# PRELIMINARY THOUGHTS ON DELGAMUUKW AND TREATY RIGHTS

BY SHIN IMAI

The decision of the Supreme Court of Canada in *Delgamuukw* limits the ability of British Columbia to authorize the use of provincial lands which are held subject to aboriginal title. If the approach used in *Delgamuukw* is applied to the interpretation of treaties, provincial power may be circumscribed in other parts of Canada which are subject to treaties between the Crown and First Nations.

Treaties signed in the nineteenth and early twentieth century cover large parts of Ontario, the Northwest Territories and the Prairie provinces. Treaty 9, which covers northern Ontario, is typical. The written version of the 1905 treaty states that the First Nation "cedes, releases and surrenders" its interest in 130,000 square miles of land. In return, the government agrees to provide annual payments of $4 a year per individual; to provide reserves totalling only 514 square miles; and to provide for the continuation of hunting, trapping and fishing rights.

The "hunting, trapping and fishing" clause found in Treaty 9 reads as follows: "And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (emphasis added).

Note that, according to the Treaty, hunting, trapping and fishing rights are subject to two exceptions. First, the rights are subject to what are referred to as the "regulations of the country". Second, the exercise of these rights is subject to what can be called the "lands taken up" limitation.

This short paper will focus on the application of the Court's decision in *Delgamuukw* to the interpretation of the "lands taken up" limitation. There are four aspects of the decision which are significant for the purposes of this discussion:

1. The weight given to oral histories;
2. The significance attached to the internal laws of the First Nation;
3. The articulation of fiduciary duties;
4. The clarification of the role of the federal and provincial governments.

## ORAL HISTORY

The Supreme Court ordered a new trial in *Delgamuukw* because of the failure of the trial judge to give sufficient weight to oral history. If the same approach is applied to the interpretation of Treaty 9, for example, the analysis should go beyond the written words to an examination of oral history and the intention of the First Nation signatories.

What does the oral history tell us of the intentions of the First Nations who signed Treaty 9? In a recent article, Patrick Macklem shows that the First Nations entered into the treaty to preserve their way of life and their hunting, trapping and fishing rights. According to the report of the Treaty Commissioners, one of the Chiefs, Missabay, expressed on behalf of his people the fear that, "if they signed the treaty, they would be compelled to reside upon the reserve to be set apart for them, and would be deprived of the fishing and hunting privileges which they now enjoy".

In reply, the Treaty Commissioners are reported to have told the First Nations that "their fears in regard to both these matters were groundless, as their present manner of making their livelihood would in no way be interfered with".

If this account of the discussions between the signatories is given weight, the agreement would indicate that the lands used for hunting, trapping and fishing could not be unilaterally taken away from the First Nations.

## INTERNAL LAWS OF FIRST NATIONS

One of the most significant aspects of *Delgamuukw* is the determination that the internal laws of Aboriginal nations are as important as common law for determining aboriginal title. It follows that the internal laws of the First Nations at the time of the signing of the treaty would also be given enhanced consideration.

In the Treaty 9 example, it may be that Cree or Ojibway law did not conceive of hunting, trapping and fishing rights as fungible commodities that could be bargained away. Therefore, no chief could have had the authority under First Nation law to agree to the eventual extinguishment of hunting, trapping and fishing opportunities.

However, since some "taking up" of land was contemplated at the time the treaty was signed, there would be a need to reconcile the aboriginal intention with the written words of the treaty. This reconciliation could take a number of forms, but could include the requirement for a level of consent and participation by the First Nations in the implementation of the "taking up" of the land clause. What this consent and participation might involve is discussed below.

## FIDUCIARY DUTY

Let us assume that the "lands taken up" clause in the treaty is interpreted as not permitting unfettered power to infringe or extinguish hunting, trapping and fishing opportunities. The inquiry should then turn to the interplay between the interests of the Crown and the interests of the First Nations.

In *R.* v. *Sparrow*, the Court puts limits on the ability of federal legislation to infringe or extinguish aboriginal rights, by requiring that the legislation be justified through a two-stage test. In the first stage, the legislation must have a valid objective that is "compelling and substantial". Once that objective is established, the Crown is under an obligation to fulfill its fiduciary duties by acting in a manner consistent with the honour of the Crown.

With respect to the first stage of the test, the Supreme Court in *Delgamuukw* refers to a wide range of valid legislative objectives that would permit infringement of aboriginal title. These objectives include agriculture, forestry, mining, hydroelectric power, protection of the environment, and the settlement of foreign populations. This list looks remarkably like the list set out in the treaty for "taking up" the land: "settlement, mining, lum-

bering, trading or other purposes." In the treaty context, then, the valid legislative objective may be found in the list of purposes included in the "lands taken up" clause.

The second stage of the test is the discharge of the Crown's fiduciary responsibilities. For Treaty 9, the inquiry could begin with the "degree of scrutiny" to be accorded the infringement of the "right to pursue their usual vocations of hunting, trapping and fishing." If the issue in dispute relates to sustenance, food, or ceremonial purposes, the government would likely be required to meet a high standard of justification. If the issue in dispute is purely commercial activity, the standard of justification may be met by taking into account a wider range of factors. In *R.* v. *Gladstone*, the Supreme Court indicated that infringements of aboriginal commercial fishing rights could take into consideration the economic interests of non-Aboriginal people in the region.

How stringent could the degree of scrutiny be? In my view, there are circumstances in which the proposed "taking up" could be completely prohibited. Even before *Delgamuukw*, the British Columbia Court of Appeal in *Claxton* v. *Saanichton Marina* prohibited the construction of a marina because it would have interfered with a treaty right of a First Nation to gather shellfish. In *Delgamuukw* itself, the Chief Justice suggests that full consent of the First Nation may be required for infringements of hunting and fishing rights: "Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."

There are several "forms" the fiduciary duty could take. One of the most commonly utilized "forms" under the *Sparrow* test is consultation. In *Delgamuukw*, the Court states that the degree of consultation may vary with the seriousness of the infringement. However, whatever the extent of the consultations, they "must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal people". In the context of hunting, trapping and fishing, I would expect that the consultations would address such matters as the area under consideration, the birds, animals, and habitat affected, the seasons for the hunt, and other pressures on the resource.

Compensation is a second issue which could be addressed. The James Bay and Northern Quebec Agreement provides a precedent for compensating loss of hunting, trapping and fishing rights. In that Agreement, there is a scheme for supplementing income for hunters and trappers, and a formula for replacing land which is taken up for development.

Formalizing First Nation participation in decisions affecting the treaty lands is a third way of discharging the fiduciary duty. If hunting, trapping and fishing rights are to be affected by development, the First Nation could have a role in ensuring that the detrimental effects are kept at a minimum. Modern land claims agreements contain many models for the establishment of joint Crown-First Nation bodies which oversee developments on land.

A number of other ideas could be implemented to address specific circumstances. For example, the Crown could modify non-aboriginal uses (such as sport hunting) to ensure the continuation of a treaty right to hunt for food. Or the members of the First Nation could be given priority for related activities such as the establishment of remote fishing camps.

### ROLE OF FEDERAL AND PROVINCIAL GOVERNMENTS

Finally, we come to the question of the constitutional authority to infringe treaty rights by "taking up" lands. In Treaty 9, the listed activities—settlement, mining, lumbering, trading—are largely within provincial legislative authority. Consequently, one view is that the treaty contemplates the exercise of provincial authority. As we have seen, the provinces have generally proceeded on this view in their development activities on treaty lands.

Another view is that treaty rights are integral to "Indianness", so that only the federal government has authority to infringe or exercise those rights under section 91(24) of the *Constitution Act, 1867*.

*Delgamuukw* itself is ambiguous on this point. While the judgement states clearly that only federal legislation can extinguish aboriginal rights, the judgement suggests that both the provinces and the federal government can infringe aboriginal rights. Whether the constitutional authority is federal or provincial, the application of the principles articulated in *Delgamuukw* will have substantial impact on the role of provinces in "taking up" lands. If *Delgamuukw* is interpreted to mean that only the federal Crown has legislative authority to infringe aboriginal and treaty rights, then the province has no authority to "take up" lands. Provincial licenses for mining, forestry, and so on would be ineffective if they authorized activities which infringed treaty rights. On the other hand, if the treaty does authorize provincial "taking up," then it is clear that the provincial Crown will have to become accustomed to a new role as a fiduciary. In this role, the province will have to satisfy the requirements set out in *Delgamuukw* to consult in good faith, provide compensation, and establish a role for aboriginal participation in the use of the land.

### CONCLUSION

I have tried to show how four aspects of the decision in *Delgamuukw*, a case dealing with aboriginal land rights, could be applied to the interpretation of the "lands taken up" limitation in Treaty 9. I find further support for this argument in court decisions relating to the other limitation to treaty hunting, trapping and fishing rights: the "regulations of the country" clause. The Ontario Court of Appeal in *R.* v. *Bombay* and the Supreme Court of Canada in *R.* v. *Badger* both applied the justification test in *R.* v. *Sparrow* to conclude that, after 1982, the federal government did not have unfettered authority to override treaty rights. Both Courts came to this result, notwithstanding the presence of a "regulations of the country" clause in the treaties. In my view, there is good reason to believe that *Delgamuukw* could similarly be applied to interpret the provisions of a treaty.

*Shin Imai is an Associate Professor of Law at Osgoode Hall Law School, York University.*