, passed at Edmonton, Alberta, 11 March 1998.

¹⁷"Comprehensive" claims are those relating to lands regarding which no treaty or claims settlement has been signed. Claims related to lands covered by treaties are termed "specific" claims. (Canada. Minister of Indian Affairs and Northern Development 1987, p. 5)

¹⁸See note 16.

¹⁹British Columbia. Ministry of Attorney General. See various documents at <www.gov.bc.ca/tno>.

²⁰Personal interview, Stewart Phillip, President, Union of British Columbia Indian Chiefs, Vancouver, October 1999.

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