

Introduction

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About 10,000 years ago, humans started to walk cross the Bering Strait, pushing southward to populate the Americas. On December 11, 1997, the Supreme Court of Canada released its judgment in the case, *Delgamuukw vs. British Columbia*, defining the rights of those Aboriginal people vis-à-vis later arrivals who came by ship from another direction. The majority decision was written by Chief Justice Antonio Lamer, who retired two years later. Four judges concurred with him; two added their own finer points. Beyond the Art Deco marble walls of the courthouse, the media and public reaction at the time reflected no obvious consensus. Responses ranged from jubilant vindication to apocalyptic warnings. One might have expected as much, given the immense scope of Lamer's decision. At its core, the *Delgamuukw* decision judges what our long past shall now mean as Canadians decide upon serious issues of the ownership and use of land, economic development, governance and social relations—issues that will affect every Canadian, in every corner of the country.

The national significance of *Delgamuukw* case prompted the Fraser Institute to hold two conferences on the issue, the first in Vancouver in July 1998 and a second and larger one in Ottawa in April 1999. This book contains the papers and proceedings of those two events.

The Gitksan and Wet'suwet'en bands from Northwestern British Columbia initiated the case in 1984. (A direct predecessor of the case, *Calder vs. B.C.*, began even earlier, in 1968.) In brief, the Aboriginal

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plaintiffs argued for recognition of unextinguished Aboriginal title to land they claimed as traditional territory. (The case name, *Delgamuukw*, comes from the Aboriginal name of the first chief listed in the filing, Earl Muldoe.) B.C. Supreme Court Justice William MacEachern ruled against the plaintiffs in 1991. His verdict was appealed to the B.C. Court of Appeal, which in 1995 largely upheld his initial ruling. An appeal to Supreme Court followed.

In his reasons for judgment, Chief Justice Lamer addressed five questions:

- (1) Can the appeal from the B.C. Appeal Court be considered by the Supreme Court of Canada?
- (2) How may the facts of Aboriginal rights and title cases be interpreted?
- (3) What is the content and requirements for proof of Aboriginal title?
- (4) What can be made of the arguments for self-government?
- (5) Can the Province extinguish Aboriginal title?

Lamer made relatively short work of the first and the last two points. On the first point, the appeal could not be considered because the appellants had changed their suit from one of “ownership” and “jurisdiction” to one of “Aboriginal rights” and “self government.” Thus, the case was sent back to trial. That new trial has yet to commence. In his fourth point, Lamer reasoned that the claims made for self-government were too general, and thus could not be considered by the courts. On the fifth point, he cited several recent Supreme Court cases upholding that the Province did not have the jurisdiction to extinguish unilaterally Aboriginal title. The bulk of the decision examined the second and third questions.

I will not go any further in explanation of Lamer's decision. The first chapter of this book, *Basics of the Decision*, provides ample analysis of the judgment. Professor Brian Slattery of Osgoode Hall Law School provides a detailed legal background to Aboriginal title. John Howard, Q.C., a retired counsel to a major forestry company, gives a historical perspective to the issue. Kent McNeil, also of Osgoode Hall, more closely examines Aboriginal title from a constitutional perspective. Geoff Plant, Liberal MLA and former counsel to the B.C. provincial government when the case was before Justice MacEachern, and Mel Smith, Q.C., former constitutional advisor to the B.C. government, raise questions as to the consistency and creativity of Lamer's ruling. Professor Jack Woodward of the University of British Columbia traces the influ-

ence of Lamer's decision in several important cases since 1997. Alexander von Gernet, a professor of Anthropology with the University of Toronto at Mississauga, gives a social scientist's perspective on a key part of the decision, namely the use of oral testimony in determining Aboriginal title.

When the Court released *Delgamuukw*, the reaction, both pro and con, came mostly from British Columbia. The case, after all, originated in B.C. The issue of Aboriginal title has provoked great debate in that province since the middle of the last century. Unlike most of Canada (though as you will learn, not all), the Crown in B.C. had not settled treaties with Aboriginal people, other than in parts of southern Vancouver Island and on the narrow strip of land between the Rockies and the Alberta border in the lower eastern part of the province. From entry into Confederation onward, successive provincial governments maintained that Aboriginal title had been extinguished or, if it had not been, whatever claims put forward were the sole responsibility of the federal government. The province's position did not, and did not have to, change when the Supreme Court in 1973 delivered a deadlocked three-to-three (one abstention) verdict in the *Calder* case. At the time, Prime Minister Pierre Trudeau, less than certain of how the Court would rule in future, began negotiations with one of the most persistent of the B.C. bands, the Nisga'a, without the province's participation.

The mid-1980s brought a change. Even as the Gitksan and Wet'suwet'en bands prepared to launch the *Delgamuukw* case, a new and popular Premier, Bill Vander Zalm, signaled a change in policy in British Columbia. The province would negotiate land claims, if perhaps not Aboriginal title, starting with the Nisga'a, who were already in discussions with the federal government. The relationship of *Delgamuukw* to the B.C. Treaty negotiations is complex and ever shifting. To try to make some sense of it, we are pleased to start Chapter 2, *Impact in British Columbia*, with an overview by Alec Robertson, Q.C. who served as the first Commissioner of the B.C. Treaty Commission. As treaty negotiations have advanced in the wake of *Delgamuukw*, new participants have emerged. Professor Paul Tennant, a leading authority on the history of Aboriginal land claims in B.C., provides a view on the diplomacy between Aboriginal bands and the municipalities. Bud Smith, the Attorney General in Premier Vander Zalm's government at the time of the decision to negotiate, further explores the theme of community involvement, linking it to B.C.'s constitutional role through a discussion of possible changes in the disposition of resource rents. Further to the question of who should pay for land claim settlements, we have a paper by Mel Smith Q.C., who in many ways brought the issue to light in his book, *Our Home or Native Land?*

A challenge at the outset of this project was to convince people outside of B.C. that *Delgamuukw* could, and surely will, have consequences across the country. Many Canadians thought the case applied only to B.C., where treaties had not been signed. Someone who grasped the national implications of *Delgamuukw* from the start was political scientist Tom Flanagan of the University of Calgary. As he shows clearly in his paper, the introduction of oral history to determine Aboriginal title will likely have a significant impact in Alberta, even though Treaty Eight covers that province. Professor Norman Zlotkin of the University of Saskatchewan Law School covers the legal interpretation of the Prairie Treaties (Six through Eight) in the new light of *Delgamuukw*. For a legal practitioner's view, we welcome the contribution of Ken Tyler, who for many years dealt with land claim issues in the Manitoba Ministry of the Attorney General.

Crossing over the Lakehead, we reach Ontario. Kerry Wilkins of the Ontario Ministry of the Attorney General provides a thoughtful discussion of how *Delgamuukw* will influence the emerging new forms of Aboriginal self-government. Professor of Native Studies at Trent University, David T. McNab, argues that Aboriginal oral traditions in Ontario may well open up discussions of land claims in Ontario as a result of *Delgamuukw*. It is instructive to note that in Ontario, as elsewhere, *Delgamuukw* has at least the potential to shift the ground in discussing existing treaty rights.

In Quebec, *Delgamuukw* has a unique significance in relationship to a possible Quebec secession as well as in its potential impact on the 1975 James Bay and Northern Quebec treaties between the Cree and Inuit people and the governments of Ottawa and Quebec City. Two differing but intersecting views are presented here. Claude Bachand, Bloc Quebecois MP for Saint-Jean, stresses the continuity of *Delgamuukw* with Quebec's approach to Aboriginal communities. Paul Joffe, a lawyer who has acted on behalf of the Cree Grand Council, asserts that the decision and Quebec's policies conflict.

Proof of the far-reaching significance of *Delgamuukw* was evident in the 1999 Supreme Court decision in the *Marshall* case concerning Aboriginal fishing rights. The Court's subsequent and highly unusual clarification suggests that it too has yet to comprehend its full meaning. *Marshall*, focused the Court's attention on the "real world consequences" (in the words of Justice Beverley McLachlin) of *Delgamuukw* in Atlantic Canada. James Youngblood Henderson (Sajej), research director the Native Law Centre at the University of Saskatchewan, examines the treaty evidence and argues forcefully that *Marshall* is merely the first of many cases yet to come in the Maritimes. Adrian Tanner, a professor of Anthropology at Memorial University, examines the situation in New-

foundland and Labrador, shedding considerable light on the extent of the Mi'kmaq people. Award-winning journalist, Don Cayo, rounds out the discussion of Atlantic Canada with a call to keep future discussions focused on improving the economic conditions of Aboriginal and non-Aboriginal individuals in the region.

In Chapter 7, we turn to the overall economic impact of *Delgamuukw*. In my own essay, I attempt to describe many of the decision's ultimate costs as transaction costs—the costs of measuring, implementing and enforcing agreements—and suggest ways to reduce them. Certainly, the major unknown cost is that of compensation. J. Keith Lowes, a Vancouver lawyer, reviews the range of economic impacts arising from compensation. Two other Vancouver lawyers, Michael J. McDonald and Thomas Lutes, provide a more detailed analysis. Robert Strother, who specializes in forestry law, examines in detail possible impacts on forestry, primarily in B.C. Also from a B.C. perspective, Ken Sumanik with the B.C. Mining Association does the same for mining.

One of the difficulties of making economic predictions about the consequences of *Delgamuukw* is that it remains uncertain how matters will proceed—by litigation or negotiation. The final chapter, *All Still Here and All Looking Ahead*, focuses on what may happen next. Darrell Bricker, a vice president of one of Canada's best-known public opinion research companies, Angus Reid, lays out Canadians' attitudes about the range of Aboriginal issues. His research shows clearly that Canadians want to improve the economic prospects of Aboriginal people. Patrick Monahan, a well-respected constitutional law expert at Osgoode Hall Law School, examines the pros and cons of each approach, litigation and negotiation. Dene Chief Bill Erasmus provides some commentary to Monahan's discussion. This volume ends with a conversation between two people personally and intimately committed to finding answers to the challenges posed by Canada's past to its present. I speak of Gordon Gibson, Senior Fellow in Canadian Studies with the Fraser Institute, and Chief Herb George (Satsan), who as a hereditary chief of the Gitksan and Wet'suwet'en has lived and breathed the case and the ones before it for nearly thirty years. Both provide a human, everyday perspective on the legal analysis.

This book departs from the usual Institute publication in that it does not present a focused set of public policy recommendations. In part, this is due to our goal in this instance of providing a wide spectrum of views and opinions. It is also due to the fact that judges, not governments, may rule on many issues under discussion.

Still, from all the contributions contained within, some points emerge. The Canadian Parliament and the provincial legislatures have a responsibility to debate and resolve issues arising from Aboriginal

rights and claims. They cannot simply abdicate their responsibility to the courts. Conversely, the courts, and in particular the Supreme Court, should refrain from translating their own public policy perspectives into jurisprudence, even if legislators prove reluctant to address critical areas. The legislature is far better able to assess what Justice McLachlin calls “real world consequences.” Finally, the lasting value of *Delgamuukw*, if it is to have one, depends upon helping Aboriginal people break out of the *status quo*. A sense that something is terribly wrong with the structure of and strictures upon Aboriginal life as it now exists united all participants, Aboriginal and non-Aboriginal alike, at the two conferences. In that sense, Canada's past only has value for its future if it leads to greater material and social well being for all its citizens.

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