

The Impact in Newfoundland and Labrador

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Introduction

For too long, the issue of aboriginal rights in Canada, and especially of land rights, has tended to be the preserve of specialists including lawyers, historians, civil servants, anthropologists and aboriginal political leaders. Discussion of these issues must be extended more broadly. Aboriginal rights will only gain the kind of respect that all laws must have in a democratic society when they become more widely understood.

It is important to examine the distinct repercussions this judicial decision is having in each region of Canada. I will consider the relevance of *Delgamuukw* to the rather special situation of aboriginal people in Newfoundland and Labrador. In that province there are four groups seeking settlement of their aboriginal land claims. Two of these claims, those of the Labrador Inuit Association and the Innu Nation, have been accepted by the federal Department of Indian Affairs and Northern Development. Negotiations have been under way for several years, and the Inuit negotiations are close to completion. The claims of the Mi'kmaq of the island of Newfoundland and the Labrador Métis Association have been rejected, but neither group accepts this as conclusive and are continuing their efforts to have their claims reconsidered.

***Delgamuukw* and Anthropology**

On the face of things, my discipline of cultural anthropology has not fared too well so far in the hands of the *Delgamuukw* judiciary. The original judge refused to accept the testimony of two anthropologist expert witnesses, and the Supreme Court, while overturning most of the trial judge's findings, left this particular one alone. The anthropologists were accused of behaving too much like advocates, a function apparently reserved by the court exclusively for lawyers. However, there are other roles besides advocacy for anthropology in the elucidation of aboriginal title.

Aboriginal title arises in the way that the aboriginal group has occupied the land and cannot be equated with the Western concept of fee simple ownership or other familiar property law concepts. As noted in the *Delgamuukw* judgment, aboriginal title "must be understood by reference to both common law and aboriginal perspectives" and, as noted in the earlier Supreme Court *Van der Peet* judgement, involves "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." Aboriginal title is thus a compromise between the two perspectives, involving a two-way process. Not only must Western law expand to include unfamiliar principles, but aboriginal ideas must also adapt to Western concepts of property. In many other colonial and former colonial jurisdictions, such bridges between European common law and aboriginal understandings and practices have been commonplace for many years. In this respect, we in Canada have some catching up to do. This undertaking will require the kind of comparative approach that is already familiar to anthropology.

Anthropology does not just provide descriptions of the groups in question, their diverse ways of life, forms of social organization and ways of thinking. It also deals in the general principles and patterns that underlie culturally diversity of ideas and practices. One of these underlying principles is a general comparative understanding of property rights. All known societies, whether they have hunting and gathering, agricultural or industrial forms of production, recognize rights to territory and territorial resources. Property in land is commonly represented as a relationship, often deeply emotional and mystical, between a people and their land. However, in terms of rights, territorial property is more accurately seen as a relationship between *people* in the sense that some enjoy particular privileges with respect to the territory or resources in question, in relation to those who do not. For those groups who hold rights to their territory collectively, the "others" are those who are not members of the group.

Even if the societies involved may have had relatively simple hunting and gathering economies, their system of land tenure is often high-

ly complex, with overlapping rights coming into play for different local sub-groups at different times of the year and covering different resources. Some rights to territory-based resources may be assigned to individuals, others to sub-groups, and still others to the whole society. While some rights may deal with the harvesting of territory-based resources, other rules may govern how particular parts of the resulting harvest is distributed. Consequently, land rights may be seen as more significant in the marking of social relations than as forms of wealth. While land under Western fee simple title can usually be freely bought and sold, this is not a common feature of land rights in non-industrial societies. The model of aboriginal title laid out in *Delgamuukw*—which refers to it as exclusively involving a collective right, one that can be sold, although only to the Crown—thus already represents a major transformation and simplification of not only prehistoric aboriginal land tenure practice, but also of some practices of aboriginal people that have continued to the present.

As stated above, cultural groups tend to express their territorial rights in emotional or even mystical terms, based on principles that they consider to be ultimate. In the *Delgamuukw* case, the connection to the land was traced by the aboriginal group through a series of individual lineages, each of which had its own oral accounts of their connections to their territories. In other parts of Canada, aboriginal people justify their connection to the land in terms of their relationship with spiritual entities connected to it. Among the Innu of Labrador, for example, human society is not seen as distinct from but part of that of animals and nature. Animals are thought of as “persons,” as are the forces of Nature, and they all are seen as linked together in a single “society.” Land-based geographic features are also thought of as spiritual “persons.” The land thus forms a matrix of social relations between Innu local groupings, one that ties together this social model of Nature. Much of this kind of understanding has continued to the present despite the adoption by the Innu of Christianity in the nineteenth century.

While non-aboriginal Canadian representations of the basis of land title may seem very different from these aboriginal perspectives, both of them depend upon a connection between the land and a culturally based principle whose key characteristic is that it is ultimate. In the case of settler’s title, its legitimacy is that it can be shown to derive from a Crown grant. As noted in the *Delgamuukw* decision, “[...] the inalienability of aboriginal lands is, at least in part, a function of the common law principle that settlers in colonies must derive their title from Crown grant and, therefore, cannot acquire title through purchase from aboriginal inhabitants.” In colonial theory, when British sovereignty was declared in colonial territories, the Crown, as both connected to

the deity and as the ultimate authority of the state, instantaneously acquired the underlying title to the territory. Unlike the test for aboriginal title, this did not require occupancy in order to be effective. This Euro-Canadian rationalization of land title can be seen, in its own way, to be as mystical and as legendary as those of the aboriginal people.

The Aboriginal Background of Newfoundland and Labrador

Before 1949, Newfoundland had been a partly self-governing British colony. Its government had never recognized aboriginal people as having a distinct legal status, nor did it have any agency devoted to them. Most aboriginal people lived in the Labrador portion, which was effectively a colony within a colony in the sense that nobody, white or aboriginal, had the franchise, and government social services and facilities for the administration of justice were minimal. On the island portion, the Beothuk were driven to extinction by 1829. The Mi'kmaq were incorrectly seen by European settlers as interlopers from Nova Scotia, brought by the French to kill off the Beothuk. They were generally discriminated against, and as a consequence some of them tried to hide their aboriginal identity, while others remained in separate communities from the non-aboriginal Newfoundlanders.

At the time of Confederation in 1949, an under-the-table arrangement was made not to extend direct federal administration to the aboriginal people of the new province, unlike the situation in rest of Canada. Starting in 1964, the provincial government, with some federal funds, began to administer programs for aboriginal people, although at a more meager level than was the case in the rest of Canada. Moreover, instead of making the programs available specifically to aboriginal people, as in the rest of Canada, they were directed at anyone who happen to be living in any of a list of designated communities, whether these individuals were of non-aboriginal, aboriginal or mixed descent. In the case of the Labrador Inuit designated communities, a funding formula of 60 percent federal and 40 percent provincial was used, indicating the approximate proportions of aboriginal and non-aboriginal people assumed to be in the communities benefiting from the programs. The only Mi'kmaq community to have access to these programs was Conne River, and then only up to 1986. In that year, with the threat of court action and against the objections of both the federal government and the province, they became a band under the Indian Act and began to be funded under federal programs for status Indians. However, the dozen or so other Newfoundland Mi'kmaq communities, organized under the Federation of Newfoundland Indians, have not had access to such aboriginal programs, whether provincially or federal administered.

Canadians sometimes wonder if the interests of aboriginal people would have been better served had they been given the same citizen's rights and social programs at Confederation as all other Canadians, rather than assigning them a special legal status and reserves. Newfoundland offers an interesting empirical test case for this idea. Both before and since Confederation, Newfoundland has tried, as much as possible, to follow such a policy of non-discrimination and administrative integration. Despite this, however, the social conditions in Newfoundland's aboriginal communities are every bit as bad, and in many cases much worse, than are those to be found in the rest of Canada. The well-known case of Davis Inlet Innu is only the most notorious example of this unfortunate situation. By contrast, since the extension of the *Indian Act* to Conne River the community has been rejuvenated and social conditions have improved.

As the result of the distinctive history of contact, the situation of aboriginal land title in Newfoundland and Labrador has some unique features. In the case of the Labrador Inuit, the members of the group making the claim who will be the beneficiaries of any settlement are not narrowly defined in terms of their aboriginal status. They have to show connections to the northern coastal communities, even though a large number of them now no longer live there. This situation follows from the history of the Moravian communities, in which inter-marriage with European Newfoundlanders began in the 1800s. There are some parallels to the situation in the Mackenzie Valley of the Northwest Territories, where Métis have been included within the Dene claim.

The Innu are a single First Nation divided by their second language and with two claims, one from the Innu Nation of Labrador, the other from the Quebec Innu. This situation reflects the federal practice of authorizing land claims by provincially based organizations. However, the Labrador boundary with Quebec in no way reflects territorial divisions between Quebec-based and Labrador-based Innu bands—large parts of Labrador are actually the traditional lands of Quebec Innu. In fact it would have made more sense to deal with Quebec and Labrador Innu aboriginal title as involving a single block of land.

In the original Delgamuukw trial, the legendary history of the aboriginal group was called into question. In Newfoundland, it is the European settlers who have their own legends that the Mi'kmaq first became established on the island by the French to kill off the Beothuk. Even though these stories have been shown to be historically false, they have helped to shape government's negative attitudes towards the Mi'kmaq land claim. This claim raises fundamental issues of what constitutes proof of aboriginal occupancy at the time that British sovereignty was established.

Finally, the Labrador Métis claim is by descendants of marriages between Inuit and Europeans. Some of this group migrated into Innu territory in the upper Lake Melville region in the mid-nineteenth century, where they became specialized as trappers for the Hudson's Bay Company and developed a unique land tenure system along the major river valleys, based on individual trap lines. Because their occupation of this territory occurred after sovereignty was established, it faces the greatest difficulties to meet one of the tests laid out in *Delgamuukw*.

***Delgamuukw* and Land Claims in Newfoundland and Labrador**

One significant finding of the *Delgamuukw* judgement deals with justifications for infringement on aboriginal title, as in the case of development projects. In the 1990 *Sparrow* decision, justification based on the conservation of a resource was addressed. In *Delgamuukw*, such projects are broadly outlined to include "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of [the region], protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims." This infringement must take place in a way that acknowledges the priority interest of the aboriginal group which has an aboriginal right to the region. The group has the right to be involved in the decision over the use to which the land is put. They must be dealt with in good faith with the intention of substantially addressing their concerns. Depending on the degree to which the development infringes on aboriginal title, the consent of the group may be required. The court also noted that compensation would normally be required when aboriginal title is infringed upon.

At a minimum, the requirement for good-faith consultation before development can proceed only begins to address what has otherwise become a highly problematic situation for many aboriginal groups. Without the recognition of the principle that aboriginal title is a substantial interest that can be protected in the face of other competing interests, an absurd situation has existed. The federal government would recognize the validity of an aboriginal land claim, but before a settlement of the claim was reached major development projects could be undertaken, projects which could render these negotiations substantially meaningless. In fact, given that land claims negotiations generally take many years or decades to conclude, it was in the self-interest of a province or territory to promote as much development as possible in the area before reaching a settlement of the land claim. This is because it is more difficult to include in the settlement lands for which rights have already been assigned to a third party than it is for unencumbered land. While a fidu-

ciary obligation rests on the federal government to settle outstanding aboriginal land title, provinces have no such legal obligation and it is in their interest to hold back, because of the benefits to be acquired from accelerating the resource development on the land in question.

Examples of this kind of situation existed in all parts of the country. A case in point in Atlantic Canada was the development of large areas of Labrador and adjacent parts of Quebec for low-level flight training by NATO air forces, beginning in 1980. The land claim of both the Innu Nation and the Labrador Inuit Association had been accepted as valid by the late 1970s. Before any meaningful negotiations of these claims had got under way, however, low-level flying had begun, and soon two major low-flying zones covering a large portion of the Innu and Inuit claim areas had been established. When the development was belatedly submitted to the Federal Environmental Impact Assessment Process, after the development was already in full gear, the Department of Defense insisted that the terms of reference of the assessment included the provision that any implications of the development for aboriginal land claims could not be addressed. Neither during or since have the concerns that have been raised by the Innu been adequately addressed

There are a number of development projects planned in Labrador in areas of outstanding aboriginal title, including the Voisey's Bay Nickel Mine/Mill; the proposed expanded Upper Churchill and the new Lower Churchill hydroelectric projects; and the Goose Bay to Red Bay section of the Trans-Labrador Highway. While the Labrador Inuit claim area includes Voisey's Bay, an agreement-in-principle has recently been signed. Thus this provision will be of more relevance to the Innu claim.

One of the significant parts of the *Delgamuukw* judgement was that the trial judge had erred in not taking account of the evidence of oral history. In Newfoundland the Mi'kmaq claim includes the assertion that they had been travelling back and forth between Nova Scotia and Newfoundland, where they had established themselves before European contact. Early European documentary evidence for this claim is sketchy. However, oral accounts of these crossings have been collected by anthropologists. Moreover, these oral accounts were documented as far back as 1912, long before there was any idea of a land claim. But, given that the *Delgamuukw* decision also establishes that prior occupation only need be established back to the time of British sovereignty, this may not be an essential point in any future Mi'kmaq legal case for aboriginal title.

A further issue related to the Newfoundland Mi'kmaq claims arises out of the Supreme Court Marshall decision, issued in 1999 after the *Delgamuukw* decision. The decision was based on a treaty with several

groups that included the Mi'kmaq, and gives them rights to exploit and trade certain natural resources, including fish. If it can be shown that Mi'kmaq were occupying Newfoundland at the time of the treaty, then it could be that this group may be among the beneficiaries of the judgement. However, when in late 1999 a group of Mi'kmaq from outside the province came to Newfoundland with the intention of exercising fishing rights in the area, they did not have the support of local Mi'kmaq, and subsequently withdrew. The Mi'kmaq leadership announced they did not intend to exercise such rights before seeking an agreement on the matter with the province.

Conclusion

The modern aboriginal land claims process has been under way in Canada since 1973. Claims are internally adjudicated by the Indian Affairs Branch, which is not subject to public judicial review when it rejects claims. These and many other aboriginal rights cases end up in courts and are appealed to the highest levels. In the negotiations, provinces have what amounts to veto power over all matters, some of which are in the constitutional domain of the federal government. For some years the federal government has been told by the Supreme Court that it has been negligent in exercising its fiduciary responsibilities to Indians. So far, these admonitions have had little noticeable affect on federal actions. While the *Delgamuukw* decision has clarified a number of issues, it is not clear that this will lead to the rapid resolution of claims issues. Meanwhile, ordinary aboriginal people are in dire need of a resolution to these disputes.

Canada was initially forced into land claims by the Supreme Court, and has ever since chanted the mantra the settlement must come from political negotiations and not the courts. And yet it has become apparent the politically negotiated settlements themselves tend to lead to court action.

In my view, the task of deciding upon the validity of land claims is too important to be left to internal decisions of the Indian Affairs Branch. Moreover, neither Canada nor the aboriginal people can afford the time and expense of continual litigation all the way to the Supreme Court over aboriginal rights. I suggest we need a specialized judicial body with the training, expertise and facilities at its disposal to bring resolution to outstanding land claims, and to disputes arising out of aboriginal title. In the U.S. there was such a Claims Commission many years ago with these kinds of judicial powers. Unfortunately, the term "Indian Claims Commission" has already been used in Canada for different bodies with no judicial power or authority. We need a body with the specialized expertise and the authority required to deal with aborig-

inal issues, with the power to subpoena witnesses and take evidence under oath, and with the power to make binding decisions. We have wasted too much time already. In the meantime, the social conditions of aboriginal people, for whom land claims are intended to assist in their adjustment to having been overwhelmed by settlers, have steadily diminished.

Very recently, the announcement has been made of the intention to form an Independent Claims Body, with some of the kinds of judicial independence and powers I have suggested are needed. However, the proposed body will only deal with unresolved issues involved in "specific claims," that is, those that arise from failure to implement all the terms of treaties. Moreover, it will be limited to awards in cash, and then only up to a maximum of five million dollars. This may be a move in the right direction, but in my view the principle of an independent judicial claims body needs to be extended to the kinds of unresolved issues embedded in certain "comprehensive claims," where cash compensation is seldom the appropriate resolution.