RECOGNITION OF ABORIGINAL TITLE

BY PETER W. HOGG

Before the decision of the Supreme Court of Canada in *Delgamuukw* v. *British Columbia* (1997), we knew that aboriginal title existed, but we did not know what it looked like. The *Calder* case (1973) and the *Guerin* case (1984) had recognized that aboriginal title survived European settlement and the assumption of sovereignty by the British Crown. The theory of the common law was that the Crown mysteriously acquired the underlying title to all land in Canada, including land that was occupied by Aboriginal people. But the common law recognized that aboriginal title, if not surrendered or lawfully extinguished, survived as a burden on the Crown's title.

Aboriginal title was recognized by the *Royal Proclamation of 1763*, which governed British imperial policy for the settlement of British North America. As settlement advanced across the country, in most of the settled areas treaties were entered into with the Aboriginal people, who surrendered portions of their land to the Crown, thereby freeing up the surrendered land for settlement and development by non-Aboriginal people. British Columbia, where most of the land was occupied by Indians when the Europeans arrived, was a notable exception to the practice of treaty-making. In that province, European settlement took place without treaties with the Aboriginal people and, while a treaty process has now been established, at the time of writing (1998) no treaties have actually been concluded. This has led to litigation, as Aboriginal people have turned to the courts to define their rights.

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The leading case on aboriginal title is now *Delgamuukw* v. *British Columbia* (1997), which was an action by Aboriginal people for a declaration that they had aboriginal title to a tract of land in the northern part of British Columbia. After a prolonged trial, followed by appeals, the result of the case was inconclusive. The Supreme Court of Canada found that the trial judge had wrongly rejected (or given insufficient weight to) much of the aboriginal evidence that was proffered in support of the claim, and the Court ordered a new trial to make new factual findings. However, the Court did lay down the rules of evidence and substance that were to govern the new trial, and the majority opinion of Lamer C.J.C. is the most complete account of the law that has ever been attempted by the courts.

Aboriginal title has its source in the occupation of land by Aboriginal people before the Crown assumed sovereignty over the land. It does not derive from a Crown grant, something that could only take place after the assumption of sovereignty by the Crown. Aboriginal title is proved, not by showing a chain of title originating in a Crown grant, but by showing that an Aboriginal people occupied the land prior to sovereignty.

Proof of pre-sovereignty occupation does not involve adherence to strict rules of evidence. Because aboriginal societies did not keep written records at the time of sovereignty, their account of the past would typically be contained in "oral histories"—stories that had been handed down from generation to generation in oral form. The admission of oral histories to prove occupation would violate the hearsay rule, but the rules of evidence have to be adapted to the realities of pre-sovereignty aboriginal societies. Otherwise, proof of occupation would become impossible and theoretical entitlements to aboriginal title would be rendered nugatory. This danger was illustrated by the trial of this case, in which the judge had found that the claimants had not established their title to the claimed lands, but he had reached this finding after rejecting (or giving little weight to) much of the oral-history evidence that had been proffered to him. This caused the Supreme Court to hold that the factual findings at trial could not stand, and that a new trial was required in which oral histories would be admitted and given appropriate weight.

In *Delgamuukw*, Lamer C.J.C. frequently repeated the proposition, which is found in all the earlier cases, that aboriginal title is *sui generis* (one of a kind). By this he meant that there are five important differences between aboriginal title and non-aboriginal title. The first is the point that I have just made, which relates to the source of aboriginal title. Aboriginal title derives from pre-sovereignty occupation rather than a post-sovereignty grant from the Crown.

The second difference relates to the range of uses to which aboriginal-title land may be put. Aboriginal title confers the right to exclusive use and occupation of the land, which includes the right to engage in a variety of activities on the land, and those activities are not limited to those that have been traditionally carried on. For example, the exploitation of oil or gas existing in aboriginal lands would be a possible use. However, the range of uses to which the land could be put is subject to the limitation that the uses "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 means that land occupied for hunting purposes could not be converted to strip mining, for example. This inherent limit on the uses to which the land could be put may be contrasted with the lack of any comparable restriction on a fee simple title (although there will usually be statutory restrictions on a fee simple title, such as zoning by-laws).

The third difference between aboriginal title and non-aboriginal title is that aboriginal title is inalienable, except

to the Crown. This was well-established in the prior case law. The doctrine of inalienability means that the Crown has to act as an intermediary between the Aboriginal owners and third parties. In order to pass title to a third party, the Aboriginal owners must first surrender the land to the Crown, which then comes under a fiduciary duty to deal with the land in accordance with the best interests of the surrendering Aboriginal people, for example, by ensuring that adequate compensation is received by the Aboriginal owners.

During the period of European settlement, the doctrine of inalienability was a safeguard against unfair dealings by settlers trying to acquire aboriginal land, and an encouragement to the process of treaty-making. The doctrine also supplied certainty to land titles in Canada, because it made clear that a Crown grant was the only valid root of title for non-Aboriginal people and for non-aboriginal land.

The fourth difference between aboriginal title and non-aboriginal title is that aboriginal title can only be held communally. Lamer C.J.C. said: "Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation."

The fifth (and last) difference between aboriginal title and non-aboriginal title is that aboriginal title is constitutionally protected. Even before 1982, aboriginal title could not be extinguished by provincial legislation, by virtue of the exclusive federal power over "Indians, and lands reserved for the Indians" in section 91(24) of the *Constitution Act, 1867*. Before 1982, aboriginal title could be extinguished by federal legislation, but the legislation would have that effect only if it showed a "clear and plain" intention to extinguish aboriginal title. In 1982, section 35 of the *Constitution Act, 1982* was adopted. The effect of section 35 is to confer constitutional protection on any aboriginal title that was "existing" (unextinguished) in 1982. The constitutional protection accorded by section 35 is not absolute, but it does require that any infringement of aboriginal title must not only be enacted by the competent legislative body (which is the federal Parliament), but also that the infringement must satisfy the *Sparrow* test of justification. At a minimum, the test of justification would normally require prior consultation with the Aboriginal owners before any of the incidents of their title was impaired, and fair compensation for any impairment.

The result of *Delgamuukw* is that we now know a good deal about what aboriginal title looks like. The case is the latest (and most important) of a long series of aboriginal-rights cases out of British Columbia, nearly all of which have been won by the Aboriginal people. It is now necessary for governments to stop fighting the Aboriginal people of British Columbia in the courts, and get on with making treaties with them.

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VARIETIES OF ABORIGINAL RIGHTS

BY BRIAN SLATTERY

What sorts of rights are covered by the words "aboriginal rights" in section 35(1) of the *Constitution Act, 1982*? The decision of the Supreme Court in *Delgamuukw* represents an important elaboration of the views presented earlier in *Van der Peet* and its companion cases. Considered as a whole, these cases suggest that aboriginal rights fall into two broad categories, which for convenience we may call generic rights and specific rights.

A generic aboriginal right is a right of a standardized character that attaches to all Aboriginal groups that meet certain criteria. The basic contours of a generic right are determined by general principles of Canadian common and constitutional law rather than historical aboriginal practices, customs, and traditions. So the governing principles of a generic right are the same in all groups where the right arises, even if the precise application of these principles may vary somewhat in light of factors specific to the group.

By contrast, a specific aboriginal right is a right distinctive to a particular Aboriginal group. The basic contours of the right are determined by the historical practices, customs, and traditions integral to the culture of the group in question. As such, specific rights differ substantially in form and content from group to group.

Aboriginal title, as defined in *Delgamuukw*, provides a clear example of a generic right. Chief Justice Lamer laid down two governing principles. First, aboriginal title gives a right to the exclusive use and occupation of the land for a broad variety of purposes. These purposes do not need to be grounded in the practices, customs, and traditions of the land-holding group, whether at the time of contact or at any other historical period. In other words, an Aboriginal group is free to use its lands in ways that differ from the ways in which the land was traditionally used. A group that lived mainly by hunting, fishing, and gathering at the time of contact is free to farm the land, to ranch on it, to use it for eco-tourism or to exploit its natural resources (para. 117). Second, lands held under aboriginal title cannot be used in a manner that is irreconcilable with the fundamental nature of the group's attachment to the land, so that the land may be preserved for use by future generations. In other words, the group may not ruin the land or render it unusable for its original purposes.

These two basic principles govern all Aboriginal groups that hold aboriginal title. Nevertheless, it can be seen that the precise application of the second principle will be governed by factors particular to the group, depending on the nature of the group's original attachment to the land. Aboriginal title is thus a prime example of generic rights. However, it is not the only one. The aboriginal right to speak a mother tongue is probably also a generic right. The basic structure of the right would be the same in all groups where it arises, even if its precise con-

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