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Robert T. Anderson

Aboriginal Title in the Canadian Legal System: *Delgamuukw v. British Columbia*

Introduction

Canada is grappling with legal issues surrounding indigenous property rights on a scale not seen in the United States since the mid-nineteenth century. Fundamental questions of fairness and justice related to indigenous peoples' property rights are in flux in the province of British Columbia (B.C.) – an area the size of the states of California, Oregon, and Washington combined. The recognition of aboriginal rights in the Canadian Constitution in 1982 and recent judicial developments made it clear to the provincial government that nearly the entire province may be subject to aboriginal title claims. Consequently, the aboriginal nations and B.C. government have embarked on a treaty process to resolve conflicting interests, but not in the fashion utilized in the United States. In the U.S., treaties and agreements with Indian tribes generally resulted in the extinguishment of all indigenous property rights in sweeping terms. In addition, payment of compensation pursuant to the Indian Claims Commission process extinguished legal claims to lands taken previously without payment of compensation. To be sure, most of the roughly 300 tribes in the contiguous forty-eight states reserved homelands, or were moved to other areas set aside for their use and occupancy, and some retained extensive rights to access off-reservation wildlife resources. In British Columbia, however, no earlier treaties ceded aboriginal lands, and the provincial government has recognized that the “extinguishment” of aboriginal title is unacceptable to aboriginal nations. There are over sixty aboriginal nations engaged in forty-nine sets of negotiations with a stated goal of reconciling aboriginal rights and title with the fact the non-aboriginal people and governments are in Canada to stay. This chapter explores the foundation beneath the current negotiations.

*Delgamuukw v. British Columbia*¹ is the Canadian equivalent to the seminal cases

¹ [1997] 3 S.C.R. 1010 (Can.). The western Gitksan pronunciation of the name is *Delgam Uuk*. Professor Bruce Rigsby, *Gitksan Grammar* (1986) (unpublished manuscript, on file at University of Queensland, Brisbane, Australia.). There is a wealth of high quality scholarship that developed in the years immediately preceding the *Delgamuukw* case and after the Canadian Supreme Court's ruling. Hamar Foster, Heather Raven & Jeremy Webber, *Let Right Be Done: Aboriginal Title, The Calder Case and the Future of Indigenous Rights* (2007); Gordon Christie, *Developing Case Law: The Future of Consultation and Accommodation*, 39 U. Brit. Colo. L. Rev. 139 (2006); Kent McNeil, *Common Law Aboriginal Title* (1989); Kent McNeil, *Aboriginal Title and the Supreme Court: What's Happening?*, 69 Sask. L. Rev. 281 (2006); *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest* (Alexandra Harmon ed., 2005); Richard H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada* 15 (1990). Two experts in the case published books recounting their testimony and role in the litigation. Richard Daly, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs* (2005); Antonia Mills, *Eagle Down is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (1994). See also Don Monet and Skanu'u (Ardyth Wilson), *Colonialism on Trial* (New Society Publishers 1992) for a detailed account of the trial proceedings.

decided by the United Supreme Court in the early 19th Century regarding indigenous property rights and sovereignty.² *Delgamuukw* required the Court to grapple directly with property rights and the political sovereignty of aboriginal peoples occupying British Columbia at the time the British Crown unilaterally asserted control. The dispute first begs the question of the location of the right and power of the colonial government to assert control over the area and the people within it. The fact that the case was litigated in the Canadian court system answers that question in the sense that it is the colonial power that makes up the common law rules of aboriginal title, and controls interpretation of the aboriginal rights and title provisions in section 35 of the Canadian Constitution Act of 1982. As demonstrated below, the Canadian Supreme Court's decision in this case created an atmosphere of respect for aboriginal nations and their pre-existing rights that has the potential to support development of land claims settlement regimes that do not depend on vanquishing the rights of the indigenous population.³ At the same time, recent history indicates a lack of progress in negotiated settlements that may be due at least in part to rigid approaches set forth by the provincial and federal governments.

Social and Legal Background

Unlike most trials which begin with opening statements by counsel for the parties, followed by the presentation of evidence in the form of live testimony, documentary evidence, and exhibits, the trial in *Delgamuukw v. British Columbia* began with statements by the primary Chiefs of the Gitskan and Wet'suwet'en. The chiefs described the social and legal background in aboriginal voices not constrained by a lawyer's effort to fit aboriginal title, law, and rights into the language of a western court.

Mr. Rush [counsel for Plaintiffs]: Yes, my Lord. We're prepared to start the opening, and I would like to ask Gisday Wa, Alfred Joseph, and Chief Delgamuukw, Ken Muldoe, to make the opening on behalf of the Gitskan and Wet'suwet'en chiefs.

The Court: All right, thank you. Who's first, please?

Mr. Joseph: My Lord, I'll read my address now. My name is Gisday Wa. I am a Wet'suwet'en Chief and a plaintiff in this case. My House owns territory in the Morice River and Owen Lake area. Each Wet'suwet'en plaintiff's House owns similar territories. Together they own and govern the Wet'suwet'en territory. As an example, the land on which this courthouse stands is owned by the Wet'suwet'en Chief, Gyolugyet, in Kyas Yx, also known as Chief Woos' House.

I also benefitted in general from John J. Borrows and Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary* (3rd ed. 2007). Websites are maintained by the plaintiff First Nations. Gitksan Chief's Office <http://www.gitksan.com> (last visited Feb 21, 2010); Office of the Wet'suwet'en, <http://www.wetsuweten.com> (last visited Feb. 12, 2010).

² Johnson v. M'Intosh, 21 U.S. 543 (1823), Cherokee Nation v. Georgia, 30 U.S. 1 (1831) and Worcester v. Georgia, 31 U.S. 515 (1832).

³ Indigenous peoples and their governments in Canada are generally referred to as First Nations, aboriginal peoples, or aboriginal nations, although many of the cases and scholars upon whom I relied use the terms interchangeably. The Inuit and Métis peoples are generally excluded from the "First Nations" category. The term "Aboriginal peoples," as used in Part II, § 35(2) of the Constitution Act, 1982, refers to Indians, Métis and Inuit peoples.

Mr. Muldoe: My Lord, I am Delgam Uukw. I am a Gitksan Chief and a plaintiff in this case. My House owns territories in the Upper Kispiox Valley and the Upper Nass Valley. Each Gitksan plaintiffs House owns similar territories. Together, the Gitksan and Wet'suwet'en Chiefs own and govern the 22,000 square miles of Gitksan and Wet'suwet'en territory. For us, the ownership of territory is a marriage of the Chief and the land. Each Chief has an ancestor who encountered and acknowledged the life and the land. From such encounters come power. The land, the plants, the animals and the people all have spirit – they all must be shown respect. That is the basis of our law.

Mr. Joseph: The Chief is responsible for ensuring that all the people in his House respect the spirit in the land and in all living things. When a Chief directs his House properly and the laws are followed, then that original power can be recreated, that is the source of the Chief's authority. That authority is what gives the 54 plaintiff Chiefs the right to bring this action on behalf of their House members – all Gitksan and Wet'suwet'en people. That authority is what makes the Chiefs the real experts in this case.

Mr. Muldoe: My power is carried in my House's histories, songs, dances and crests. It is recreated at the Feast when the histories are told, the songs and dances performed, and the crests displayed. With the wealth that comes from respectful use of the territory, the House feeds the name of the Chief in the Feast Hall. In this way, the law, the Chief, the territory, and the Feast become one. The unity of the Chief's authority and his House's ownership of its territory are witnessed and thus affirmed by the other Chiefs at the Feast.

Mr. Joseph: By following the law, the power flows from the people and to the people through the Chief; by using the wealth of the territory, the House feasts its Chief so he can properly fulfill the law. This cycle has been repeated on my land for thousands of years. The histories of my House are always being added to. My presence in this courtroom today will add to my House's power, as it adds to the power of the other Gitksan and Wet'suwet'en Chiefs who will appear here or who will witness the proceedings. All of our roles, including yours, will be remembered in the histories that will be told by my grandchildren. Through the witnessing of all the histories, century after century, we have exercised our jurisdiction.

The Europeans did not want to know our histories; they did not respect our laws or our ownership of our territories. This ignorance and this disrespect continues. The former Delgam Uukw, Albert Tait, advised the Chiefs not to come into this Court with their regalia and their crest-blankets. Here, he said, the Chiefs will not receive the proper respect from the government. If they are wearing their regalia then, the shame of the disrespect will be costly to erase.

Officials who are not accountable to this land, its laws or its owners have attempted to displace our laws with legislation and regulations. The politicians have consciously blocked each path within their system that we take to assert our title. The courts, until perhaps now, have similarly denied our existence. In your legal system, how

will you deal with the idea that the Chiefs own the land? The attempts to quash our laws and extinguish our system have been unsuccessful. Gisday Wa has not been extinguished.

If the Canadian legal system has not recognized our ownership and jurisdiction but at the same time not extinguished it, what has been done with it? Judges and legislators have taken the reality of aboriginal title as we know it and tried to wrap it in something called “aboriginal rights.” An aboriginal rights package can be put on the shelf to be forgotten or to be endlessly debated at constitutional conferences. We are not interested in asserting aboriginal rights – we are here to discuss territory and authority. When this case ends and the package has been unwrapped, it will have to be our ownership and our jurisdiction under our law that is on the table.

Our histories show that whenever new people came to this land, they had to follow its laws if they wished to stay. The chiefs who were already here had the responsibility to teach the law to the newcomers. They then waited to see if the land was respected. If it was not, the newcomers had to pay compensation and leave. The Gitksan and Wet’suwet’en have waited and observed the Europeans for a hundred years. The Chiefs have suggested that the newcomers may want to stay on their farms in their towns and villages, but beyond the farm fences the land belongs to the Chiefs. Once this has been recognized, the Court can get on with its main task which is to establish a process for the Chiefs’ and the newcomers’ interests to be settled. The purpose of this case then is to find a process to Gitksan and Wet’suwet’en ownership and jurisdiction within the context of Canada. We do not seek a decision as to whether our system might continue or not. It will continue.⁴

While the two chiefs clearly set forth the basis for their rights of ownership and sovereignty, the fact that they found themselves in a Canadian court of law meant that they would have to do battle within the context of Canadian aboriginal law – an area that had developed significantly in only the preceding fifteen years.

The property rights of the indigenous inhabitants of what are now the United States and Canada have common roots in the Royal Proclamation of 1763, by which King George III established colonial governments for the territory acquired in North America from the French in the Treaty of Paris. The Proclamation sought to protect Indian occupation in the areas subject to the Crown’s claimed authority and made it unlawful for colonists to settle upon or acquire Indian lands without Crown consent. King George declared that “great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians [so that we] strictly enjoin and require that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians”⁵ This message was not well received by the colonists in what is now the United States, nor in Canada. Both fiercely resisted what they viewed as unwarranted Crown

⁴ Transcript of Proceedings at 65, *Delgamuukw*, British Columbia, [1997] 3 S.C.R. 1010 (No. 23799) (transcript on file at University of British Columbia Library, Vancouver, B.C.). The Supreme Court of British Columbia is the provincial trial court.

⁵ Royal Proclamation, Oct. 7, 1763, reprinted in Robert Odawi Porter, *Sovereignty, Colonialism and the Indigenous Nations* 145 (2005).

interference in local matters. In the United States, it encouraged the break from Britain and the Declaration of Independence. In Canada, the Proclamation was frequently ignored.

The Proclamation was consistent with the European Doctrine of Discovery, which United States Supreme Court Chief Justice John Marshall explained in *Johnson v. M'Intosh*. "This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it."⁶ The "title" asserted is best understood as a right of preemption, *i.e.* the right to deal with the actual occupants regarding ownership to the exclusion of private citizens and other colonizing nations. Thus, in *Johnson v. M'Intosh*, non-Indian claimants to title based on transactions with First Nations when under the authority of the British Crown were not recognized, but the claimants who could trace title through a transaction with the United States government were held to possess valid title. And so it went in the United States that aboriginal claims to land were treated as good as against all third parties until such title was extinguished or otherwise limited by treaty or agreement ratified by Congress.⁷ Aboriginal title (also known as original Indian title) was a tribal right of use and occupancy, said to be as "sacred as the fee simple of the whites."⁸ Thus, as the wave of settlers moved west across tribal territories in the United States, the federal government negotiated treaties to extinguish tribal aboriginal rights to most land, but subject to reservations of territory held by the tribes for their exclusive use and occupancy. The most recent modern treaty substitute in the United States is the Alaska Native Claims Settlement Act of 1971 – an agreement imposed by Congress to extinguish tribal land claims, along hunting and fishing rights, and one which has significant flaws.⁹

Canada eventually subscribed to a colonial theory of aboriginal title similar to that in the United States, but one which has not yet taken full form. In *St. Catherine's Milling and Lumber Co. v. The Queen*,¹⁰ decided in 1888, the Privy Council considered a dispute between the Dominion (the national or federal government) and the province of Ontario over the proceeds from timber sales on lands contained within 32,000 acres that had been ceded to the Dominion of Canada in 1873 by the Salteaux Tribe of Ojibbeway Indians. The Dominion claimed the beneficial interest in these lands and issued a permit to St. Catherine's "to cut and carry away one million feet of lumber from a specified portion of the disputed area." The provincial courts and the Supreme Court of Canada affirmed judgments against St. Catherine's claim of right and in favor of Ontario's claim of beneficial interest in the ceded lands. On appeal to the Privy Council,

⁶ *M'Intosh*, 21 U.S. at 572-73. For detailed analysis of the case and its progeny, see Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of their Lands* (2005) and Chapter ___ of this book. See generally Nell Jessup Newton et al., *Cohen's Handbook of Federal Indian Law* 969-974 (LexisNexis 2005).

⁷ U.S. *ex rel. Hualapai Indians v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941).

⁸ *Mitchel v. United States*, 34 U.S. 711, 746 (1835). Of course, the Supreme Court in 1955 created a gaping hole in the fabric of aboriginal title when it held that "unrecognized aboriginal title" in southeast Alaska was not protected by the just-compensation clause of the Fifth Amendment. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). See Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 *Hastings L.J.* 1215 (1980).

⁹ See Robert T. Anderson, *Alaska Native Rights, Statehood and Unfinished Business*, 43 *Tulsa L. Rev.* 17 (2007) (reviewing history and "settlement" of Native claims in Alaska).

¹⁰ 14 App. Cas. 46 (1888).

the Dominion was permitted to intervene and argued that under the British North American Act it succeeded to the rights of the British Crown to acquire aboriginal lands and was also entitled to lease such lands once a cession from the Indians was obtained – as it had been here. The Privy Council rejected that argument, reasoning that while the Dominion retained sole power to make transactions with the First Nations, other provisions of the British North American Act reserved the beneficial interest in such lands to the provinces. In a passage not necessary to resolve the dispute, the Privy Council stated that the Indian interests in lands “can only be ascribed to the general provisions made by the royal proclamation [of 1763] in favour of all Indian tribes then living under the sovereignty and protection of the British Crown.”¹¹ This *dictum* in *St. Catherine’s Milling and Lumber Co.* was generally understood as confirming the existence of aboriginal title, albeit rooted in the Proclamation of 1763.¹²

Aboriginal Rights and Title in British Columbia

It was not until 1846 that the British Crown asserted sovereignty over British Columbia, when it entered into the Washington Treaty with the United States to fix the boundary in the Pacific Northwest.¹³ In 1848 Vancouver Island, located off the southwest coast of British Columbia, was proclaimed a Crown Colony with any of the Crown’s property rights vested in the private Hudson’s Bay Company. In 1858 the Colony of British Columbia was formed and the two colonies were unified in 1866. The Constitution Act of 1867, also known as the British North America Act, established the Dominion of Canada and assigned management of Indian affairs to the national Parliament. Section 91 of the Act provided that “the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, § 24. Indians, and lands reserved for the Indians.” In 1871 British Columbia became the sixth province of the Dominion, but because of the preceding section of the Constitution Act, the provinces lacked legal authority to extinguish aboriginal rights after 1867. Thus, while the provinces succeeded to all property interests of the Crown, those interests were subject to aboriginal title claims that could only be extinguished by the Dominion of Canada.¹⁴

Despite the language of section 24 of the Constitution Act and the *St. Catherine’s Milling and Lumber* decision, British Columbia consistently denied acknowledgement of aboriginal rights, although it did “follow a pattern of allocating small reserves close to white settlements without any agreement with the Indians.”¹⁵ A different pattern was maintained during the 1850s on Vancouver Island. James Douglas, who was the Governor of the Colony of Vancouver as well as the chief operating officer of the Hudson’s Bay Company’s northwest operations, entered into

¹¹ *Id.* at 54.

¹² See Kent McNeil, *Coherence*, in Foster, Raven & Webber, *supra* note 1, at 129, 130.

¹³ Treaty with Great Britain, in Regard to Limits Westward of the Rocky Mountains, U.S.-Gr. Brit, June 15, 1846, 9 Stat. 869. See *infra* p. 11, for a map of British Columbia and the claim area.

¹⁴ Constitution Act, 1867, R.S.C., App. II, No. 5, 109. Passage of the Constitution Act of 1982 (which includes aboriginal rights recognition) incorporated by reference the Constitution Act of 1867. While the ties with Great Britain are no longer of independent force in terms of governance, “the Canadian constitution is still technically embodied in a British statute, the Canada Act of 1982.” Gerald L. Gall, *The Canadian Legal System* 65 (5th ed. 2004).

¹⁵ Bartlett, *supra* note 1, at 15. Band Councils established by the Canadian government under the Indian Act of 1867 governed these reserves. *Id.*

14 treaties with First Nations covering small portions on the south end of the Island near present-day Victoria. Those treaties provided for the surrender, or transfer, of unoccupied lands to the Colony as agent of the British Crown, but subject to continuing rights of the First Nations to hunt and fish on unoccupied Crown lands. British Columbia refused to recognize the hunting and fishing rights protected by these treaties until forced to do so by the Canadian Supreme Court in 1965,¹⁶ but even then continued to deny the existence of aboriginal rights in the remainder of the Province.¹⁷ The policy of Pierre Trudeau's national government in the late 1960s was set out in its Statement of the Government of Canada on Indian Policy (1969). Its tone was one of assimilation, and it called for the abolishment of federal services for aboriginal peoples much like the termination era of the United States in the 1950s. As to aboriginal land claims, it stated: "These are so general and undefined it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to Indians as members of the Canadian community." Prime Minister Trudeau was a charismatic left-leaning Canadian Prime Minister who was extremely popular with young people in the east and was well-known for his support of civil liberties. But in a speech given in Vancouver, B.C. in 1969, he addressed aboriginal rights and stated: "We can't recognize Aboriginal rights because no society can be built on historical 'might have beens.'"¹⁸ If a supposedly liberal easterner who had taught constitutional law at the University of Montreal held such views, it is no surprise that the majority governments in British Columbia and other western provinces and territories, where there had been few treaties, refused to recognize aboriginal claims to title.

Moreover, a 1927 law had purported to make it illegal for aboriginal people to raise funds to assert aboriginal title to their land.¹⁹ British Columbia's pattern of denying aboriginal title mirrored that of the federal government and remained in full bloom when the Canadian Supreme Court in *Calder v. Attorney-General of British Columbia*²⁰ considered the Nisga'a Nation's claim to ownership of portions of British Columbia.²¹ The Nisga'a are related western neighbors of the Wet'suwet'en who in 1913 had petitioned the imperial government in London, stating that they were willing to accept "white people into [their] territory, provided this be carried out justly and in accordance with the British principles embodied in the Royal Proclamation [of 1763]."²² The government never responded in any meaningful way and in 1966 a Nisga'a leader, Frank Calder, and four chiefs of the Nisga'a villages approached Thomas Berger to bring a case to force the Crown to recognize that aboriginal title had never been extinguished. Mr. Calder had served in the B.C. Legislative Assembly with Mr. Berger and that, along with the latter's renowned success in the *White* and *Bob* litigation, led the Nisga'a to seek Mr. Berger's services.

¹⁶ *R. v. White and Bob*, [1965] S.C.R. vi (Can.). The fascinating story of this case can be found in Thomas R. Berger, *One Man's Justice: A Life in the Law* 87-106 (2002).

¹⁷ Bartlett, *supra* note 1, at 15-18.

¹⁸ Berger, *supra* note 14, at 114.

¹⁹ *Id.* at 113. The law lapsed in 1951. *Id.*

²⁰ [1973] 1 S.C.R. 313 (Can.).

²¹ The Court refers to the plaintiffs as the Nishga Indian Tribe or Nishga Nation, while the Treaty agreed to by the Nation in 1998 refers to the Nisga'a Nation. I use the latter term. The Nisga'a are the western neighbors of the Delgamuukw plaintiffs.

²² *Id.* at 111.

In *Calder*, the plaintiffs for the first time squarely presented to the Canadian courts the theory that aboriginal title had never been extinguished in the Nisga'a territory.²³ Justice Judson addressed the source of aboriginal title theory for three members of the Court:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right." What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the goodwill of the Sovereign."²⁴

However, the same three justices rejected the Nation's aboriginal title claim on the ground that a collection of sovereign acts by the *colony* of British Columbia after its establishment in 1858, but prior to its entry as a *province* into the Dominion of Canada in 1870, terminated any aboriginal title.²⁵ Three others would also have recognized a claim of aboriginal title based on common law principles, and also concluded that there was no showing of extinguishment of that title. A seventh Justice voted to dismiss the case on the ground that British Columbia's sovereign immunity had not been properly waived and thus there was no jurisdiction to hear the suit. Since the latter ground, which was joined by the three who reasoned that aboriginal title existed but had been extinguished, served as the basis for dismissal of the Nisga'a claim, there was no definitive ruling on the merits of the recognition of aboriginal title – although six members of the Court explicitly found that it had at least existed at one time.²⁶ The national government consequently recognized the need to negotiate with First Nations over their land claims, although British Columbia refused to join negotiations with the Nisga'a until 1990.²⁷ As a result of the decision in *Calder*, Prime Minister Trudeau was forced to rethink his position and is reported to have stated that "perhaps" the Indians had more "legal rights" than he thought when he made his remarks in Vancouver in 1969.²⁸

A watershed event occurred with the adoption of a new Constitution Act in 1982, which added an aboriginal rights clause to the existing constitution acts, along with a charter of freedoms that was championed by Prime Minister Trudeau.²⁹ The aboriginal rights provisions state that:

²³ The story of the *Calder* case is told in Berger, *supra* note 14, at 107-138. Berger became a judge on the British Columbia Supreme Court in 1971 and later was commissioned to conduct a review of the Alaska Native Claims Settlement Act, the results of which are found in Thomas R. Berger, *Village Journey: The Report of the Alaska Native Review Commission* (1985).

²⁴ *Calder*, [1973] 1 S.C.R. at 328.

²⁵ *Id.* at 326-333.

²⁶ The Nisga'a negotiated a settlement of their aboriginal claims in a Treaty that became effective in 1998 and was upheld by the British Columbia Supreme Court over a challenge to its provisions recognizing self-government. *See Campbell v. British Columbia*, [2000] 79 B.C.L.R.3d 122 (Can.). The British Columbia Supreme Court is the trial court level with any appeals taken to the B.C. Court of Appeal and then on to the Canadian Supreme Court.

²⁷ Berger, *supra* note 14, at 126.

²⁸ *Id.*

²⁹ Parts 1 & 2 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.³⁰

The full meaning of this Act has not been developed, but it has been at the center of a number of recent important cases. The first major case applying the provisions involved the question of aboriginal rights to fish using gear prohibited by current Crown regulations.³¹ The Supreme Court found that the Constitution Act protected rights that had not been extinguished before 1982 and also that protected aboriginal rights could not be read as subject to regulatory limits put in place before such rights were incorporated into the Constitution. The Court also rejected the Crown’s argument that extensive regulation of Indian fishing could be construed as extinguishing the underlying right, stating that the Crown failed to meet its burden of demonstrating a “clear and plain intent to extinguish” the underlying right. Further, while the Crown retains the right to regulate aboriginal rights it must be done in a way that respects the substantive protection of aboriginal rights and places a burden of justification on any government regulation. Thus, with respect to the aboriginal right to fish for food at issue in *Sparrow*, the Crown may regulate for conservation purposes, but the priority use after such a goal is met will be the aboriginal fishing right. The Court acknowledged that this placed a heavy burden on the Crown, but that this was necessary to ensure that aboriginal “rights are taken seriously.”

In *R. v. Van Der Peet*, the Court again acknowledged that the pre-European occupation of Canada by aboriginal peoples mandated special status and treatment under the common law – status now protected by the Constitution.³² It involved the assertion of an aboriginal *right* to exchange fish for money or other goods. The Court set out a framework for the determination of such rights by demanding that a practice, custom, or tradition be shown to have been an integral part of a group’s distinctive culture before the arrival of the Europeans, and be a practice that maintains an integral place today, although the nature of its exercise may have evolved over time.³³

The Canadian Supreme Court developed a jurisprudence distinguishing aboriginal rights from aboriginal title, and at the same time the Court scrupulously avoided dealing with claims to self-government and tribal sovereignty with any precision. The Court’s rulings are filled with caution and use language sensitive to the place of First Nations in Canada. At the same time, the

³⁰ *Id.* § 35.

³¹ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (Can.).

³² *R. v. Van der Peet*, [1996] 2 S.C.R. 507. ¶ 30.

³³ For a thoughtful criticism of the Court’s reasoning, see Russel Lawrence Barsh and James Youngblood Henderson, *The Supreme Court’s Van der Peet Trilogy: Naive Imperialism and Ropes of Sand*, 42 McGill L. J. 993 (1997).

Court frankly acknowledges the reality that the dominant force in Canada is the colonizing government and that the best that can be done is to “reconcile” the preexisting rights of the First Nations with the modern non-Native Canadian society.

Chief Justice Lamer’s preliminary remarks in his *Delgamuukw* opinion clearly frame the case and inform the audience of the importance of the constitutional provision.

This appeal is the latest in a series of cases in which it has fallen to this Court to interpret and apply the guarantee of existing aboriginal rights found in s. 35(1) of the *Constitution Act, 1982*. Although that line of decision³⁴ have laid down the jurisprudential framework for s. 35(1), this appeal raises a set of interrelated and novel questions which revolve around a single issue – the nature and scope of the constitutional protection afforded by s. 35(1) to common law aboriginal title.

The Gitksan and Wet’suwet’en peoples who had filed the lawsuit were eager for an answer.

Factual Background and Genesis of the Case

The Gitksan and Wet’suwe’ten are distinct peoples in north-central B.C. who numbered about 4,000 – 5,000 for the former and 2,000 for the latter at the time of trial in 1987.³⁵ There were also approximately 30,000 non-aboriginals living in the claim area. Dr. Valerie Napoleon explains that “[a]long with the Nisga’a and the Tsimshian, the Gitksan are one of three closely related northwest coast peoples in British Columbia that form the ‘Tsimshian.’ These three groups share a common ancient heritage, and there are many similarities between their cultures and languages. The Gitksan’s non-Tsimshian neighbours include the Wet’suwet’en, Carrier, Tahltan, and Sekani peoples.”³⁶ These indigenous groups first experienced sustained contact with non-aboriginal peoples in 1823. As the number of non-aboriginal people entering British Columbia increased, the Gitksan protested the trespasses through a blockade of a river used for white trade in the 1870s and met with the Prime Minister of Canada in Ottawa in 1908 to lodge their protests. Increasing non-aboriginal settlement only heightened the conflicts, eventually leading the Gitksan and Wet’suwet’en to court.

The House is the central social unit in Gitksan society. House members in the past would live at times under one roof in a longhouse, but in modern times as in the past, House members are scattered due to marriage, kinship relations and occupation. There are now six Gitksan villages.³⁷ The House controls its own territories for use by its members for food, trade, and ceremonial purposes according to a traditional land tenure system. Several Houses combine to comprise clans with common origins and play important roles in determining territoriality and settling any conflicts. It was this system of law, social structure, and property rights that the two

³⁴ *Sparrow*, 1 S.C.R. 1075, proceeding through the *Van der Peet* trilogy (*Van der Peet*, 2 S.C.R. 507; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672 (Can.), and *R. v. Gladstone*, [1996] 2 S.C.R. 723 (Can.)); and ending in *R. v. Jones*, [1996] 2 S.C.R. 821 (Can.), *R. v. Adams*, [1996] 3 S.C.R. 101 (Can.), and *R. v. Côté*, [1996] 3 S.C.R. 139 (Can.).

³⁵ In the interest of brevity, I have focused on the Gitksan arguments and evidence.

³⁶ Valerie Ruth Napoleon, *Ayook: Gitksan Legal Order, Law and Legal Theory 4* (Unpublished Ph.D. dissertation, University of Victoria) (on file with author).

³⁷ *Id.*, at 5-6.

First Nations relied upon as demonstrating their “ownership and jurisdiction over the claim area.” As the Gitksan explained in their Factum (brief) to the Canadian Supreme Court,

Earl Muldoe is Delgamuukw, head chief of the House of Delgamuukw. The head chief has primary responsibility for, and authority in the House and a range of responsibilities in relation to the House territory, including the allocation and disposition of rights to use the territory among House and non-House member. The role of a chief is very important and chiefs begin training their successors from a young age. Successors are educated in the oral histories, House songs, crests, territorial boundaries, and the feast system. A House member becomes a chief by virtue of succeeding to the name held by the previous holder. Chiefly names carry the power of the House, called in Gitksan, “daxgyet.” These names can be traced back over the centuries and in themselves call up the history of the Gitksan people. With the succession of the new chief, the crest, territory and authority are passed on.³⁸

The province of British Columbia had steadfastly refused to acknowledge that either the Gitksan or Wet’suwet’en possessed aboriginal property rights, or any right to self-government, despite the fact that the Canadian Supreme Court’s ruling in the *Calder* case made it clear that claims of aboriginal title could be valid, and *Van der Peet* had explained the common law roots of the rights now enshrined in the Canadian Constitution. Since Canada’s federal government refused to negotiate without provincial involvement, the First Nations were left with no choice but to litigate, or do nothing. The latter was plainly unacceptable.

³⁸ Factum of the Appellants, *The Gitksan Hereditary Chiefs v. British Columbia*, [1997] 3 S.C.R. 1010 (No. 23799).

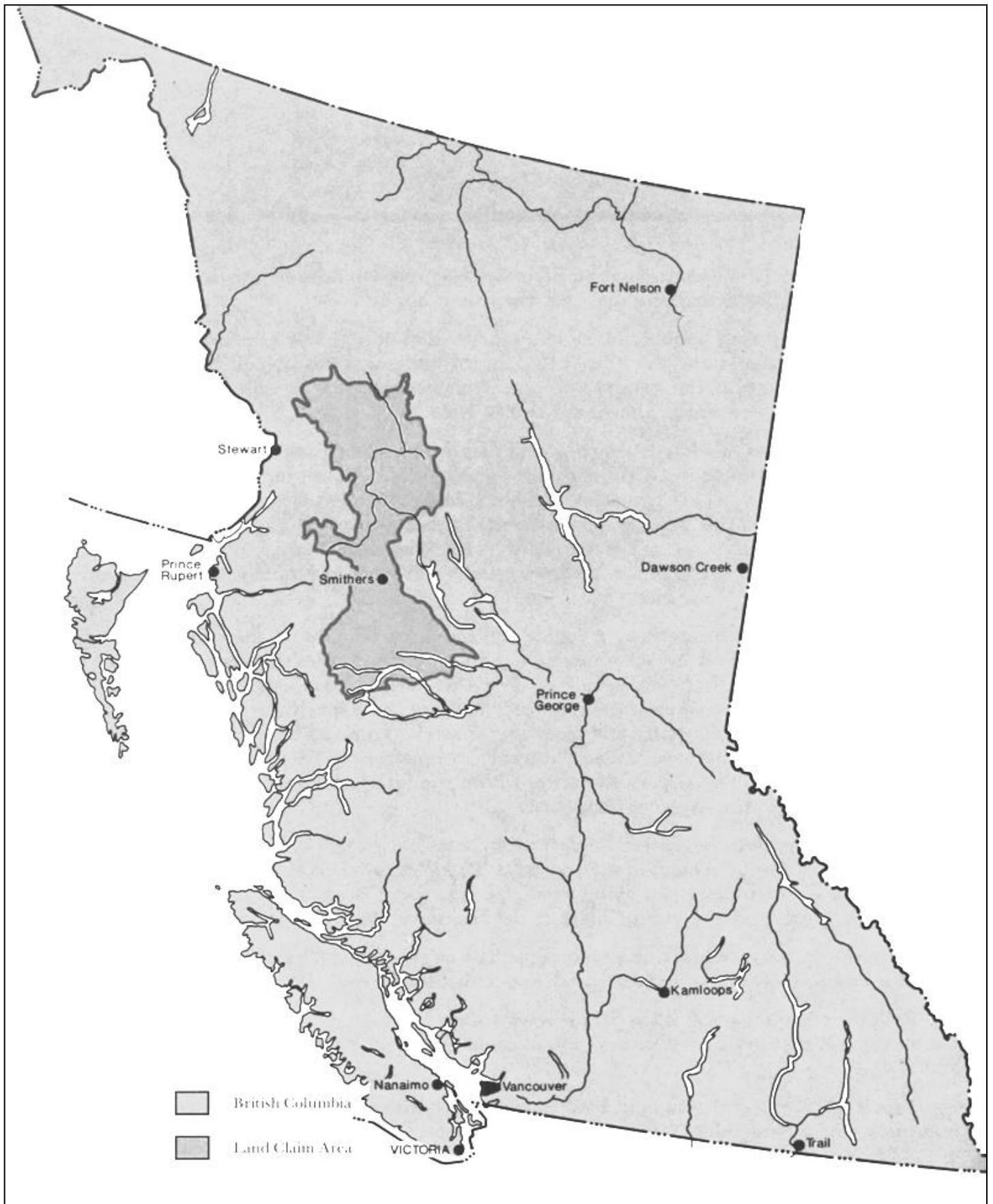


Figure 1 The town of Smithers, where the first part of the trial was held, is in the center of the claim area, which is approximately 22,000 square miles – about the size of West Virginia.

Stuart Rush began his career as a criminal defense practitioner in the early 1970s after graduating from the University of British Columbia with his law degree.³⁹ He became familiar with aboriginal people early in his legal career after a stint as a junior member of a team conducting an inquest into the death of a prominent aboriginal person who was in the hands of the Royal Canadian Mounted Police. Mr. Rush was subsequently retained by the Gitksan and Wet'suwet'en to represent over a dozen tribal members facing criminal charges for fishing violations. He won every case and naturally became highly regarded in the aboriginal community. The inclusion of the aboriginal rights clauses in the Constitution Act of 1982 combined with the Gitksan and Wet'suwet'en realization that their aboriginal rights of ownership and jurisdiction could not be negotiated without judicial recognition of the claims. Mr. Rush became lead counsel in the *Delgamuukw* case along with Vancouver lawyer, Peter Grant, who explained that in 1977:

Canada's minister of Indian and northern affairs, Hugh Faulkner, accepted the Gitksan and Witsuwit'en claim over their traditional territory as a foundation for negotiating a "comprehensive claim" under the federal treaty-making process. Unfortunately, British Columbia refused to acknowledge Aboriginal rights or title in this province and would not participate in such negotiations.⁴⁰

By 1982 many leaders among the Gitksan and Wet'suwet'en peoples believed that further delay would cause oral histories needed for proof of the claims to be lost as elders passed away. Mr. Rush and Mr. Grant commenced the case, but soon realized that they needed an expanded legal team to pursue the case and added Professor Michael Jackson, Louise Mandell and Murray Adams to the core legal team. Dr. Antonia Mills, an anthropologist who provided key expert testimony for the plaintiffs, further explained the roots of the case.

The Gitksan and Witsuwit'en had never signed a treaty; up to the opening of the land claims court case, the question of who has jurisdiction over their traditional land remained unresolved: the Gitksan and Witsuwit'en continue to harvest the fish, fowl game, and plants on their traditional territories. However . . . the case is not based on use rights. It is based on the premise that the Gitksan and the Witsuwit'en have continued to maintain jurisdiction over their territories through their system of governance, that is, the matrilineal succession of titles designated at feasts (potlatches), in which land rights are passed on. The Gitksan and the Witsuwit'en have never agreed to any other jurisdiction over their territories and are seeking recognition of their ownership and jurisdiction.³⁶

After the Constitution Act of 1982, the Crown sought to litigate several test cases to obtain judicial construction of the aboriginal rights provisions. The litigation costs of the case were borne at least in part by the Canadian government, although the costs to the plaintiffs quickly outstripped the limited funding provided. "The Gitksan and Witsuwit'en made it very clear to their legal counsel and to the experts that they wished the case to be founded on their own

³⁹ Information regarding Mr. Rush is from the Alumni Profiles of the University of British Columbia Faculty of Law website and a telephonic interview conducted by the author on April 7, 2010.

⁴⁰ Peter Grant, *Foreword* to Daly *supra* note 1, at xvii.

³⁶ Mills, *supra* note 1, at 4-5.

evidence and oral histories.”⁴¹ *Delgamuukw* was one of the test cases, and the opening statements by Delgamuukw and Gisday Wa at trial in Smithers, B.C., quoted earlier in this chapter, clearly articulated the First Nations’ theory of the case.⁴² The case is remarkable for the length of the trial — over a three-year period the trial court heard 318 days worth of evidence followed by 56 days of legal argument and eventually rendered a 381-page opinion. After an intervening appeal to the highest court in British Columbia and a two-year hiatus for further negotiations, the trial court decision was vacated and remanded by the Supreme Court of Canada for a new trial.⁴³ Although the trial court decision was vacated for pleading and evidentiary errors, the Canadian Supreme Court discussed the form and content of aboriginal rights, aboriginal title and rights of self-government at some length. Equally important is the guidance regarding the use of oral history in proving aboriginal claims. Since then, a number of cases have provided more content to the principles established in *Delgamuukw*.⁴⁴

The case was heard before the Chief Judge of the British Columbia Supreme Court, Allan McEachern, who was appointed to the bench in 1979 by Prime Minister Pierre Trudeau. He had been born and raised in the Vancouver area and had worked in the timber industry, the fishing industry and an iron foundry before taking up the law.⁴⁵ He was well connected and a popular member of the political and legal establishment in Vancouver. He was a commissioner of the Canadian Football League and had been the President of the British Columbia Football Club. His obituary in 2008 recounted that he had grabbed headlines in a case striking down government regulations that denied medicare funding for abortions. In another case that received public notice, he issued an injunction prohibiting street prostitution in part of Vancouver, defining hooking as a public nuisance. A substantial portion of his obituary in Canada’s largest national newspaper, however, discussed his role in the *Delgamuukw* case:

Stuart Rush, a Vancouver trial lawyer who was on the *Delgamuukw* legal team for 14 years, remembers being struck with how important court formality was to Mr. McEachern and yet how willing he was to make concessions to the nature of the process in what was a highly unusual trial. “He had a really good sense of humour and this was a hard fought case and there was a lot of sharp feeling between the counsels on both sides so sometimes it got pretty tense,” Mr. Rush says. “Mr. McEachern had to adjudicate those . . . he did that with a steady hand which I thought made it possible for there to be a more or less civilized environment in the court room.”

Nonetheless, Mr. Rush says he and his clients were “stunned” by Mr. McEachern’s decision that aboriginal rights did not exist because they had been wiped out by colonial legislation. In his 394 page decision, Mr. McEachern borrowed a phrase from Thomas

⁴¹ Peter Grant, *Foreword to Daly supra* note 1, at xviii.

⁴² A map of the claim area can be found on page __, *supra*.

⁴³ The trial court opinion can be found at *Delgamuukw v. British Columbia*, [1991] 79 D.L.R. (4th) 185 (hereinafter cited as Trial Court), while the British Columbia Court of Appeal decision is at *Delgamuukw v. British Columbia*, [1993] 104 D.L.R. (4th) 470. The University of British Columbia Library has a 369 volume set of transcripts, reports and exhibits from the case. See also *Colonialism on Trial, supra*, note 1.

⁴⁴ *R. v. Marshall*, [2005] 2 S.C.R. 220; *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 S.C.R. 550.

⁴⁵ Biographical information taken from the Alicia Priest, *Chief Justice of B.C. Was a Lawyer's Lawyer and a Judge's Judge*, *Globe & Mail* (Toronto), Feb. 9, 2008 at S11.

Hobbes and called the pre-colonization life of the Gitksan “nasty, brutish, and short.” His judgment was widely criticized by native and non-native alike, and he was labeled “ethnocentric” and even “racist.” In 1993 his judgment was overturned by the B.C. Court of Appeal and by the Supreme Court of Canada four years later. Indeed, *Delgamuukw v. British Columbia* moved the Court to make its strongest statement ever on the legitimacy of aboriginal title in Canada and on the legitimacy of indigenous oral history.⁴⁶

Judge McEachern appeared to have a great interest in hearing the case, although it was not revealed until relatively late in the process. After several years of preparation and pre-trial motion work, the aboriginal plaintiffs were surprised to learn that Chief Judge McEachern had decided to hear the case himself. He had ruled against the plaintiffs on a number of pre-trial matters without disclosing any intent to try the case on the merits. Shortly before trial, he announced that he would hear the case on the merits — a development viewed with suspicion and foreboding by Mr. Rush. Counsel for the Gitksan and Wet’suwet’en advised their clients of the possibility of removing the judge through a motion for recusal, but in the end the likely delay in the proceeding counseled in favor of proceeding to trial. Mr. Rush recalls that his clients believed in the veracity of their evidence and felt a need to get on with the case due to the continuing loss of elders who might testify.

In his opinion of nearly 400 pages, Chief Judge McEachern characterized the claims as being brought by 35 Gitksan and 13 Wet’suwet’en hereditary chiefs alleging: 1) that they and their ancestors own approximately 22,000 square miles in northwest British Columbia; 2) that they are entitled to govern the territory according to their own law; 3) alternatively that they have certain aboriginal use rights to the territory; and 4) that they are entitled to damages for the removal of and damage to natural resources from their territory. To prove these claims, the Gitksan and Wet’suwet’en offered voluminous evidence from Indian witnesses and the anthropologists (among others) to demonstrate their claims of ownership by showing use and occupancy and also by demonstrating that their legal, social, and political system was inextricably tied to territorial control and responsibility passed on through the generations. The plaintiffs had earlier asserted in their pleadings that they wanted a judgment recognizing absolute “ownership and jurisdiction.” That seemingly absolute demand was moderated as the trial continued over a three year period, so that “while ownership and jurisdiction were the plaintiffs’ primary claims, they wished the court to grant them whatever other rights they may be entitled to.” In response, Judge McEachern indicated that an amendment to the pleadings might be required “to assert alternative claims additional to ownership and jurisdiction.”⁴⁷ The pleadings were never amended. The plaintiffs’ claim was an accurate description of the rights that have long been recognized in United States law, but how the Canadian courts would deal with the claim was uncertain. It was apparent that six justices in the *Calder* case were ready to recognize some form of aboriginal title, but the form was not clear. It was a wise strategic move to moderate the claim – especially in the face of what turned out to be a hostile trial court judge. As revealed below, a different pleading issue, *i.e.*, the amalgamation of the individual House claims of ownership, precluded a decision on the merits in the Canadian Supreme Court.

⁴⁶ *Id.*

⁴⁷ Trial court, *supra* note 38, ¶¶ 294-95.

In any event, Judge McEachern was extremely skeptical of the evidence presented by the plaintiffs. For example, he observed:

When I come to consider events long past, I am driven to conclude, on all the evidence, that much of the plaintiffs' historical evidence is not literally true. For example, I do not accept the proposition that these peoples have been present on this land from the beginning of time. Serious questions arise about many of the matters about which the witnesses have testified and I must assess the totality of the evidence in accordance with legal, not cultural, principles.

I am satisfied that the lay witnesses honestly believed everything they said was true and accurate. It was obvious to me, however, that very often they were recounting matters of faith which have become fact to them. If I do not accept their evidence, it will seldom be because I think they are untruthful, but rather because I have a different view of what is fact and what is belief.⁴⁸

Judge McEachern's attitude toward the aboriginal plaintiffs' case was criticized sharply for the ethnocentric and condescending attitude revealed by the Court throughout the proceedings.⁴⁹ Plaintiffs had expended considerable effort preserving testimony of elders through depositions taken in advance of trial, but that extensive evidence, like other evidence based on oral history and tradition fell upon a "tin ear." The trial judge's attitude toward oral history prompted this cartoon.

⁴⁸ *Id.* ¶¶ 357-58.

⁴⁹ Leslie Hall Pinder, *The Carriers of No: After the Land Claims Trial* (Lazara 1991).



Figure 2 In *Our Box Was Full*, *supra* note 1, Richard Daly described the courtroom incident that prompted the cartoon. The trial judge was of the view that courtroom decorum precluded the singing of a traditional song that reflected territorial proprietorship. Chief Judge McEachern reportedly stated that in cultural matters he had a “tin ear.” Cartoon printed with permission of Don Monet.

Dr. Richard Daly, an anthropologist, was retained by the plaintiffs in the case and lived in proximity to the client community while gathering data to be included in a report for the court. The purpose was to explain the “context for the plaintiffs’ demand for the legal recognition of their full-fledged proprietorship, a tradition of self-governance, and their comprehensive knowledge and extensive use of the land in the course of what, broadly speaking, are and were their economic pursuits.”⁵⁰ Another expert, Dr. Antonia Mills, was also retained after the case was filed in order to fill what she viewed as a supporting role to assist the court in understanding the cultural context and governmental system related to the land claims of the Wet’suwet’en. She had never served as an expert witness before, but had conducted fieldwork and research among related peoples in British Columbia and had had some contact with the Wet’suwet’en.⁵¹ It was understood by these experts that the primary evidence was to be from the aboriginal witnesses who had first-hand knowledge of their ownership and system of governance.

⁵⁰ Daly, *supra* note 1, at xxv.

⁵¹ Mill, *supra* note 1, at 11-12.

However, like the testimony of the aboriginal witnesses, the expert testimony was received with disdain by the trial court. Judge McEachern stated:

I found Dr. Daly's report exceedingly difficult to understand. It is highly theoretical and, I think, detached from what happens "on the ground."

Most significantly, Dr. Daly lived with these people for two years, while this litigation was under way, making observations on their activities, listening and, I think, accepting everything they said, without keeping any notes. . . .

It is always unfortunate when experts become too close to their clients, especially during litigation.⁵²

In their post-trial books, both Daly and Mills sharply disputed the Judge's characterization of their proffered testimony. As Dr. Mills explained, "*Delgamuukw* set a new precedent by having the chiefs themselves act as the prime witnesses" while the western-trained "experts" sought to demonstrate their conclusions that the Gitksan and Wet'suwet'en "have maintained their own culture despite being surrounded by a dominant culture which believes that it should supplant them."⁵³

At the early stages of the litigation the province of British Columbia denied the possibility of aboriginal title or rights of any sort. The province sought a "declaration that the Plaintiffs have no right, title or interest in and to the Claim Area, and the resources thereon, thereunder or thereover," or alternatively, that their only claim was for compensation for damage to any aboriginal rights that might have existed.⁵⁴ Judge McEachern agree in substance, concluding that the combination of 13 pre-provincial acts, *i.e.*, before 1871, had effectively eliminated nearly all aboriginal rights of the Wet'suwet'en and Gitksan.

Aboriginal persons and commentators often mention the fact that the Indians of this province were never conquered by force of arms, nor have they entered into treaties with the Crown. Unfair as it may seem to Indians or others on philosophical grounds, these are not relevant considerations. The events of the last 200 years are far more significant than any military conquest or treaties would have been. The reality of Crown ownership of the soil of all the lands of the province is not open to question and actual dominion for such a long period is far more pervasive than the outcome of a battle or a war could ever be. The law recognizes Crown ownership of the territory in a federal state now known as Canada pursuant to its Constitution and laws.⁵⁵

Subject to what follows, the plaintiffs have established, as of the date of British sovereignty, the requirements for continued residence in their villages, and for non-exclusive aboriginal sustenance rights within those portions of the territory I shall later

⁵² Dr. Mills' testimony was similarly disparaged. *Id.* ¶¶ 370-71, 373.

⁵³ Mills, *supra* note 1, at 11, 26.

⁵⁴ Trial Court, *supra* note 38, ¶ 300.

⁵⁵ *Id.* ¶¶ 567

define. These aboriginal rights do not include commercial practices.⁵⁶

McEachern's pre-provincial extinguishment theory lacked the support of both the province and plaintiffs when the case went up to the British Columbia Court of Appeal. A more liberal government had been elected and rejected the harsh position taken at trial by the province. Instead, the province agreed with the Gitksan and Wet'suwet'en that there had been no blanket extinguishment prior to 1871 and that aboriginal rights continued, although there continued to be a dispute over the nature and content of such rights. According to Professor Michael Jackson of the University of British Columbia Faculty of Law and co-counsel for plaintiffs, the incoming New Democratic Party government had made a commitment that it would seek to negotiate land claims. With the new government came a new lead counsel in Bryan Williams, who had been a former president of the Canadian Bar Association and during his tenure had stated that achieving justice for aboriginal peoples was a national priority. Counsel for the hereditary chiefs met with him and sought to narrow the issues on appeal. One of the results was British Columbia's agreement not to argue the blanket extinguishment. As it turned out, three of the province's former lawyers were appointed by the court to address the now-abandoned provincial arguments as *amicus curiae*.

For their part, the plaintiffs claimed "an unextinguished aboriginal right to ownership, or at least a proprietary interest in the lands and resources within the external boundary of the territory." They further claimed that such proprietary interests were generally free from provincial law. As the Court of Appeal described it, "[t]he [jurisdictional] claim involves an unextinguished right to control the lands and natural resources of the territory, and to govern the territory and the plaintiffs' people by Gitksan and Wet'suwet'en laws. The claim seeks to exclude the operation of the British Columbia laws in the territory."⁵⁷ The plaintiffs also objected to the trial court's exclusion or disregard of evidence offered in support of the aboriginal claims.

The Court of Appeal agreed that no rights had been extinguished prior to 1871 and that thereafter the province had no authority to extinguish aboriginal rights. The court rejected claims to "aboriginal title," or absolute ownership. It also rejected the plaintiffs' claims to jurisdiction over land and resources, but noted that a court declaration was not needed for internal self-regulation. The court further found that aboriginal rights "are subject to Canadian (and provincial) legislative authority."⁵⁸ Nevertheless, it was a victory for the plaintiffs since aboriginal rights would have been recognized, although their geographic scope limited.

The Canadian Supreme Court Decision

As often is the case as complex litigation develops over time, the parties' legal theories were altered to fit new circumstances. In the Canadian Supreme Court, British Columbia claimed underlying title to all land in the province and not granted by it to third parties, but

⁵⁶ *Id.* ¶ 1445.

⁵⁷ *Delgamuukw, v. British Columbia*, [1993] 104 D.L.R. (4th) 470 ¶ 185.

⁵⁸ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, ¶¶ 31-34.

potentially subject to aboriginal “rights” and in more limited cases to aboriginal “title.”⁵⁹ The province distinguished “rights” and “title” as follows: “Aboriginal title, then, is not acquired merely because the aboriginal society used or occupied even specific tracts of land to hunt, fish and harvest resources. All such aboriginal rights will have ‘an important link to the land’ without the land itself assuming the significance of aboriginal title land.”⁶⁰

British Columbia, though its counsel, Joseph J. Avray, argued that since the original claims were pleaded as ones for “ownership” and “jurisdiction,” but were now being asserted as claims for “aboriginal title” and “self-government,” there was prejudice to the province. Chief Justice Lamer rejected this argument, noting that the trial court had orally permitted the adjustment of the claim and the province had not appealed. Moreover, Chief Justice Lamer correctly pointed out that the form and content of aboriginal rights and title under the common law and the 1982 Constitution Act had “rapidly evolved” since the pleadings were drafted. British Columbia’s next argument, however, derailed a portion of the case for the First Nations, and might have been an appropriate ending point depending on one’s judicial philosophy.

Although the case had been allowed to proceed as one for aboriginal title and self-government, it also had been pleaded as a set of *individual* House claims, which the plaintiffs argued could be consolidated to present joint claims. British Columbia argued that if it had known the individual House claims were going to be combined into two communal claims on the part of each First Nation, it would have altered its litigation strategy to meet this alternative claim. The Wet'suwet'en and Gitksan argued that there could be no prejudice since the facts that supported either legal theory were identical – an argument Chief Justice Lamer considered to have “considerable weight” – but not enough to allow a ruling on the merits. He stated that to “frame the case in a different manner on appeal would retroactively deny the respondents the opportunity to know the appellants’ case.”⁶¹ At that point, the Court might have simply remanded the case for a new trial, but the Court instead went on to explain that “there are other reasons why a new trial should be ordered.”⁶² The reasons that followed elevated the ruling to its groundbreaking status.

After noting the general rule that appellate courts should be “extremely reluctant” to interfere with trial court findings of fact and the assessment of the credibility of expert witnesses,⁶³ Chief Justice Lamer sharply criticized the trial court’s treatment of the evidence offered by the Wet'suwet'en and Gitksan.

The trial judge's treatment of the various kinds of oral histories did not satisfy the principles I laid down in *Vanderpeet*. These errors are particularly worrisome because oral histories were of critical importance to the appellants’ case. They used those histories in an attempt to establish their occupation and use of the disputed territory, an essential requirement for aboriginal title. The trial judge, after refusing to admit, or giving no

⁵⁹ See *Factum of the Respondent, Her Majesty the Queen in Right of the Province of British Columbia* ¶¶ 87-102, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (No. 23799).

⁶⁰ *Id.* ¶¶ 89-91.

⁶¹ *Delgamuukw*, [1997] 3 S.C.R. ¶ 76.

⁶² *Id.* ¶ 77.

⁶³ *Id.* ¶ 78.

independent weight to these oral histories, reached the conclusion that the appellants had not demonstrated the requisite degree of occupation for “ownership”. Had the trial judge assessed the oral histories correctly, his conclusions on these issues of fact might have been very different.

In the circumstances, the factual findings cannot stand.⁶⁴

While space limitations do not permit review of all the evidentiary errors discussed by the Court, some of the most important evidence was presented through special oral histories known as the *adaawk* and *kungax*.

It is apparent that the *adaawk* and *kungax* are of integral importance to the distinctive cultures of the appellant nations. At trial, they were relied on for two distinct purposes. First, the *adaawk* was relied on as a component of and, therefore, as proof of the existence of a system of land tenure law internal to the Gitksan, which covered the whole territory claimed by that appellant. In other words, it was offered as evidence of the Gitksan’s historical use and occupation of that territory. For the Wet’suwet’en, the *kungax* was offered as proof of the central significance of the claimed lands to their distinctive culture. As I shall explain later in these reasons, both use and occupation, and the central significance of the lands occupied, are relevant to proof of aboriginal title.⁶⁵

Judge McEachern had admitted the testimony regarding the *adaawk* and *kungax*, but had inappropriately limited the purposes for which they were admitted by relegating them to a role of supplementary evidence to confirm facts otherwise established. The Court rejected that limitation and noted that “if this reasoning were followed, the oral histories of aboriginal peoples would be consistently and systematically undervalued by the Canadian legal system.”⁶⁶ Judge McEachern was also rebuked for rejecting affidavits submitted by chiefs to demonstrate each House’s ownership of territory. The affidavits relied in part on statements of deceased individuals regarding use and ownership of lands, which were rejected as hearsay not fitting within the “reputation” exception to hearsay. One of the reasons Judge McEachern had given was that the statements were made in the context of discussing the prospects of land claims against the province. Chief Justice Lamer dismissed the argument.

It would be perverse, to say the least, to use the refusal of the province to acknowledge the rights of its aboriginal inhabitants as a reason for excluding evidence which may prove the existence of those rights. Second, this rationale for exclusion places aboriginal claimants whose societies record their past through oral history in a grave dilemma. In order for the oral history of a community to amount to a form of reputation, and to be admissible in court, it must remain alive through the discussions of members of that community; those discussions are the very basis of that reputation. But if those histories are discussed too much, and too close to the date of litigation, they may be discounted as being suspect, and may be held to be inadmissible. The net effect may be that a society

⁶⁴ *Id.* ¶¶ 107-08

⁶⁵ *Id.* ¶ 94.

⁶⁶ *Id.* ¶ 98.

with such an oral tradition would never be able to establish a historical claim through the use of oral history in court.⁶⁷

Despite the fact that a remand was necessary due to the pleading and evidentiary errors, Chief Justice Lamer proceeded to set out his view of the law regarding aboriginal title, aboriginal rights, and the right to self-government, or sovereignty. His views were fully concurred in by two other Justices; two others concurred, but would have made some refinements to the reasoning. Interestingly, the sixth Justice participating concurred with the Chief Justice, but was also in “substantial agreement” with the other concurring Justices. The effect was a stunning legal victory for the aboriginal plaintiffs, although no specific relief would be forthcoming.

Chief Justice Lamer described aboriginal title as not being an absolute title in the fee simple sense as claimed by the plaintiffs, but more than what British Columbia characterized as merely individual aboriginal practices, or use rights protected by the Constitution Act of 1982. The province had argued that aboriginal “title” included only the exclusive right to use land to carry out those activities. The Court attempted to identify a middle ground.

The content of aboriginal title, in fact, lies somewhere in between these positions. Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This inherent limit, to be explained more fully below, flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a fee simple.⁶⁸

The Court continued and identified the source of aboriginal title in the occupancy of territory by indigenous people “*before* the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward.”⁶⁹ Chief Justice Lamer described it as a communal interest, alienable only to the Crown. He then developed what was described as the “content” of aboriginal title. “[L]ands held pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants’ attachment to those lands. This limit on the content of aboriginal title is a manifestation of the principle that underlies the various dimensions of that special interest in land -- it is a *sui generis* interest that is distinct from “normal” proprietary interests, most notably fee simple.”⁷⁰ Thus, if “occupation [were] established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (*e.g.*, by strip mining it).”⁷¹ This aspect of

⁶⁷ *Id.* ¶ 106.

⁶⁸ *Id.* ¶ 111.

⁶⁹ *Id.* ¶ 114.

⁷⁰ *Id.* ¶ 125.

⁷¹ *Id.* ¶ 128.

the ruling seems paternalistic at best and would seem to preclude aboriginal nations from adapting to changing economic, social, political, and environmental conditions. If climate change makes an area no longer suitable for hunting, fishing, or gathering, why should an aboriginal nation be precluded from making some new use of the area, while non-aboriginal fee simple owners would not? The Court offered no explanation for the conclusion that the title is somehow less than a fee simple.

The Court also found that the Constitution Act, 1982, did not create aboriginal rights, but protects “[t]he *existing* aboriginal and treaty rights of the aboriginal peoples of Canada.” Chief Justice Lamer also noted that there may be cases where a connection with the land may not be sufficient to establish aboriginal title, but other aboriginal rights, including site-specific rights to engage in particular activities, may be protected by the Constitution. The latter would often include activities such as fishing or gathering where the activities do not rise to the level of demonstrating exclusivity of the use and occupancy sufficient to make out a claim of aboriginal title. This reasoning was in accord with the decision of the Court in *R. v. Sparrow*, and the new ground was broken with the discussion of the content and proof of aboriginal title. With regard to the latter the Court stated that “the aboriginal group asserting the claim must establish that it occupied the lands in question at the *time at which the Crown asserted sovereignty over the land subject to the title.*”⁷² In *Delgamuukw* that would be 1846, which is when the Washington Boundary Treaty⁷³ fixed the boundary between the United States and Canada. In contrast, an aboriginal right must be “integral to the aboriginal community claiming the right” *during the period prior to contact*. “This arises from the fact that in defining the central and distinctive attributes of pre-existing aboriginal societies it is necessary to look to a time prior to the arrival of Europeans. Practices, customs or traditions that arose solely as a response to European influences do not meet the standard for recognition as aboriginal rights.”⁷⁴ Aboriginal title, on the other hand, is recognized due to prior occupation of aboriginal people and is recognized as of the date that the Crown asserted sovereignty over an area. According to Chief Justice Lamer, this is because it is at that moment that the Crown became the “owner” of the underlying legal title as a matter of the English common law and the aboriginal occupancy is transformed into a “burden” on the Crown’s title.⁷⁵

Of course, the First Nations may have a different view of the legal status of their historic use and occupancy rights (courts of the colonizing nations shudder at the notion of calling such rights “ownership” with its fee simple), but the Canadian Supreme Court, like the United States Supreme Court 160 years earlier, arrogated the power to make the rules. As might be expected, the Canadian Supreme Court adopted a rule that benefits the Crown and Canada’s interest. Aboriginal law is said to be relevant to prove recognition of claimed rights before Crown sovereignty, and must be accompanied by proof of physical presence on the claimed territory.⁷⁶ Thus, proof of an aboriginal land tenure system would aid in establishing aboriginal title. For Gitksan and the Wet’suwet’en the *adaawk* and *kungax* would be evidence of such a system and

⁷² *Id.* ¶ 144.

⁷³ Treaty with Great Britain, in Regard to Limits Westward of the Rocky Mountains, U.S.-Gr. Brit, June 15, 1846, 9 Stat. 869.

⁷⁴ *Delgamuukw*, [1997] 3 S.C.R.. ¶ 144.

⁷⁵ *Id.* ¶ 145.

⁷⁶ *Id.* ¶ 146 (citing *Baker Lake (Hamlet) v. Canada*, [1979], 107 D.L.R. (3d) 513).

critical to establishing the claim.⁷⁷ In light of this fact, Judge McEachern's refusal to give proper treatment to the oral evidence of the system made a remand for a new trial necessary. Since the relevant time for determining the existence of aboriginal title is at sovereignty, there is no need to demonstrate continuity to the current time. This avoids the injustice that would occur if the frequent dispossession of land at the hand of the Crown were to work a divestment of aboriginal title.⁷⁸ On the other hand, the Court stated that "[i]f present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation."⁷⁹

The Continuing Importance of Delgamuukw

Many issues remain unresolved after the decision, which set the table for further litigation and negotiation. A key question is what it means for aboriginal rights to be protected by the Canadian constitution. Constitutional protection certainly is important, but as with constitutional rights in the United States, such rights may be infringed upon under some circumstances. Thus, either the Crown or the provinces may effectively limit the exercise of aboriginal rights or title if justified.⁸⁰ The infringement must be necessary, that is, justified, to accomplish a legislative objective that is "compelling and substantial."⁸¹ Evaluating the objective requires consideration of the purposes of the recognition and confirmation of aboriginal rights in the constitution. Chief Justice Lamer described the purposes of that recognition as: 1) "the recognition of the prior occupation of North America by aboriginal peoples"; and 2) "the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown."⁸² When viewed through this lens, however, it may be that the Crown and its surrogates have substantial leeway in carrying out their activities, notwithstanding aboriginal rights. As Chief Justice Lamer wrote:

In my opinion, the 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. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.⁸³

The Court went to describe that consultation must occur before an infringement may occur and that payment of compensation may be required for any damage. "[T]his 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,

⁷⁷ See Val Napoleon, *Delgamuukw: A Legal Straitjacket for Oral Histories?*, 20 Can. J.L. & Soc'y 123 (2005) (pointing out the ethnocentric manner in which oral histories are treated).

⁷⁸ *Delgamuukw*, [1997] 3 S.C.R. ¶ 152-154.

⁷⁹ *Id.* ¶ 151.

⁸⁰ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (infringement may occur by Crown or Provinces, but must be justified).

⁸¹ *Delgamuukw*, [1997] 3 S.C.R. ¶ 161.

⁸² *Id.*

⁸³ *Id.* ¶ 165.

particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.”⁸⁴ This right of consultation exists even when the aboriginal claim of right or title has not been established in litigation or through a treaty settlement with the extent of consultation dependent on a preliminary assessment of strength of the claim.⁸⁵ Chief Justice Lamer closed his opinion by reiterating the Crown’s obligation to deal fairly with aboriginal nations and their aboriginal lands and to pursue negotiated settlements “to reconcile the pre-existence of aboriginal societies with the sovereignty of the Crown.”⁸⁶

Conclusion

Delgamuukw was the first case to definitively set out and explain the attributes of aboriginal title, aboriginal rights, and their place in Canada’s constitutional scheme. It also established important rules geared toward to favorable treatment of oral history offered by aboriginal witnesses. As a result of the litigation the British Columbia Treaty Commission was established in 1992 by agreement of B.C., Canada, and the First Nations Summit.⁸⁷ The Commission’s 2008 annual report describes a six-stage negotiation process with more than 60 First Nations involved in various stages of the process. The Gitksan and Wet’suwet’en are among 43 First Nations said to be in stage 4, at which proposals are exchanged with quite a long way to go before a treaty agreement is reached. The reconciliation of aboriginal claims appears to be a long way off, but the *Delgamuukw* decision established a settlement atmosphere that can tolerate ambiguity and does not require extinguishment of aboriginal interests in land. Rather, the recognition of a duty to consult over potential impairment of such interests, coupled with a duty to accommodate, could hold promise for fair dealings with aboriginal nations without the need to impose settlements with a heavy hand, or to permanently extinguish aboriginal rights. The current lack of progress in reaching settlements, however, may reflect the B.C. and federal governments’ reluctance to recognize substantial land claims, and to mandate pre-set limitations on land ownership rights and limited self-government rights. Litigation, on the other hand, presents its own set of difficulties. The consultation and compensation requirements arising from the *Delgamuukw* decision have resulted in some interim compensation for resource extraction, but there seems to be no right to “just say no” to any infringement that the Crown government “justifies.” That justification, like the form and content of aboriginal title, is determined by the non-aboriginal court system. While reconciliation of some sort may be reached in the land claims, the balance of power remains decidedly tipped in favor of the B.C. and federal governments. The *Delgamuukw* litigation set an optimistic tone for aboriginal right and title cases in Canada, but whether the promise of fair treatment and reconciliation will be achieved is uncertain at best. Aboriginal leaders have complained that “Rather than bringing flexibility to the process to address unique circumstances consistent with emerging case law and international human rights standards, federal and provincial negotiators continue to come to the table with their cookie-cutter and homogenous approach to negotiations.”⁸⁸ For the Wet’suwe’ten there have been fourteen years of negotiations which have resulted in \$13 million of debt, but no

⁸⁴ *Id.* ¶ 168. For a discussion of the subsequent cases see Christie, *supra* note 1, and Kent McNeil, *Aboriginal Title and the Supreme Court: What’s Happening?*, 69 Sask. L.Rev. 281 (2006).

⁸⁵ *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 S.C.R. 550.

⁸⁶ *Delgamuukw*, [1997] 3 S.C.R. ¶ 186 (citing *R. v. Van der Peet*, [1996] 2 S.C.R. 507 ¶ 31)

⁸⁷ See BC Treaty Commission, <http://www.bctreaty.net> (last visited Feb. 23, 2010).

⁸⁸ *Problems Plaguing Treaty Talks Not of First Nations’ Making*, Vancouver Sun (April 15, 2008).

agreement.⁸⁹ Despite their victory in *Delgamuukw*, the Gitksan and Wet'suwet'en quest for recognition and reconciliation of their property rights and sovereignty remains unfulfilled.

⁸⁹Office of the Wet'suwet'en, *Wet'suwet'en Treaty Update* (Dec. 18, 2009), <http://wetsuweten.com/news/article/media-release-wetsuweten-treaty-update/>