

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-

continued on page 72

VARIETIES OF ABORIGINAL RIGHTS *from page 71*

tent varies from linguistic group to group. The aboriginal right of self-government arguably fall into this category as well, as we will see later.

Although the distinction between generic and specific rights is clear in principle, it is less sharp in practice. What the courts initially regard as a specific right distinctive to a particular group might over time prove to be a generic right, if experience shows that rights of a similar legal structure are found in a substantial number of Aboriginal societies.

Turning now to specific aboriginal rights, we can see that they fall into three groups, depending on their degree of connection with the land. The first group comprises specific aboriginal rights that relate to a definite tract of land but fall short of aboriginal title. The Court describes these as site-specific rights. For example, if an Aboriginal people proves that hunting on a certain tract of land was an integral part of their distinctive culture then, assuming that the right exists apart from aboriginal title to that tract of land, the aboriginal hunting right will constitute a site-specific right tied to that particular tract.

The second group comprises specific aboriginal rights that involve the use of

land but are not tied to any particular tract of land. We may call these floating rights, because they have the capacity to move from area to area. For example, an Aboriginal group might be able to establish that it has a specific right to perform certain land-related activities that are not connected to any particular tract of land but may be exercised on any land to which the group members have access, whether as Aboriginal people or simply as ordinary members of the public. For example, suppose an Aboriginal group has always gathered wild plants for medicinal purposes as an integral part of its distinctive culture. These plants are not found in any particular place but grow in a large variety of locations, which change from year to year. It happens that the active ingredients in some of these plants are listed as "restricted drugs" in the *Food and Drugs Act*. If members of the Aboriginal group were charged with possession under the *Act*, they might be able to defeat the charge by establishing an aboriginal right to gather the plants for medicinal purposes. Here the aboriginal right would be a floating right because, although it involves a use of land, it is not tied to any specific tract of land.

In the third group we find specific aboriginal rights that are not necessarily linked with the land at all—cultural rights for short. Like other specific rights, cultural rights are grounded in the practices, customs, and traditions integral to the culture of a particular Aboriginal group. Their distinguishing characteristic is the fact they can be exercised without using the land. For example, an Aboriginal

group might have an exclusive right to sing certain distinctive songs as an integral part of its culture. This right is not limited to any particular tract of land and obviously does not involve any use of the land at all.

In light of the Court's analysis in Delgamuukw, it now seems arguable that the right of self-government should be classified as a generic aboriginal right akin to aboriginal title rather than a bundle of specific aboriginal rights. According to this view, the right of self-government is governed by uniform principles laid down by Canadian common and constitutional law.

When we stand back from this classification, an important point emerges. Although the distinction between generic and specific rights is clear in principle, it is less sharp in practice. What the courts initially regard as a specific right distinctive to a particular group might over time prove to be a generic right, if experience shows that rights of a similar legal structure are found in a substantial number of Aboriginal societies. For example, a specific right to sing certain songs might constitute the germ of a broader category of generic cultural rights with

standard legal features. In other words, a specific right has the potential to contribute to the emergence of a new class of generic rights.

How does this classification apply to the aboriginal right of self-government? In the *Pamajewon* case, the Court viewed the question of self-government through the lens provided by *Van der Peet* and held that the right of self-government would have to be proved as an element of specific practices, customs, and traditions integral to the particular Aboriginal society in question. According to this approach, the right of self-government would consist of a bundle of specific rights to govern particular activities rather than a generic right to deal with a range of more abstract subject-matters. However, this holding must now be viewed in light of *Delgamuukw*, which significantly broadens our understanding of the classification of aboriginal rights.

In light of the Court's analysis in *Delgamuukw*, it now seems arguable that the right of self-government should be classified as a generic aboriginal right akin to aboriginal title rather than a bundle of specific aboriginal rights. According to this view, the right of self-government is governed by uniform principles laid down by Canadian common and constitutional law. The basic structure of the right does not vary from group to group; however, its application to a particular group may differ depending on the local circumstances. This is the approach to the right of self-government taken in the *Report of the Royal Commission on Aboriginal Peoples* (which the Supreme Court cites in its brief

comments on self-government in *Delgamuukw*). It seems that this approach is most consistent with the global understanding of aboriginal rights that emerges from the Court's analysis.

[T]he manner in which the members of the group use their aboriginal lands is presumptively governed by the internal law of the group. So, in effect, the concept of aboriginal title supplies a protective legal umbrella, in the shelter of which Aboriginal land law may develop and flourish.

Nevertheless, this conclusion could be debated. In declining to be drawn into any analysis of self-government in *Delgamuukw*, the Court reiterates its holding in *Pamajewon* that rights to self-government cannot be framed in what it describes as "excessively general terms", and observes that in the current case the Aboriginal parties advanced the right to self-government "in very broad terms, and therefore in a manner not cognizable under s. 35(1)". These statements could be read as indicating that the right of self-government is nothing more than a bundle of specific rights, governed by the criteria laid down in *Van der Peet*.

However, I think it preferable to read these comments as a warning against over-ambitious litigation, which attempts

to induce the courts to settle very abstract and difficult questions without an appropriate factual or argumentative context. As the Court states: "The broad nature of the claim [of self-government] at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of aboriginal self-government. The degree of complexity involved can be gleaned from the Report of the Royal Commission on Aboriginal Peoples, which devotes 277 pages to the issue. That report describes different models of self-government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc. We received little in the way of submissions that would help us to grapple with these difficult and central issues. Without assistance from the parties, it would be imprudent for the Court to step into the breach. In these circumstances, the issue of self-government will fall to be determined at trial."

Elsewhere in its reasons, the Court indicates an approach to the question of self-government that builds on the concept of aboriginal title. In discussing the communal nature of the title, Lamer C.J.C. states: "Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that

land are also made by that community."

This point has several important ramifications. First, the manner in which the members of the group use their aboriginal lands is presumptively governed by the internal law of the group. So, in effect, the concept of aboriginal title supplies a protective legal umbrella, in the shelter of which Aboriginal land law may develop and flourish. Second, since decisions about the manner in which lands are used must be made communally, there has to be some internal structure for communal decision-making. This need for a decision-making structure provides an important cornerstone for the right of aboriginal self-government. At a minimum, an Aboriginal group has the inherent right to make communal decisions about how its lands are to be used and by whom. In particular, the group may determine how to apportion the lands among group members, to make grants and other dispositions of the communal property, to lay down laws and regulations governing use of the lands, to impose taxes relating to the land, to determine how any land-based taxes and revenues are to be used, and so on.

Since aboriginal title is itself a generic right, it follows that the inherent right to make communal decisions about aboriginal lands is also a generic right whose basic legal

structure does not vary from group to group. Nevertheless, the precise way in which this right applies and the particular modalities of self-government that it supports will clearly be governed by factors specific to the group.

Our discussion is summed up in the diagram below, which illustrates the various categories of aboriginal rights reviewed.



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