



A Lay Person's Guide to DELGAMUUKW

The Supreme Court of Canada decision in the Delgamuukw case in late 1997 was widely seen as a turning point for treaty negotiations. The decision confirmed aboriginal title does exist in British Columbia, that it's a right to the land itself — not just the right to hunt, fish or gather — and that when dealing with Crown land, the government must consult with and may have to compensate First Nations whose rights are affected. Everyone involved in treaty negotiations recognized the decision could have major impacts on policies, positions and mandates.

Soon after the court's decision, the Principals in the BC treaty process — the governments of Canada and BC and the First Nations Summit — began a review of the treaty process to reflect the direction given by the Supreme Court. It was also an opportunity to review the effectiveness of the five-year-old treaty process. The Treaty Commission chaired the meetings among the Principles during the winter of 1998/99 and put forward its views and an analysis of obstacles it observed that needed to be addressed.

The Treaty Commission pointed out that treaty negotiations begin with mutual recognition. When a First Nation sits down at the treaty table, it recognizes there is some legitimacy to the claims of title, ownership and jurisdiction by Canada and BC. Similarly, Canada and BC recognize there is some legitimacy to the claims of title, ownership and jurisdiction by the First Nation. The challenge is giving that recognition practical expression.

The parties, having recognized each other's titles, must balance their

interests and allow time for the negotiations to unfold and the new relationship to develop. The discussion is continuing over whether this will be accomplished through interim measures agreements, through completed sections of treaties that will be given early implementation or some other means. Providing some treaty benefits early in the negotiations will help to promote confidence in the treaty process among First Nations.

The Treaty Commission also reminded the parties that treaty negotiations are a voluntary political process — it's a choice. The treaty process was set up as a voluntary process based on political negotiations, not legal interpretations.

And finally, the Treaty Commission has urged the parties to be more flexible and creative at the negotiating tables — to find ways of reflecting the direction the court has given through their respective mandates. In any negotiation, if the parties don't see their interests being fairly and effectively considered, they are going to look for other options. That may happen. The parties at each negotiating table must find ways of reaching consensus on new approaches.

The Treaty Commission developed this lay person's guide to answer some questions you may have about the Supreme Court decision. In doing so, we relied on assistance from two distinguished professors specializing in aboriginal law, Hamar Foster of the University of Victoria and Patrick Macklem of the University of Toronto.

What started the lawsuit?

The Gitksan Nation and the Wet'suwet'en Nation started the lawsuit in 1984. There was a federal land claims process available at the time, but it was slow, and the Province — which holds underlying title to the Crown land in the area — would not participate. So the First Nations went to court.

What did they claim?

Their claim covered 133 individual territories, amounting to 58,000 square kilometres of northwestern British Columbia. They claimed both ownership of the land and jurisdiction. That is, wherever provincial laws conflicted with tribal laws in the territory, tribal law would prevail.

Who was the claim against?

The main defendant was the Province of British Columbia, as the owner of the lands in question. Other First Nations, business and resource associations were later allowed to take part, arguing on both sides of the case.

What were the main arguments in response to the claims?

BC's main defence at trial was that all aboriginal land rights in BC were extinguished by laws of the colonial government before it became part of Canada in 1871, when authority to pass laws in relation to Indians was transferred to Canada. In the Court of Appeal, BC changed its position and argued that aboriginal land rights had not been extinguished. However, the Court of Appeal appointed special counsel to make the extinguishment argument and unanimously decided that there had been no blanket extinguishment of aboriginal interests in land by the colonial government. In the Supreme Court of Canada, BC's main argument

was that aboriginal title was primarily a collection of aboriginal rights to engage in traditional activities.

What did the Supreme Court of Canada decide?

There was no decision as to whether the Gitksan and Wet'suwet'en have aboriginal title to the lands they claimed. The court said that this issue could not be decided without a new trial. One reason was a technical one, having to do with the way the claim was stated. Another was that the original trial judge had not given enough consideration to the oral histories presented by the First Nations.

Will there be another trial?

It will be up to the Gitksan and Wet'suwet'en to decide whether to negotiate an agreement or to begin again with another lawsuit. The first trial lasted three years and the appeals took another six years.

Why is the case so important?

Even though the actual land claim was not decided, the case has enormous significance for BC because the judges went on to make a number of statements about aboriginal rights and title that indicate how the courts will approach these cases in the future.

What is aboriginal title?

The court said that aboriginal title is a right to the land itself. Until this decision, no Canadian court had so directly addressed the definition of aboriginal title. Other cases had dealt with aboriginal rights in terms of the right to use the land for traditional purposes such as hunting. Aboriginal title is a property right that goes much further than aboriginal rights of usage.

Permitted uses of aboriginal lands

are no longer limited to traditional practices. For example, mining could be a permitted use, even if mining was never a part of the First Nation's traditional culture.

In many ways, aboriginal title is just like ordinary land ownership. The owner can exclude others from the property, extract resources from it, use it for business or pleasure.

But there are important differences, too.

- Aboriginal title is a communal right. An individual cannot hold aboriginal title. This means that decisions about land must be made by the community as a whole.
- Because aboriginal title is based on a First Nation's relationship with the land, these lands cannot be used for a purpose inconsistent with that continuing relationship. For example, if the people's culture was based on hunting, their aboriginal title lands could not be paved over or strip-mined if that would destroy their cultural relationship to the land.

- Aboriginal title lands can be sold only to the federal government.
- Aboriginal title has the additional protection of being a constitutional right. No government can unduly interfere with aboriginal title unless the interference meets strict constitutional tests of justification.

Except for these limitations, aboriginal title holders can use their lands as they wish.

What is the difference between aboriginal title and ordinary land ownership?

The following chart shows the major differences established by the Delgamuukw decision between aboriginal title and the familiar kind of land ownership that is registered in the Land Titles office.

	Ordinary Land Ownership	Aboriginal Title
Who can own land?	An individual or a group	A common group; there are no individual rights to aboriginal title
Can the owner sell the land?	Yes	May be sold only to the federal Crown
What limits are there on land use?	Zoning, and other provincial and municipal laws	Use must not impair traditional use of the land by future generations
What laws protect the land?	Common law and provincial statutes	Common law and the Canadian constitution

So where does aboriginal title exist in BC?

Nobody knows yet. It will have to be either agreed on through a treaty process or decided by the courts on a case-by-case basis. If First Nations decide to go to court to establish title to lands, they will have to prove that they occupied the land to the exclusion of others before 1846, the year Britain declared sovereignty over the area that became British Columbia. Then they have to prove some degree of continuity from that occupation until today.

The Delgamuukw case does say that courts must be willing to rely on oral history, including traditional stories and songs, in a way that until now they have not. However, it is still far from clear exactly what level of proof will be enough to establish a claim of aboriginal title.

Will the decision affect private property?

The Gitksan and Wet'suwet'en made no claim to private lands, so the court did not directly address this question.

However, the court's decision clearly suggests that there are private lands in BC that are subject to aboriginal title, or at least were wrongly sold. This is because the court confirmed that the province had no authority to extinguish aboriginal title after union with Canada in 1871, yet the province has been

selling land to private interests since 1849. Still, the remedy for First Nations is more likely to be the payment of compensation than any adjustment to private ownership.

How will aboriginal title affect the Province's title to Crown lands?

This is a difficult question and one that cannot be answered with any certainty right now.

The court does indicate that the Province will still have a limited right to deal with Crown land that is subject to aboriginal title, for example by granting resource tenures. The limits on that right are expressed in a two-pronged test:

It would have to be for a purpose that is compelling and substantial. (The court gives agriculture, forestry, mining, environmental protection and economic development as possible examples, which would have to be examined on a case-by-case basis);

The government's action must be consistent with the special relationship between the Crown and aboriginal peoples, which is a relationship of trust.

This means that the Province will need to consult with First Nations before granting any interest in aboriginal lands to others. Whether this means that a First Nation's consent would be required will depend on the circumstances. Consent would likely be required for provincial laws regulating hunting and fishing on aboriginal lands.

Cash compensation will be another factor. First Nations are entitled to share in the economic benefits derived from their lands.

The general principle seems to be that any infringement by the Crown on aboriginal title has to be for a purpose that promotes the reconciliation of the two cultures.

However, other statements in the

decision raise serious doubts about whether provincial laws relating to mining, forestry and other land uses can directly apply to aboriginal title lands. This is one of the most uncertain aspects of the decision and will require further guidance from the courts.

Will I still be able to hike and camp or pick berries on Crown lands that are subject to aboriginal title?

Once it is established that particular lands are aboriginal title lands, the owners naturally will be able to regulate access to those lands. If these regulations conflict with provincial or federal laws, it is not yet clear which law will apply.

Will First Nations be able to use the courts to stop activities on lands they are claiming?

Yes, just as they could before Delgamuukw. It might be somewhat easier now that the court has defined aboriginal title and the requirements for its proof. But there are still strict requirements. A court will not make this kind of order unless it is satisfied that the First Nation's interest in the land will have been irreparably harmed by the activity and that the balance of convenience between all of the parties to the lawsuit favours stopping the activity.

Another way that First Nations can prevent this kind of harm is by negotiating interim measures agreements within the treaty process. Under these agreements, First Nations and the provincial and federal government agree on how land will be used while a treaty is being negotiated, and how the benefits will be shared.

Why did the Supreme Court give special rights to aboriginal people?

In one sense, aboriginal title is not a special right at all. It is simply a

matter of recognizing property rights that until now have been wrongfully ignored. To continue to deny First Nations their property rights would be to deny the equality of all Canadians before the law.

But it is true that aboriginal peoples have a unique constitutional status in Canada. The Supreme Court of Canada explained it this way, in an earlier case:

When Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land and participating in distinctive cultures as they had done for centuries. It is this fact and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and that mandates their special legal, and now constitutional status.

The concept of aboriginal title was not invented by the Supreme Court. It is consistent with approaches developed in New Zealand, Australia and the United States, and in the last century by the Privy Council, which was then the highest court in the British Empire. It also is in many respects a natural evolution of the earlier aboriginal rights cases decided by Canadian courts since 1973.

Can government pass laws to extinguish (wipe out) aboriginal title?

No. In Canada the constitution is the highest authority in the land, not Parliament. Parliament can, in certain circumstances, pass laws that conflict with constitutional rights, but only in ways that can meet a strict test of justification set down by the courts. A law to extinguish aboriginal title would be unlikely to meet that test.

Also, the clause in the constitution that permits governments to override certain constitutional rights does not apply to aboriginal rights. Aboriginal title is an aboriginal right.

These issues could cause a lot of conflict between aboriginal and non-aboriginal people. Did the Supreme Court talk about how these conflicts can be worked out?

Yes. The court strongly urges the parties to negotiate rather than litigate. The Chief Justice says at the end of his judgment:

Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts.

The Crown, he says, is under a moral, if not a legal, duty to enter into and conduct negotiations with First Nations in good faith.

Litigation of aboriginal claims can be not only costly but divisive of communities and entirely unpredictable in their result. And although it will continue to be necessary to resort to the courts for the answers to certain questions, litigation is limited in what it can accomplish. It cannot address the problems of economic and social development that are so critical to aboriginal communities. Negotiated settlements on the other hand, can achieve constructive and creative results that enhance communities and resolve conflict.

The court's decision concludes with these words:

Ultimately, it is through negotiated settlements, with good faith and give and take on both sides, reinforced by judgments of this Court, that we will achieve... "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.



BC Treaty Commission

203 1155 West Pender Street Vancouver BC V6E 2P4

tel 604 482-9200 fax 604 482-9222

toll free 1 800 665-8330

www.bctreaty.net

**BC Treaty Commission
Reprints**

If you would like to receive more information from the Treaty Commission, as it becomes available, please fill out this form and send it to us.

**203 1155 West Pender Street
Vancouver BC V6E 2P4
tel 604 482-9200 fax 604 482-9222
toll free 1 800 665-8330**

Name _____

Address _____

City _____ Province _____ Postal Code _____

We welcome your comments on this publication or on any other information provided by the Treaty Commission.
