

Converting the Communal Aboriginal Interest into Private Property

Sarnia, Osoyoos, the Nisga'a Treaty and Other Recent Developments

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The Communal Aboriginal Interest in Aboriginal Title

*Delgamuukw*¹ makes it clear that aboriginal title—first described as a “personal and usufructuary right”² and more recently as a *sui generis* interest in land “best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indian’s behalf when the interest in surrendered”³—is a right to the land itself.⁴ Aboriginal title arises from First Nations’ possession of lands before the assertion of British sovereignty and crystallized into a burden on the underlying title of the Crown at the time of assertion of sovereignty.⁵

For the purposes of this paper, aboriginal title has the following important attributes:

Notes will be found on pages 101–102.

- (1) Aboriginal title is a collective interest in land and not an individual right. It is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land must be made by that community.⁶
- (2) Aboriginal title lands cannot be transferred, sold or surrendered except to the Crown.⁷
- (3) Aboriginal title is a right to the land itself.⁸
- (4) Aboriginal title is a right to exclusive use and occupation.⁹
- (5) Aboriginal title lands have an inherent limit—they cannot be used for purposes that are irreconcilable with the First Nations attachment to the land without surrender.¹⁰
- (6) Unextinguished aboriginal title is constitutionally entrenched.¹¹

The first attribute is important in determining *who* can make the decision to modify aboriginal title. The other attributes are important in determining *how* the communal interest in aboriginal title can be modified or converted into private interests.

Who may make the decision to modify the communal interest? (*Sarnia*)

The recent decision in *Sarnia*¹² makes it clear that a fundamental aspect of aboriginal title is that because it is a communal interest, the decision to modify (in this case, surrender) must be made by the collective decision of the community as a whole, in accordance with aboriginal law. *Sarnia* was a claim for the recovery of four square miles in the City of Sarnia which were, by Treaty, formerly part of the Chippewas reserve and which the Band claimed had never been surrendered. The property owners traced their title to a Crown patent issued in 1853. The Band claimed against Canada, Ontario and 2,000 property owners for recovery of the land or alternatively for damages against the Crown. The Court held that the *Royal Proclamation, 1763*¹³ continued in effect and that the common law of aboriginal title incorporates the surrender procedures evidenced by Crown practice.¹⁴ A valid surrender, in this case, required that the aboriginal title land be purchased by the Crown at a public meeting of the Indians assembled for that purpose by the Governor or his equivalent.¹⁵ The Court held that “the decision to surrender must be made by the collective decision of the community as a whole, not by some faction of the community or even by a group of chiefs.” The “only way to make the surrender and to evidence it is by some public meeting or assembly of Indians held for that purpose.”¹⁶ On the particular facts of *Sarnia*, there was no evidence of any commu-

nity meeting held to consider the surrender. Therefore, Justice Campbell found it unnecessary to decide whether the Chippewas of Sarnia had a general practice of collective consensus decision making or majority decision making, either of which attained the status of an internal decision protocol or an aboriginal right in relation to the surrender of aboriginal title.¹⁷ As there was no collective decision of the community to cede aboriginal title to the Crown, the purported surrender was held to be invalid. Thus the Crown patent was invalid and aboriginal title to the land continued to exist.

Sarnia deals with how aboriginal title lands reserved by treaty may be surrendered. The question of who may surrender aboriginal title in reserve lands is more complex. The Court in *Guerin*¹⁸ held that the Indian interest in reserve lands and unextinguished aboriginal title lands was the same.¹⁹ The question arises whether a band can make the collective community decision to surrender aboriginal title in reserve lands. There is no problem with a band effecting a surrender of the aboriginal title in reserve lands, where the band is the successor to the aboriginal group holding aboriginal title at sovereignty (see note 24). However, where the band is not the successor to the aboriginal group, or is the joint successor with other bands, the situation becomes more complicated, especially in light of the *Osoyoos*²⁰ case discussed below.

How is Aboriginal title converted into Private Interests? (*Osoyoos*)

To convert aboriginal title lands into fee simple estates, the communal interest in the former must be modified in such a way as to ensure a good title in the latter. Since 1982, the two main ways by which this may be accomplished are by voluntary surrender under the *Indian Act*²¹ (subject to the discussion of the *Osoyoos* case below) or by a land claims agreement.²²

(i) Surrender under the *Indian Act*

The present *Indian Act* reflects the land surrender procedure first set out in the *Royal Proclamation, 1763*. Reserve land must be surrendered absolutely before it can be sold to non-Indians.²³ Surrenders of reserve land must be made to the Crown, must be assented to by a majority of the electors of the band,²⁴ and must be accepted by the Governor in Council.²⁵ As such, it may contain all the essential elements for surrender of aboriginal title. However, the recent case of *Osoyoos* suggests that a surrender of the reserve interest may not, in all cases, have the effect of modifying aboriginal title in the reserve lands. The majority of the Court in *Osoyoos* seems to suggest that the reserve interest, at least for the purpose of section 35 of the *Indian Act*, may be expropriated

without necessarily affecting aboriginal title to these lands.²⁶ This case concerned whether the Osoyoos Band could tax an irrigation canal right of way expropriated under section 35 of the *Indian Act*. The Court found that an Order in Council, which granted rights of exclusive enjoyment and possession of the right of way, issued pursuant to section 35 of the *Indian Act* operated to extinguish the reserve interest in the lands.²⁷ The Court suggested that expropriation of the reserve interest did not amount to extinguishment of the aboriginal title.²⁸ Justice Lambert, dissenting, held that if the Band has aboriginal title to the lands within the geographic boundaries of the reserve (as is the case in most reserves in British Columbia) then section 35 of the *Indian Act* should not be read as extinguishing the reserve interest.²⁹ He found that the Indian interest in reserve land is an interest that is now described as aboriginal title.³⁰ It is not difficult to see the anomalies that might arise if *Osoyoos* is extended to the surrender provisions of the *Indian Act*. A band could surrender the reserve interest absolutely, thereby allowing the Crown to create third party interests which may nevertheless still be subject to an existing aboriginal title.

The modified defence of bona fide purchaser for value without notice

In *Sarnia*, the Court held that a Crown grant, to which 2,000 property owners in the City of Sarnia traced their title, was invalid because there had been no extinguishment of the aboriginal title in those lands. However, Justice Campbell held that the treaty rights and aboriginal title in the disputed lands were extinguished by the application of a defence of *bona fide* purchaser for value without notice combined with an equitable limitation period of 60 years. The Court applied the equitable limitation period, in part because the purchasers had occupied the lands for a very long time and had no way of discovering the defect in the original grant, even with due diligence; and because there was a potential adequate remedy against the Crown for damages for breach of fiduciary duty. The Court recognized that “the defence of good faith purchaser for value without notice is a fundamental aspect of our real property regime designed to protect the truly innocent purchaser who buys land without any notice of a potential claim by a previous owner.”³¹ Thus on the facts of this case, Justice Campbell held that the aboriginal and treaty rights were extinguished in the disputed land at the end of the equitable limitation period and crystallized into a damage claim against the Crown.³²

Extinguishment by Limitations Acts

Justice Campbell in *Sarnia* held that various federal and provincial statutory limitation periods both pre- and post-Confederation were not ap-

plicable to extinguish aboriginal title in lands reserved by Treaty because Parliament had no power to unilaterally extinguish a treaty right, and even if such a power existed it could only extinguish treaty rights, or aboriginal title, if its intention to do so was clear and plain. The Province had no jurisdiction to extinguish title, and section 88 of the *Indian Act* did not incorporate such laws by reference (and because the lands in question were reserved by Treaty the paramountcy set out in section 88 would also operate to render provincial limitations statutes inapplicable).³³

In *Stoney Creek Indian Band*,³⁴ Justice Lysyk reached a similar conclusion on the effect of provincial limitation periods. He held that the B.C. *Limitations Act*³⁵ was constitutionally inapplicable to bar a claim for damages arising out of trespass to reserve lands because the Province was constitutionally incompetent to legislate with respect to the occupancy or possession of reserve lands, and section 88 of the *Indian Act* did not apply to referentially incorporate provincial laws in respect of reserve lands.³⁶

The situation with respect to the application of a provincial Limitation Act may be different where the action for recovery of land invalidly surrendered is brought in federal court. In *Apsassin*,³⁷ the Court held that s. 39 of the *Federal Court Act* (which incorporated applicable provincial limitation periods to claims brought in federal court) operated to bar a claim against the federal Crown for damages for breach of fiduciary duty in relation to the original surrender of *reserve* lands. However, it is important to note that no argument was advanced that s.39 was constitutionally inapplicable to extinguish aboriginal title since the claim was brought prior to the constitutional entrenchment of aboriginal title (and treaty and other rights) through s.35(1) of the *Constitution Act, 1982*.³⁸

**(ii) Conversion of Aboriginal Title into fee simple estate
by land claims agreements (The Nisga'a Treaty)**

In areas where aboriginal title has been addressed through land claims agreements, each agreement is unique as to how aboriginal title is treated. Modern treaties have sought to avoid extinguishment language and instead have sought to “modify” aboriginal title in such a way as to achieve the certainty of extinguishment without its political ramifications. The *Nisga'a Final Agreement (NFA)* constitutes the full and final settlement in respect of the aboriginal rights, including aboriginal title, of the Nisga'a Nation.³⁹ The *NFA* exhaustively sets out the Nisga'a's s. 35(1) rights. The *NFA* modifies Nisga'a aboriginal title to a fee simple estate in areas to be known as Nisga'a lands or Nisga'a fee simple lands.⁴⁰ The Nisga'a may dispose of the whole of its estate in fee simple

to any person.⁴¹ The governance or jurisdictional control of the Nisga'a Lands by the Nisga'a Government does not cease upon the sale of its interest in the land.⁴² The Nisga'a Government has the authority to establish its own land title or land registry system.⁴³ The interests or estates created under the Nisga'a laws in respect of estates or interests that are recognized and permitted by federal or provincial laws of general application will be consistent in respect of those interests or estates with federal and provincial laws of general application, other than the provincial Torrens system and any federal land title or land registry laws.⁴⁴ The *NFA* also removes Nisga'a Lands from federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*,⁴⁵ and the *Indian Act*. The *Sechelt Agreement-in-Principle*⁴⁶ (*Sechelt AIP*) effectively contains the same concepts with respect to aboriginal title lands as evidenced in the *NFA*.

Modification of the aboriginal title interest

The wording of the modification provisions in the *NFA* and the *Sechelt AIP* state that "for greater certainty, aboriginal title will be modified and *continues* as the estate in fee simple" [emphasis mine].⁴⁷ There is no express surrender of the aboriginal title; however, the agreement requires the First Nation's free, full, voluntary and fully informed collective intention to consent to the modification of their aboriginal title. Thus aboriginal title is converted into a fee simple estate with respect to the proprietary interest and becomes a treaty right. It would seem that the continuing fee simple aboriginal title can be used for purposes that are irreconcilable with the nature of the First Nation's attachment to the land. This is logically inconsistent as the root of aboriginal title is the First Nation's connection with the land. Thus it might be more appropriate to say that aboriginal title is surrendered and a new treaty right is created which is a fee simple estate.

Potential uncertainty of third party fee simple title

The fee simple estate that the First Nation may grant to a third party may be subject to another First Nation's interest. For example, the Gitanyow assert aboriginal title to lands covered by the *NFA* which may affect any fee simple estates granted by the Nisga'a to third parties. A question arises whether in such a case the Gitanyow could seek recovery of the land in question from the third party. *Delgamuukw* recognized that joint aboriginal title to land is possible and that joint aboriginal title may place inherent limitations on the way in which each First Nation uses their aboriginal title lands.⁴⁸ Both the *NFA* and *Sechelt AIP* have identical provisions to deal with this contingency.⁴⁹ If it is determined that an aboriginal group other than the Nisga'a Nation have rights under s. 35(1) of the *Constitution Act, 1982* that are adversely af-

fectured by a provision of the *NFA*, that provision will cease to operate to the extent that those rights are adversely affected. This may create uncertainty for third party rights.

Treaty Negotiation must be in Good Faith (Luuxhon)

This problem has already surfaced in an action initiated by the Gitanyow alleging that in signing the *NFA* the Crown was not negotiating in good faith with the Gitanyow. In *Delgamuukw*, Chief Justice Lamer stated that “the Crown is under a moral, if not legal, duty to enter into and conduct those negotiations in good faith.”⁵⁰ Since *Delgamuukw*, the lower courts have recognized the requirement for good faith negotiations where British Columbia and Canada have entered into treaty negotiation with First Nations. In *Luuxhon*,⁵¹ an action was commenced by the Gitanyow Hereditary Chiefs on behalf of the Gitanyow First Nation against Canada and British Columbia. Two questions were posed for the Court: first, whether Canada and British Columbia, having undertaken to negotiate a treaty with the Gitanyow, were fixed with an obligation to negotiate in good faith; and second, whether by signing the *NFA*, and thereby giving the Nisga’a rights to territory subject to a Gitanyow claim to aboriginal title, the Crown had violated their obligation to consult with the Gitanyow in good faith. The Gitanyow First Nation has significant overlap of traditional territory with the Nisga’a and asserts aboriginal rights and title to areas contained in the *NFA*. Justice Williamson proceeded to determine only the first question and did so as a question of law. He held that the Crown has a legal obligation to negotiate treaties in good faith with aboriginal peoples. Further that this obligation applies equally to Canada and the provinces and is rooted in the fiduciary relationship existing between the Crown and aboriginal peoples through s. 35(1) of the *Constitution Act, 1982*. Justice Williamson relied on the judgment of Melvin J. in the *Chemanius* case.⁵²

Conclusion

Aboriginal title may be distinct in comparison with traditional common law interests in land, however it is hardly unique when compared with other non-common law interests in land. Non-common law interests in law are recognized in most of the lands formerly constituting the British Empire, particularly the former colonies in Africa and Asia. In the majority of these jurisdictions, the “native” land law (customary law) contains elements very similar to those ascribed to aboriginal title in *Delgamuukw*. Yet in these jurisdictions, customary land law has co-existed with the transplanted English common law and has, in some instances, resulted in the evolution of legal interests in land that contain incidents of both the customary law and the common law. For example,

since customary interests in land have been at the centre of Ghanaian land law since colonial times, most transactions in land come into contact with customary law at some point, and the free market economy has adapted to function efficiently. In Canada, as Chief Justice Lamer stated in *Delgamuukw*, the jurisprudence on aboriginal title is somewhat underdeveloped.⁵³ This is an understatement. The implications of *Sarnia*, *Osoyoos* and *Luuxhon* for the conversion of the communal interest in aboriginal title lands into private interests are far reaching. As stated above, *Sarnia* held that a Crown grant was not effective to give title where the collective has not effected a valid surrender of aboriginal title. The Court fashioned a modified *bona fide* purchaser without notice defence to deal with the situation of innocent third party purchasers for value with an apparently valid Crown grant. This doctrine may not be readily applicable to modern grants. It would be difficult to argue that private parties do not now have notice of aboriginal title claims in British Columbia. Even private interests on reserve lands may be less certain than previously thought. *Osoyoos*, by suggesting that expropriation of the reserve interest does not necessarily affect the aboriginal title interest in reserve lands, leaves uncertain private interests in these lands. Similarly, title to lands granted by the Nisga'a under the *NFA* to third parties may be problematic. *Luuxhon* raises the problem of overlaps and begs the question of what happens to private rights granted by a collective who may only have joint title to the lands in question.

Notes

- 1 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].
- 2 *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.) at 45.
- 3 *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 382 [hereinafter *Guerin*].
- 4 *Delgamuukw*, *supra* note 1 at para. 140.
- 5 *Ibid.* at para. 145.
- 6 *Ibid.* at para. 115.
- 7 *Ibid.* at para. 113.
- 8 *Ibid.* at para. 140.
- 9 *Ibid.* at para. 117.
- 10 *Ibid.* at para. 128.
- 11 *Ibid.* at paras. 133, 134.
- 12 *Chippewas of Sarnia Band v. A.G. (Canada) et al.* (unreported, April 30, 1999) 95-CU-92484 Ont. S.C. [hereinafter *Sarnia*].
- 13 *Royal Proclamation, 1763*, R.S.C., 1985, App. II, No.1.
- 14 *Sarnia*, *supra* note 12 at pp. 84, 98, 101, 116, 122.
- 15 *Ibid.* at pp. 101,102.
- 16 *Ibid.* at 86.
- 17 *Ibid.* at pp. 62, 63.
- 18 *Guerin*, *supra* note 3 at 379.
- 19 *Delgamuukw*, *supra* note 1 at para. 120.
- 20 *Osoyoos Indian Band v. The Town of Oliver* (unreported, May 4, 1999) Victoria V03036 (B.C.C.A.) [hereinafter *Osoyoos*].
- 21 *Indian Act*, R.S.C. 1985, c. I-5 [hereinafter *Indian Act*].
- 22 It may be that voluntary abandonment of the First Nation's attachment to the land will extinguish aboriginal title but this is beyond the scope of this paper.
- 23 *Indian Act*, R.S.C. 1985, c. I-5, ss. 37-38.
- 24 Of note, is *Corbiere v. Canada (Minister of Indian and Northern Affairs)* (unreported, May 20, 1999) File No.: 25708 (S.C.C.), which may change the definition of electors in the *Indian Act* to include both on and off-reserve members.
- 25 *Indian Act*, R.S.C. 1985, c. I-5, s. 39.
- 26 *Osoyoos*, *supra* note 20 at para. 85.
- 27 *Ibid.* at para. 105.
- 28 *Ibid.* at para 85.
- 29 *Ibid.* at paras. 33-36.
- 30 *Ibid.* at para. 34.
- 31 *Sarnia*, *supra* note 12 at 228.
- 32 *Ibid.* at 230.
- 33 *Ibid.* at 226-227.
- 34 *Thomas et al. v. Alcan Aluminum*, [1999] 1 C.N.L.R. 92 (B.C.S.C.).
- 35 *Limitations Act*, R.S.B.C. 1979, c.236.

- 36 While Justice Lysyk's order has been overturned by the Court of Appeal in *Stoney Creek Indian Band v. Alcan Aluminun Ltd.*, [1999] B.C.J. No. 2169 (QL) on procedural grounds, his reasoning on the issues was untouched.
- 37 *Blueberry River Indian Band v. The Queen* [1995] 4 S.C.R. 344.
- 38 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.
- 39 *Agreement between the Government of Canada, the Province of British Columbia and the Nisga'a Nation*, the Nisga'a Final Agreement, initialled August 4, 1998 at c. 2, art. 22 [hereinafter *NFA*].
- 40 *Ibid.* at c. 2, art. 25 and at c. 3, art. 3.
- 41 *Ibid.* at c. 3, art. 4.
- 42 *Ibid.* at c. 3, art. 5.
- 43 *Ibid.* at c. 11, arts. 46 and 50.
- 44 *Ibid.* at c. 11, art. 46.
- 45 *Constitution Act, 1867* (U.K.), 30 & 31 Vict. c. 3.
- 46 *Agreement-in-Principle between the Government of Canada, the Province of British Columbia and the Sechelt People*, the Sechelt Agreement-in-Principle, dated April 16, 1999 [hereinafter Sechelt AIP].
- 47 *NFA*, *supra* note 39 at c. 1, art. 24 and Sechelt AIP, *ibid.* at c. 1, art. 1.9.2.
- 48 *Delgamuukw*, *supra* note 1 at paras. 158-159.
- 49 *NFA*, *supra* note 39 at c. 1, arts. 33-35 and Sechelt AIP, *supra* note 44 at c. 1, art. 1.13.
- 50 *Delgamuukw*, *supra* note 1 at para. 186.
- 51 *Luuxhon v. The Queen* (unreported, March 23, 1999) Vancouver C981165 (B.C.S.C.) [hereinafter *Luuxhon*].
- 52 *Chemanius First Nation et al. v. B.C. Assets and Lands Corp. et al.* (unreported, January 7, 1999) Victoria 983940 (B.C.S.C.).
- 53 *Delgamuukw*, *supra* note 1 at para. 119.