

Compensation after *Delgamuukw* Aboriginal Title's Inescapable Economic Component

MICHAEL J. MCDONALD AND THOMAS LUTES

Introduction

As any observer of recent Canadian news can attest, aboriginal issues in Canada are once again atop the public and media agenda. The range of issues in the public eye is remarkable: from the applicability of sales tax to New Brunswick's aboriginal peoples; to the return of traditional lands to the First Nation at Ipperwash, Ontario; to the unprecedented fusion of aboriginal healing circles and the Canadian justice system in British Columbia's Bishop O'Connor case.

While such stories ride the crest of the latest wave of national media attention, the land claims process in British Columbia remains somewhat adrift following the December 1997 *Delgamuukw* decision. The implications of the Supreme Court of Canada's ruling in *Delgamuukw* that aboriginal title exists and contains an "economic component" poses a tremendous challenge to government, private industry and First Nations. In particular, the Crown faces judgment for its action—or inaction—in

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resolving land and resource claims, not only in our courts of law but also in the forum of public opinion, with its jury of voting citizens.

The scenarios of economic doom voiced by a few politicians and public commentators since *Delgamuukw* was handed down have not allayed British Columbians' understandable concerns about the practical effects on their lives and on the effect of compensation to First Nations on the provincial economy. The entire land base of British Columbia is *not* about to be transferred to British Columbia's First Nations, and the entire provincial budget for the next quarter-century will *not* be directed to compensating the Province's aboriginal peoples. However, the continued unresolved infringement of aboriginal rights and title in British Columbia and the finalization of land claims and treaty negotiations *will* result in compensation from the Crown to First Nations. When compensation may be owed to First Nations and how compensation might be determined are the subjects of this paper, which is intended to present some practical options for decision-makers as they set out on the rather uncertain path blazed by *Delgamuukw*.

"Compensation" is used generically in this paper to refer both to damages awarded to aboriginal groups by our courts for unjustifiable infringement of their title, and to a portion of the payment made as part of a government settlement with First Nations. In our view, applying the term "compensation" to settlement or treaty payments is appropriate, since First Nations may, in many cases, be relinquishing, putting into abeyance, or agreeing to an exhaustive definition of their rights or title as part of these packages. Moreover, many land claim settlements will include compensation amounts for past unjustified infringements. The practical distinction between the two kinds of compensation is explained below.

The bulk of this paper is devoted to compensation issues, particularly for infringement of title, with a brief review of some of the important issues in the land claims settlement realm given at the end of the paper. We have chosen to focus on a detailed review of major compensation issues in this paper, although the complications arising from the taxation aspect of land claim settlements and self-government certainly merit their own discussion. Since our courts have so far said very little about exactly how compensation for infringement of aboriginal rights will be valued, much of the analysis in this paper is based on speculation.

The "Inescapable Economic Component" of Aboriginal Title

[A]boriginal title encompasses the right to *exclusive* use and occupation of land; second, aboriginal title encompasses the *right to choose* to what uses land can be put, ... and third, ... lands held pursuant to

aboriginal title have an inescapable *economic component*. (Emphasis in judgment; Chief Justice Antonio Lamer in *Delgamuukw v. British Columbia* at 264)

In its short lifespan, the *Delgamuukw* decision has already been dissected, analyzed, celebrated, condemned and misrepresented like few Supreme Court of Canada decisions before it. It is certainly an historic decision, in which the Court's findings on the evidentiary use of aboriginal oral histories would alone have left the decision characterized as a landmark. It is the question of aboriginal title, however, which has drawn the most attention, including the fire of those who have characterized it as invented or "made-up" law.

One of the reasons for this criticism is surely that the portion of Chief Justice Antonio Lamer's judgment regarding the Canadian history and jurisprudence of aboriginal title is a model of brevity—exactly the type of concise judicial style for which he has become an ardent proponent. Unfortunately, this brevity results in a rather cursory treatment of the gradual but coherent jurisprudence relating to aboriginal title which has evolved in Canada over the last century and beyond. Admittedly, the Chief Justice's "fast-forwarded" treatment of aboriginal title jurisprudence does leave certain remarks in the judgment, such as the following statement, appearing to stand without solid foundation:

Aboriginal title ... is a *right to the land* itself. Subject to the limits I have laid down above, that land may be used for a variety of activities, none of which need be individually protected as aboriginal rights under [the *Constitution*]. Those activities are parasitic on the underlying title. (Emphasis in judgment; *Delgamuukw* at 252)

Such wording, while perhaps bold in relation to the language in earlier aboriginal title decisions, is very much in keeping with aboriginal title's considerable legal pedigree. As University of Victoria Law Professor Hamar Foster argues in his March 1998 article in *The Advocate*, "the bare bones of the *Delgamuukw* judgment have deep roots in the common law, and in the history of what has, since the 1870s, been called the BC Indian Land Question."¹ The article is one of several excellent sources that supplement the somewhat skimmed analysis in *Delgamuukw* regarding the history of aboriginal title.²

Whatever the perceived weaknesses in *Delgamuukw*, the Supreme Court of Canada did speak clearly about the content of aboriginal title in the ruling. Chief Justice Lamer wrote concisely about the consequences of aboriginal title's economic component as follows:

[A]boriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put ... In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. (*Delgamuukw* at 265).

The Chief Justice went on to note that since the issue of damages was not argued at the highest court level, it was unnecessary to determine how an appropriate level of compensation would be determined. He concluded, "it is best that we leave those difficult questions to another day."³ While the day for these "difficult questions" may not arrive at the Supreme Court of Canada level for some time, the Federal and Provincial Governments can hardly afford to delay the reckoning of compensation issues. The occasions when compensation may be owed to aboriginal nations from the Crown are canvassed below, along with a brief discussion of some of the mechanisms and alternatives for compensation.

When Is Compensation Owed to First Nations?

Below, we examine the related but distinct circumstances in which the Crown will owe compensation to British Columbia's First Nations. The first situation involves government compensation when aboriginal peoples' rights, including title, have been infringed. An analysis of infringement compensation requires a fairly detailed review of the Supreme Court of Canada's rulings in *Delgamuukw* on justifying infringement, the Crown's fiduciary duty to First Nations, and the varying levels of compensation. We have included a discussion of two real-life scenarios as a means of mapping the possible compensation implications for First Nations, government and industry.

The second trigger for compensation is, of course, a result of the land claims settlement process currently under way in British Columbia. While land claims agreements will normally include a compensation element for infringement of aboriginal rights, the ultimate settlement will obviously be driven by policy, economics, and the reality of long-term negotiations, and not necessarily by judicially dictated principles of compensation.

Compensation for Infringement of Title

(a) Justifying Infringement: Satisfying the Valid Legislative Objective and the Fiduciary Duty Tests

Throughout their evolution in Canadian law, aboriginal rights have never been held to be absolute. The Supreme Court of Canada's 1990 ruling in *Sparrow* made this eminently clear:

Section 35(1) [of the *Constitution*] does not promise immunity from government regulation in twentieth century society, but it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect of any aboriginal right protected under [the *Constitution*]. (*R. v. Sparrow*, [1990] 3 C.N.L.R. 160 at 162)

A test for “justifying any legislation” that infringes aboriginal rights has been developed by our courts over the years. The “infringement test” involves a two-stage analysis, which is briefly summarized in the paragraphs below.

Assuming that the aboriginal right exists, the infringement must arise by reason of a compelling and substantial legislative objective, such as the reconciliation of First Nations’ prior occupation in Canada with Crown sovereignty, the conservation of natural resources, or economic development priorities. In *Delgamuukw*, Chief Justice Lamer expanded upon the kinds of legislative objectives that might, depending upon the context, justify infringement of aboriginal title, and tailored his discussion to the British Columbia setting:

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 in the settlement of foreign population 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. (*Delgamuukw* at page 263-264.)

The second requirement of the justification test is that the infringement must be consistent with the special fiduciary relationship between the Crown and aboriginal peoples. In applying this stage of the justification test to the infringement of aboriginal title, the Supreme Court in *Delgamuukw* held that the operation of the fiduciary duty, both in terms of the standard of scrutiny and the form of that duty, will depend on the nature of aboriginal title. In this regard, the Chief Justice noted the relevance of three particular aspects of aboriginal title:

- aboriginal title encompasses the right to exclusive use and occupation of the land;

- aboriginal title encompasses the right to choose to what uses the land can be put; and
- lands held pursuant to aboriginal title have an inescapable economic component.

The first aspect of aboriginal title, that it is a right to exclusive use and occupation of the land, means that in order to satisfy its fiduciary duty, the Crown will be required to demonstrate that both the process by which it allocated the land's resources, and the actual allocation of those resources, reflect the prior interest of the aboriginal titleholder. As Chief Justice Lamer explained:

[T]his might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licenses for forestry and mining reflect the prior occupation of aboriginal title in lands, that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced. The list is illustrative and not exhaustive No doubt, there will be difficulties in determining the precise value of the aboriginal interest in the land and any grants, leases or licences given for its exploitation. These difficult economic considerations obviously cannot be solved here. (*Delgamuukw* at page 264)

This statement suggests that where the Province 'shares the wealth' of the land by ensuring some of the economic benefits and actual allocation of land and resources go to First Nations, it may *justifiably* infringe aboriginal title. In British Columbia, this resource sharing may be done at little or no cost to the Government where Crown tenures and licences are issued without charge.

Second, the fact that aboriginal title encompasses the right to choose to what uses the land can be put implies involvement of First Nations in decision-making with respect to their title lands. Further, this aspect of aboriginal title imposes a duty upon the Crown to consult the aboriginal group holding title, prior to the Crown dealing with the land. The Supreme Court described the range of consultation required as follows:

The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the min-

imum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal people's 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, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands. (*Delgamuukw* at 265)

The definition of meaningful consultation in this context is perhaps the hottest topic in aboriginal law at the moment. The chasm between First Nations' and governments' understanding of the content of consultation will only create greater numbers of judicial review applications of government decisions where aboriginal rights are at stake.

Third, since aboriginal title has an inescapable economic component due to the modern uses to which aboriginal title lands can be put, the Court in *Delgamuukw* held that fair compensation will ordinarily be required whenever aboriginal title is unjustifiably infringed. In the Chief Justice's words, "the amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement, and with the extent to which aboriginal interests were accommodated."⁴ Clearly, the measurement of the economic component of aboriginal title and the compensation required will lead, in many cases, to difficult questions of law and economics.

(b) Why Damages Flow From a Breach of a Fiduciary Duty

Before analyzing the factors that will lead to varied levels of compensation for justifiable infringement, a brief summary of the law of damages for breach of fiduciary duty is in order, since compensation will normally arise if the Crown's fiduciary duty to First Nations is not fulfilled. Essentially, a 'fiduciary' is an individual or entity that has the ability to unilaterally exercise some discretion or power that affects a 'beneficiary's' interests. In addition, the beneficiary is somehow vulnerable to the fiduciary's exercise of power or discretion.⁵

In the aboriginal law context, compensation for breaches of the fiduciary duty is, in the words of Chief Justice Lamer in *Delgamuukw*, "a well-established part of the landscape of aboriginal rights."⁶ One of the leading cases on fiduciary duties owed by the Crown to First Nations is *Guerin v. The Queen*, a 1984 decision of the Supreme Court of Canada.⁷ In *Guerin*, the Federal Government was held to have breached its fiduciary obligation to protect the Musqueam Indian Band's interests when it negotiated a lease with the Shaughnessy Golf and Country Club on terms that were not revealed accurately to the Band. The

Band had surrendered the land under conditions that were not followed by the Crown in the subsequent lease, and the Crown did not consult with the Band in accordance with its fiduciary duty. In its decision, the Supreme Court of Canada emphasized the following basic principles of damages for breach of fiduciary duty:

- a “fiduciary” or trustee who defaults or breaches its duty must make restitution to the beneficiary;
- the fiduciary in breach is liable to place the beneficiary in the same position as he or she would have been if no breach had been committed; and
- unlike damages awarded by a court in tort law (such as negligence for personal injury) and contract law, a court considering damages for breaches of fiduciary duty need not always rigorously apply what are known as “limiting factors.” These factors include *foreseeability*, which limits an award if the wrongdoer should not reasonably have been able to predict the damage it caused; *remoteness*, which limits damages which are simply too far removed from the original act of the wrongdoer to be considered compensable; and *causation*, which is an insistence upon proving a direct link between an act and the resulting damage.⁸

In applying this general breach of fiduciary duty principles to the specific facts in *Guerin*, the Court made the following findings:

- the Crown’s breach of fiduciary duty was not in failing to lease the land, but was in leasing it when it could not lease it on the terms approved by the Band. The Band was therefore deprived of its land and the use to which it might have wanted to put the land - *i.e.*, to put it to the most advantageous use possible during the period covered by the unauthorized lease;
- the Band should be compensated for the lost opportunities for developing the land for the leasing period of up to 75 years, and the Band, as beneficiary, should get the benefit of any increase in market value of its land; and
- the Band should not have to prove that it would have developed the land even if the breach of duty had not occurred, since in fiduciary or trust situations, a court should make a presumption in favour of the beneficiary.

Essentially, the Supreme Court of Canada awarded damages to the Band for what it had lost as a result of the Crown’s breach: the lost opportunity to lease its land at a more favourable rate, which lost oppor-

tunity was assessed in light of what actually happened to land values after the breach had occurred. It should be noted that since breach of fiduciary duty damages are founded on trust-law principles, which import equity or the "conscience" of the court, judges are given much wider latitude in fashioning remedies for breaches of fiduciary duty than in typical contract or negligence situations. This equitable approach, with its wider range of compensation options, is a recognition of the fact that a beneficiary is particularly vulnerable to the acts of a fiduciary, who at all times should be acting in the best interests of the beneficiary.

One of the greatest challenges for governments in this area will be to avoid repetition of the result in the *Guerin* case for past and ongoing unjustifiable infringements. A wholesale application of compensation principles for breach of fiduciary duty in the aboriginal title context would force our courts, however reluctantly, to place a hard dollar value on aboriginal rights and title. This would have significant economic implications for government, particularly if many First Nations choose to leave the treaty negotiation table and litigate the overall title question regarding their traditional lands. Fortunately, at this point, only one such group (the Sechelt Indian Band) has filed such a suit, and it remains at the negotiation table.

(c) How the Amount of Compensation Will Vary

As noted above, the Supreme Court of Canada in *Delgamuukw* did not consider precisely how compensation would be valued on a dollar basis. The Court's clearest guidance, however, comes from Chief Justice Lamer's finding that compensation will vary with:

- the nature of the particular title at issue;
- the nature of the infringement;
- the severity of the infringement; and
- the extent to which aboriginal interests were accommodated.⁹

One of the implications of the Court's ruling on the variability of compensation is that government *can* minimize, and perhaps even eliminate, the amount of compensation it might otherwise owe to First Nations for ongoing and perhaps even past rights infringement. Throughout the analysis on compensation for unjustifiable infringement of title, it is important to keep in mind that it will certainly be necessary for First Nations to prove aboriginal rights and title where compensation damages are sought for breach of fiduciary duty by unjustified infringement of rights. In some cases, such as infringement on some reserve lands, proof of title will be a much easier exercise for a First Nation.

(d) The Nature of the Title at Issue

In determining compensation amounts, the general and particular aspects of aboriginal title will be vitally important. The *sui generis* (unique) nature of aboriginal title should prevent the blanket application of usual land valuation principles. The unique nature of aboriginal title was made clear in *Delgamuukw*:

Aboriginal title has been described as *sui generis* in order to distinguish it from 'normal' proprietary interests, such as fee simple. However, as I will now develop, it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives. (*Delgamuukw* at 241)

The Supreme Court of Canada did, however, put flesh to the conceptual framework in noting that the nature of aboriginal title includes the following four key factors, all of which are reviewed below:

- it is inalienable except to the Crown;
- its use by First Nations must not be irreconcilable with the aboriginal group's attachment to the land;
- it is communally held as a collective right by all members of a First Nation; and
- it is a right to exclusive use and occupation of the land.

The Inalienability of Aboriginal Title The first aspect of title, that it is inalienable except to the Crown, suggests that to some extent, aboriginal title land should be devalued due to its lack of marketability. However, one can expect strong counter-arguments from First Nations that the inalienability of their land actually represents a distinctive element that cannot be defined by customary land valuations. Support for this view is found in *Delgamuukw*, where the Chief Justice ruled:

Alienation [of native title land] would bring to an end the entitlement of the aboriginal people to occupy the land and would terminate their relationship with it What the inalienability of lands held pursuant to aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an aboriginal community and the lands over which it has aboriginal

title has an important non-economic component. The land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. (*Delgamuukw* at 247-248)

It is not clear whether the concept of “inherent and unique value in itself” can be translated into a compensation amount. Perhaps the concept is more applicable to a consideration of whether infringement could be justified at all with compensation where the unique value of certain lands to an aboriginal nation is extremely high.

Besides this *Delgamuukw*-driven argument, the fact that our courts have traditionally defined marketable title as title which “at all times under all circumstances may be forced on an unwilling purchaser”¹⁰—i.e., in the case of aboriginal title, the Crown—indicates that a ‘market’ does exist for title land. In fact, the inalienability of title land, except to the Crown, may point toward fair market value as a minimum starting point for valuing aboriginal title. This argument is premised on the surrender of aboriginal lands to the Crown being compensated by way of expropriation law principles. Historically, numerous incidents of expropriation of both reserve lands and traditional lands (which many First Nations are now claiming fall within their aboriginal title land boundaries) have taken place. Railway rights-of-way, weapons ranges, fur trading posts and other expropriations have diminished aboriginal peoples’ land base.

Compensation in such cases has normally been paid to First Nations at the time of expropriation. Such expropriation has been valued in accordance with general expropriation law principles, which include the premise that the owner should receive fair market value for the expropriated property, normally based on the use of the land on the date of the expropriation. Various methods can be used to determine value, including the direct sales approach (which compares comparable property values), the income approach (which considers income derived from the land) or the cost approach (which supplements the direct sales approach by considering land improvements that cannot otherwise be compensated for in the direct sales approach). In expropriation law, compensation greater than fair market value may be awarded if the owner is able to show that a special economic advantage is gained from the use of his land.

The use of the fair market value measurement in the expropriation context was adopted by the Royal Commission on Aboriginal Peoples in its 1996 Report to the Federal Government. The Royal Commission recommended that any expropriated lands now abandoned by the military or railroad companies be returned to First

Nations, or that the appropriate First Nations be provided with a right of first refusal on such lands. The Commission referred to fair market value in its conclusion:

(f) If an Aboriginal community does not wish the return of expropriated lands because of environmental damage or other reasons, they receive other lands in compensation or financial compensation equivalent to fair market value; and

(g) The content of such compensation package be determined by negotiation or, failing that, by the Aboriginal Lands and Treaties Tribunal.¹¹

The Limitation on the Use of Title Lands The Supreme Court of Canada was unequivocal in stating that aboriginals may not use their title lands in a manner “irreconcilable” with their attachment to the land. This was held in *Delgamuukw* to be roughly analogous to the restrictions in traditional property law against life estate holders ruining or destroying their property.¹² Again, one can expect arguments from the Crown that this limitation on aboriginal title should lead to some diminution in the value of title land. Indeed, in some cases, a particular aboriginal group’s attachment to its land may be akin to a zoning restriction that renders otherwise more valuable land less desirable. For example, park land in large urban areas or Agricultural Land Reserve property in Richmond, which otherwise would have tremendous value for residential or commercial development, suffers from diminished market value by virtue of its zoning characteristics. Similarly, land held by a First Nation whose relationship to the land is such that little or no economic development is possible could be accorded a lower than market value.

Aboriginal Land is Communally Held The fact that aboriginal title land cannot be held by individual aboriginal community members also means that decisions regarding the land are made by the community. It is difficult to assess how a court will evaluate this aspect of title. In our view, a court may agree to a slight diminution in the value of aboriginal title due to its communal nature, since decision-making as to that land will be made more cumbersome and time-consuming.

Exclusivity of Use That aboriginal title allows for the exclusive use and occupation of the land by First Nations imports a wide variety of considerations. These include the fact that the very origins of aboriginal title are distinct from its fee simple counterpart. Aboriginal title is founded upon the undisputed occupation of present-day Canadian

territory by aboriginal peoples prior to the assertion of Crown sovereignty. In Chief Justice Lamer's words:

What makes aboriginal title *sui generis* is that it arises from possession *before* the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward ... (Emphasis in judgment; *Delgamuukw* at 242)

In other words, aboriginal title is not, like fee simple, dependent upon Crown grants for its existence. It predates European discovery and colonization of Canada, and survives British sovereignty.

The exclusivity of use is, in our view, an indicator that aboriginal title may be given additional value by a court up to or beyond the fair market value benchmark for fee simple lands. In a sense, aboriginal title land is similar to real property that is free from all zoning restrictions, and is therefore available for its highest and best use. This analogy must be tempered, of course, by the condition that an aboriginal group's use of the land must not be irreconcilable with its attachment to the land. Still, even with this limitation, exclusivity is perhaps the most important characteristic that will affect how a court might assess compensation for infringement of aboriginal title. This, in a sense, creates 'jurisdiction free' land insofar as there would otherwise be statutory limits on government-approved uses.

A few additional factors that will be consistent across all First Nations' lands bear mentioning. The first is that aboriginal rights, which include aboriginal title, are protected in the Canadian Constitution. This is a fundamental aspect of aboriginal title status; no other property rights are given such recognition in Canada. Secondly, Justice Gerard La Forest's concurring reasons in *Delgamuukw* included the following suggestion that the "honour of the Crown" and the degree of occupancy of title land will affect compensation amounts:

It must be emphasized ... that fair compensation in the present context is not equated with the price of a fee simple. Rather, compensation must be viewed in terms of the right and in keeping with the honour of the Crown. Thus, generally speaking, compensation may be greater where the expropriation relates to a village area as opposed to a remotely visited area. I add that account must be taken of the interdependence of traditional uses to which the land was put. (*Delgamuukw* at 283)

In this passage, Justice La Forest seemed to be referring to one of the characteristics of aboriginal title, namely the relative exclusivity of use.

According to Justice La Forest, it seems that there is a range of aboriginal title lands which vary in their degree of exclusive occupancy and interdependence of uses, both of which will affect their value when it comes to compensation.

An important further distinction is that aboriginal title clearly includes subsurface mineral rights, whereas these rights are normally reserved in fee simple grants. The Supreme Court of Canada confirmed the mineral rights content of aboriginal title land in its 1995 decision, *Blueberry River Indian Band v. Canada*, in which the Band challenged the Federal Government's transfer of mineral rights as part of 1945 surrender by the Band of reserve lands to the Government.¹³ In *Delgamuukw*, the Court cited the *Blueberry River* case and the *Indian Oil & Gas Act*¹⁴ in its review of aboriginal title, noting that the legislation "presumes that the aboriginal interest in reserve land includes mineral rights."¹⁵ This would have the effect of increasing compensation, particularly where extraction of minerals is not significantly irreconcilable with an aboriginal nation's attachment to its lands.

Of course, the determination of compensation does not end with a valuation of a First Nation's particular title to its land. The nature and severity of the infringement, as well as the Crown's efforts to accommodate aboriginal interests, will augment or diminish the amount of compensation the Crown will have to pay. While a valuation of the nature of title will depend entirely on aboriginal title's unique characteristics and on the distinctiveness of each First Nation's land holding, the remaining three compensation factors all contain some element of discretion on the part of the Crown. It is incumbent on the Crown to decide whether it will exercise such discretion in a manner that fulfills its fiduciary and other duties and reduces potential liability for compensation in the aboriginal law context.

(e) The Nature of the Infringement

That compensation should vary depending upon the nature of the infringement seems obvious. An intentional governmental act, or an act condoned by government, would normally be viewed by a court in a harsher light than an unintentional or passive infringement. One can envisage, for example, a court taking a softer approach as far as compensation level where infringement has occurred on land to which a First Nation did not previously claim title. Conversely, compensation would be enhanced where the infringement, such as the granting of forest tenures, takes place on land which the Crown has full knowledge is claimed as title land by a First Nation. It should be noted, however, that an unintentional or passive act of infringement by the Crown should not ne-

gate compensation; the honour of the Crown and the Crown's fiduciary duty to see to aboriginal peoples' interests place a considerable burden of knowledge and care on government. To some extent, this process has begun in that government has assisted First Nations in developing "Traditional Use Studies" to document important areas that may attract a greater fiduciary duty and greater compensation if infringement has occurred. This step may ultimately assist the Crown in its potential "due diligence" defences to breach of fiduciary duty claims.

(f) The Severity of the Infringement

The severity of infringement of aboriginal title is another strong determinant of the degree of compensation. Infringement that destroys or seriously diminishes a First Nation's connection to the land, or adversely affects its culture and identity, should result in much higher compensation than incidental infringement. The wholesale destruction of an area to which a First Nation holds title by strip mining or clear-cutting will clearly fall into a different compensation realm than the improper surveying, with its minimal impacts, of aboriginal title land. The duration of each infringement will be another aspect of its severity. For example, compensation for a one-time infringement should not match compensation for infringement of title caused by decades of the granting of forestry and mining licences on aboriginal lands which include village sites, burial grounds and sacred sites, as well as crucial hunting and gathering areas.

(g) Extent of Accommodation of Aboriginal Interests

This variable in the compensation calculation, perhaps more than any other, provides government with options for minimizing its exposure to compensation. The accommodation of First Nation interests comprises two major tasks for government. The first is to involve the First Nation in the development of the particular resources found on their land. This involvement may include joint decision-making; resource-sharing; the conferral of licences or lands to First Nations' communities and businesses; and the reduction of economic barriers to First Nations' involvement in resource development.¹⁶ The conferral of licences to First Nations' communities and businesses would be an important aspect of accommodation.

The second governmental task, and perhaps the most important means of accommodating First Nations, will be to engage in a consultation process with First Nations prior to infringement of title. In *Delgamuukw*, the Chief Justice stressed the importance of consultation in the following passage:

[T]he fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. (*Delgamuukw* at 265)

The Chief Justice went on to note that the type and extent of consultation will vary from a duty to discuss important decisions when the infringement is trivial, to the full consent of a First Nation in some cases. The Chief Justice indicated that even when the minimal standard is consultation, that consultation must be in good faith and must be carried out with the intention of substantially addressing the First Nation's concerns. He noted that in the majority of infringement situations, the amount of input, involvement and discussion with the First Nation "will be significantly deeper than mere consultation."¹⁷

Infringement Scenarios: Reducing Crown Exposure to Compensation

Clearly, many resource and land use decisions taken in this Province will continue to raise the possibility of infringing on British Columbia First Nations' rights and title until broad land claims settlements or other resource agreements are reached. In many cases, it will be impossible for government to avoid paying compensation to First Nations for past infringements, whether such compensation is paid by way of a legal award or an out-of-court settlement. However, on a go-forward basis, it will be possible for government to assess the consequences of infringement decisions such as resource extraction and minimize or even eliminate compensation that may otherwise be owed to First Nations. As the following scenarios illustrate, the 'size of the cheque' that the Crown may have to write will depend, in many cases, upon involving the particular First Nation in a consultation process and in creating partnerships in developing the particular resource.

Scenario No. 1: Sale of Crown Land to Private Sector for Real Estate Development

Population pressure and urban growth in British Columbia may lead to the need to encroach on First Nations' traditional lands. Should government proceed to sell such land for residential development that is on or near traditional lands, it runs the real risk of unjustifiably infring-

ing aboriginal title and incurring the concomitant liability to pay compensation. As noted above, the amount of this compensation would depend very much on the First Nation's particular title to the land, the severity and nature of the infringement, and the extent to which First Nations were consulted with and accommodated. Under this scenario, the unilateral sale of land that was later proven to be aboriginal title land, with no prior consultation with or no participation from the First Nation involved, could attract a considerable amount of compensation. Moreover, one could expect the First Nation to resist the development of the land by way of judicial review, injunction or filing a caveat with the Land Title Office claiming aboriginal title.

On the other hand, the Crown could minimize its compensation exposure, and help fulfil its fiduciary duty, by carrying out one or more of the following:

- at a minimum, engaging in meaningful consultation with the First Nation involved;
- engaging in full consultation to the extent of obtaining consent of the First Nation for the transfer;
- conferring some of the land to be developed to the First Nation, or offering other Crown land in the area to increase the size of the First Nation's Reserve;
- placing restrictions on the use of the Crown land involved in the transfer so as to minimize the impact of the change on the First Nation;
- considering the creation of a community facility, park, roads, utility improvements, etc., on the land so that the First Nation would also share in benefits and services;
- involving the First Nation in a joint decision-making process about the sale of the land; and/or
- directing a portion of the sale proceeds to the First Nation for infrastructure and community development.

As the range of processes above suggests, the Crown and First Nation involved are afforded the option of crafting an innovative, First Nation-specific arrangement. Of course, the parties may not be able to reach a mutually satisfactory agreement. Should government proceed with the land transfer in the absence of an agreement with the First Nation, the Crown could still reduce the compensation it must pay if it has engaged in meaningful, deep consultation with the First Nation. In all likelihood, in-depth consultation and a joint decision-making

process will lead to agreements in many cases that would otherwise proceed to litigation.

Scenario No. 2: The Issuance of a Forest Licence under the Forest Act

One of the most common claims by First Nations that their title has been infringed will arise from the granting by the Provincial Government of *Forest Act* licences and tenures. With each judicial review by First Nations that quashes forestry approvals or licences granted on or near lands claimed as title lands, the Crown attracts the risk of an injunction restraining logging and/or, after logging has occurred, a lawsuit seeking compensation for infringement. Again, government's exposure may be limited by considering one or more of the following options:

- engaging in meaningful consultation with the First Nation prior to forest management decisions;
- obtaining the consent of the First Nation to the logging on its land;
- entering into joint decision-making / co-management agreements with the First Nation for development of the resource;
- requiring that the forest licence on aboriginal title land be a joint-tenure licence with the First Nation community;
- preferring aboriginal joint venture applications in the open bidding process;
- making forest licences conditional on the successful applicant entering into business arrangements with the First Nation;
- involving the First Nation significantly in higher level planning under the *Forest Practices Code*; and/or
- reducing stumpage for First Nation tenure-holders.

In both scenarios above, government will have to ensure that a proper legislative mandate is in place that allows government decision-makers to validly carry out such activities as consultation, joint decision-making and resource sharing. Without such legislative authority, decision-makers may run afoul of administrative law principles of natural justice and even of having certain legislation found to be unconstitutional. For example, in a 1996 Supreme Court of Canada decision, *R. v. Adams*, the Court considered Quebec fishing regulations that allowed only for aboriginal food fishing at the discretion of the Minister. The Court found that since the regulatory fishing scheme amounted to "a pure act of

Ministerial discretion” that gave no direction as to how the discretion should be exercised, it infringed the existing aboriginal right to fish for food.¹⁸ The Supreme Court of Canada noted that while in normal situations, “unstructured administrative discretion”¹⁹ would only be reviewed by courts after it was exercised to determine whether it complied with the *Canadian Charter of Rights and Freedoms*, infringement of aboriginal rights called for a different approach:

In light of the Crown’s unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seeks to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfill their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights ...²⁰

Certain legislation in British Columbia already contains important provisions for consultation with First Nations and considerations of their interests. The B.C. *Environmental Assessment Act*²¹ includes several sections that mandate consultation with First Nations:

- section 7 requires that applications for Project Approval Certificates include information on consultation activities undertaken with First Nations and a summary of the First Nations’ response;
- section 9, which calls for creation of a Project Committee to review the project, allows for First Nation representation on the Committee;
- section 14 provides for the Project Committee to make a written assessment of the adequacy of the project proponent’s information distribution efforts, which may include specific measures providing for more detailed consultation with First Nations;
- section 17 provides for further input from First Nations as the project approval process attains various stages;
- section 22 calls for specific project report specifications, including particulars of potential impacts on aboriginal rights; and

- section 23 calls for the project report to include satisfactory plans on how the project proponent intends to carry out consultation with First Nations whose territory includes or is in the vicinity of the project.

The *Environmental Assessment Act* provisions on consultation were considered in a recent B.C. Supreme Court decision, *Cheslatta Nation v. British Columbia*,²² in which a First Nation sought judicial review of various government decisions relating to a mine project. While Chief Justice Williams ruled that the common law duty of consultation with aboriginal peoples is “always present and always important,” he noted that an additional statutory obligation to consult, which did not lessen the common law to consult, existed because of the *Act*.²³ This statutory obligation does not necessarily create a second tier of consultation; the case suggests that the content of the statutory obligation in the *Act*—good faith meaningful consultation—was essentially similar to the duty to consult at common law.

Two other statutes bear mentioning. Section 13 of the B.C. *Forest Act* requires that before entering into a forest licence, a regional manager must evaluate licence applications according to various criteria, including meeting Crown objectives of environmental quality, water management, fisheries, wildlife and cultural heritage resources.²⁴ This section could be viewed as providing authority for consultation and joint decision-making with British Columbia’s First Nations. More specific authority is found in Ontario’s *Crown Forest Sustainability Act*,²⁵ which includes the following section:

(23) The Minister may enter into agreements with First Nations for the joint exercise of any authority of the Minister under this Part.

Such provisions are increasingly common in new and revised Canadian legislation relating to environment and resource use, and should prove important in ensuring that the Crown’s obligation to consult and share resource decisions with First Nations is met.

The Effect of the *Limitation Act* on Infringement of Rights Decisions

The restrictions imposed in the B.C. *Limitation Act*²⁶ may affect the ability of some First Nations to bring to court certain claims for compensation for infringement of title that occurred many years ago. The *Limitation Act* does include provisions for postponing the running of time for limitations in, among others, breach of trust cases and in situations where material facts relating to an action have been willfully con-

ceased. There is an ultimate 30-year limitation period even if the postponement of the running of time is found to exist. However, certain kinds of actions are not affected by limitation periods and may be brought at any time. These include actions for possession of land, where the person entitled to possession has lost possession in circumstances similar to trespass, and actions for declarations for title to property by any person in possession of the property. First Nations may, therefore, be able to avail themselves of these property exemptions.

In other cases, the *Limitation Act* provisions may be strictly applied to deny the ability of First Nations to proceed with lawsuits. For example, in *Roberts v. Canada*, a 1995 decision of the Federal Court Trial Division, the Court barred and extinguished an action by two British Columbia bands for damages against the Crown relating to a dispute about Reserve Lands.²⁷ This area of law may become fertile ground for creative legal arguments from both the Crown and First Nations in lawsuits whose subject is historical infringement of title. While it is beyond the scope of this paper to review the considerable jurisprudence on limitation issues relating to aboriginal rights, one might expect First Nations to argue strenuously that the Crown's trust-like or fiduciary duty toward them, and the very recent development of the concept and content of aboriginal title, should result in a postponement or elimination of limitation periods in some cases.

The Crown's Fiduciary Duty and the Involvement of Industry

In many cases of resource development, the consultation and decision-making process between the Crown and the First Nation will also involve the private company developing the resource. That company is likely to have more of the specific technical and environmental knowledge than the Government or the First Nation, and will normally assist the First Nation by providing information on the impact of the development on its lands. Industry will also be involved in many cases in joint-venture business relationships with First Nations. In practical terms, the involvement of industry at this stage may allow the Crown to off-load a portion of its fiduciary duty on to the private sector.

In addition, the requirement of the Crown to provide economic benefits to First Nations may fulfil a portion of the Crown's fiduciary duty, limit its own liability for compensation, and do so without drawing from the government's coffers. Moreover, the Province may well reap the economic benefits inherent in private-sector-First Nations' dealings, such as maximizing taxation revenues and reducing the size of the compensation package under later land claims settlements. These economic benefits may be possible, for example, where industry

has reached an agreement with the First Nation to provide the Band with an annual payment from a project on aboriginal title land. Such a payment might not only be taxable by the government in the hands of the First Nation but, depending upon the circumstances, would not be tax-deductible by the business. Further, one could foresee government arguing that the payments made to the First Nation by industry should minimize the Crown's financial obligations to the First Nation in any land claims settlements or infringement lawsuits by the First Nation. First Nations may insist upon written assurances that any benefits conferred to them from agreements with the private sector relating to resource development on their lands not be used by the Crown to diminish later claims for compensation. This area is further complicated by the conflict between the need for confidentiality between the First Nation and private sector in any business negotiations, and the Crown's fiduciary duty to each First Nation to ensure that its best interests are maintained.

Clearly, the Government-Industry-First Nation triangle presents a myriad of uncertainties. It also offers numerous options for creative business planning, consultation and joint decision-making that could alleviate the Crown's burden while fostering economic growth. The *Delgamuukw* decision has not magically removed British Columbia's resources from the negotiation table—it has, however, placed another seat at that table.

Compensation in Land Claims Settlements

(a) Negotiation: The Preferred Approach

Chief Justice Lamer's urging in *Delgamuukw* to government and First Nations to resolve title and rights issues by way of negotiation is only the latest judicial admonition that the negotiated approach is the best solution to outstanding title issues. The Chief Justice's closing comments in the case are unusually blunt:

[T]his litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts ... Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that will achieve ... "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." Let us face it, we all are here to stay. (*Delgamuukw* at 273)

Delgamuukw has already spawned or revitalized litigation on behalf of First Nations for past and present infringement of title and rights. Such lawsuits will multiply if outstanding issues are left unresolved and if the Crown proceeds with resource development in the Province without a sound consultation policy. As suggested in the section on compensation in the infringement context, a “brush-fire” approach to resolving infringement of title will leave the Crown open to the political and financial risks of ongoing and uncertain litigation. The honour of the Crown, the fiduciary duty owed by government to First Nations, and the growing public sentiment opposing continued disputes with First Nations should lead to an accelerated land claims settlement process. Fortunately, compensation in a land claim settlement context allows the parties tremendous latitude for crafting agreements and nearly unlimited scope for a meeting of the minds; lawsuits leave compensation decisions to the judiciary, which is constrained by a fairly narrow range of remedies.

(b) The Content of Land Claims Settlements

Land claims settlements are essentially modern-day equivalent of treaties. Such agreements can include an element for compensation for past and ongoing infringement of aboriginal rights, plus compensation of some kind for an extinguishment of rights, for the holding of certain or all rights in abeyance, or for an exhaustive definition of the rights of a particular First Nation. This definition will include delineation of geographical boundaries for aboriginal title land and land on which aboriginal rights may be exercised.

Other aspects in land claims settlements may include some recognition of any existing fee simple lands and private rights on lands in and around the settlement area; water, forestry, sub-surface and fisheries resource management provisions; archeological and cultural agreements, including protection for artifacts and burial sites; self-government and policing provisions; environmental assessment and protection provisions; and taxation considerations, including, in some cases, wider scope for governmental taxation of aboriginal peoples.

(c) The Financial Component

Of all these items up for negotiation under a land claims settlement, perhaps the most contentious and high profile will be the amount of financial compensation paid to the aboriginal group. A lump-sum amount may include amounts for land given up, past infringements, ongoing use of traditional aboriginal territory by third parties, compensation for past grievances such as lost cultural artifacts and, in some cases, an amount acknowledging the harm caused by the residential

school system. Of course, an amount representing any extinguishment or exhaustive definition of aboriginal rights would be included. Of this amount, a considerable portion may be allocated toward aboriginal title land previously removed from the First Nation or given up as part of the settlement. Valuation methods will obviously be left to the parties. However, one can assume that some formula, perhaps fair market value plus or minus a premium that varies depending upon the nature of the land and rights at issue, will be adopted. The utility of any such formula across the Province's many land settlement negotiations is uncertain since the nature of each First Nation's attachment to its land will vary tremendously. As lawyer Jack Woodward has pointed out, even the existing Canadian treaties may hold little value as precedents for land claim settlements:

There are a great many ... treaties in Canada, even in B.C., but they are all virtually useless as a guide to the quantum of compensation which will be paid for such a cession of title. Most such treaties were products of the peculiar political circumstances of their times. To state the obvious, the aboriginal parties almost never had adequate legal advice when entering these compacts. Currently there is a strong tide of opinion in most aboriginal communities to *never* cede, release or surrender their lands or rights, so a treaty on the old model seems unlikely today.²⁸ [Emphasis in original]

An added complication of determining how much a surrender of aboriginal title is worth, whether past or future, is the collision of value systems regarding land. Whereas 'fair market value', 'highest and best use of land', and other traditional property worth measurements are useful in many contexts, including expropriation, they do not alone capture the value of land to First Nations. In some way, the First Nations' perspective that their land is sacred and plays a vital part in their creation stories will have to be reconciled. Negotiators must also consider the fact that in surrendering land or otherwise diminishing their rights, First Nations will be giving up opportunities to become involved in economic development. The reality that after signing land claims agreement, many First Nations will no longer be able to resist future resource and land development in their vicinity, and will no longer be asked to be part of the consultation or resource-sharing process, should be recognized. As well, the important fact that the Crown will be gaining certainty of resource access decisions by way of removing the costs of compensation for future infringement should be considered and evaluated.

However the reconciliations and valuations are ultimately made, it is clear that the *Delgamuukw* decision will have tremendous impact on

land claim settlements, particularly as they relate to title lands. Old policies and approaches will no longer work. The following passage, taken from a 1995 draft Provincial Government discussion paper on the Province's approach to land and resource aspects of treaty negotiations, illustrates the need to re-evaluate policies and strategies:

Compensation for First Nations

Some First Nations have indicated that they will seek compensation based on a calculation of damages arising from past use and alienation of the lands and resources within their traditional territories. *The Province will not calculate the cash component of treaties on this basis, and Provincial negotiators will not have a mandate to enter into discussions on such calculations.*²⁹ [Emphasis added]

Conclusion

The Federal and Provincial Governments do have options for reducing their risks of future liability for compensation to aboriginal nations. Averting such risks will mean mounting a concerted effort directed at meeting the fiduciary duty to First Nations, including "sharing the wealth" by involving aboriginal people in the economic benefits of the land and its resources. In many cases, this inclusion can be accomplished by government with little cost and should, where aboriginal-private industry tensions and economic uncertainty are high, stimulate economic activity and government revenues. The issue then becomes not one of law or economics, but of political will.

Notes

- 1 H. Foster, "Aboriginal Title and the Provincial Obligation to Respect it: Is *Delgamuukw v. British Columbia* 'Invented Law'?" (1998), 56 *The Advocate* 221-231 at 222.
- 2 See also H. Slade and P. Pearlman, "Why Settle Aboriginal Land Rights? Exploring the Legal Issues of Litigation and Negotiation" in Roslyn Kunin, ed., *Prospering Together: The Economic Impact of the Aboriginal Title Settlements in B.C.*, (Vancouver: Laurier Institution, 1998) 45.
- 3 *Delgamuukw* at 266.
- 4 *Delgamuukw* at 265-266.
- 5 See Madame Justice Wilson's judgment in *Frame v. Smith* (1987), 42 D.L.R. (4th) 81 (S.C.C.).
- 6 *Delgamuukw* at 265.
- 7 [1984] 2 S.C.R. 335.
- 8 *Ibid.*, at 360-362.
- 9 *Delgamuukw* at 265-266.
- 10 *Re: Dalgleish* (1910), 15 B.C.R. 217 (B.C.S.C.).
- 11 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*—Vol. 2 (Ottawa: Canadian Communication Group, 1996) at 631.
- 12 *Delgamuukw* at 248.
- 13 *Blueberry River Indian Band v. Canada* (1995), 130 D.L.R. (4th) 193.
- 14 R.S.C. 1985, c. I-7.
- 15 *Delgamuukw* at 245.
- 16 *Delgamuukw* at 264-265.
- 17 *Delgamuukw* at 265.
- 18 [1996] 3 S.C.R. 101 at 131.
- 19 *Ibid.* at 131.
- 20 *Ibid.* at 132.
- 21 R.S.B.C. 1996, c. 119.
- 22 [1998] B.C.J. No. 178.
- 23 *Ibid.* at paragraph 43.
- 24 R.S.B.C. 1996, c. 157.
- 25 S.O. 1996, c. 25.
- 26 R.S.B.C. 1996, c. 266.
- 27 [1995] F.C.J. No. 1202.
- 28 J. Woodward, "Damages for Infringement Evaluation and Title" in the *Continuing Legal Education Society of B.C.—Aboriginal Title Update* (CLE: Vancouver, 1998) at 4.1.02.
- 29 Government of British Columbia, "Draft Provincial Approach to Lands and Resources Component of Treaty Negotiations," April 25, 1995, at page 10.