An Invaluable Lever for Québec's Aboriginal Communities

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Introduction

My presentation is divided into two parts. The first is a brief statement about the principles of the *Delgamuukw* judgment. In the second part, I will offer some general comments on the practical implications of the December 1997 judgment for Québec's Aboriginal communities. I will also discuss three specific cases in which the logic set out in *Delgamuukw* has been applied, still applies, or should apply.

The *Delgamuukw* Decision

The *Delgamuukw* decision fundamentally offers a description of Aboriginal title in Canada and explains how that title may be established. It also sets out the specific criteria whereby it may be determined whether Aboriginal title has been infringed, as well as the rules that should be followed in such cases. *Delgamuukw* constitutes a precedent in this regard.

Although it mentions the existence of Aboriginal title, the case law never previously stated the exact content and complete scope of that title.[1] In 1973, *Calder v. Attorney General of British Columbia* recognized the

Notes will be found on page 292.

existence of Aboriginal title, but specifically stated that it was a right rooted in Aboriginal peoples' historic occupation, possession and use of traditional territories. In short, this right does not derive from the Royal Proclamation of 1763, treaties, or from the law, but from the historical occupation of the lands themselves. In 1984, the *Guérin* decision confirmed that Aboriginal title was inalienable. Four years later, *Canadian Pacific Ltd. v. Paul* stipulated that Aboriginal title was *sui generis* and different from other common Aboriginal rights: hunting, fishing, trapping and other rights.[2] In the meantime, s. 35 of the *Constitution Act, 1982* also constitutionalized and protected the treaty and other traditional rights of Aboriginal peoples.[3]

In 1997, *Delgamuukw* restated this case law, then vastly increased our knowledge of Aboriginal title. The judgment essentially states that an Aboriginal band holding such title may exclusively occupy and use, for varied purposes, the land for which it was recognized as having Aboriginal title.[4] Unless the lands affected by the title are surrendered to the Crown, Aboriginal title is inalienable.[5] In addition, title is collective in that it benefits the entire Aboriginal community affected. To put it plainly, this isn't merely a matter of hunting or fishing rights; we're talking about the right of the First Nations to occupy their lands and their ability to decide and to regulate the activities, including economic activities, that are carried out on those same lands.

The First Nations that hold Aboriginal title are not required to limit themselves to traditional activities on their lands, although they must ensure that the utilization of resources on those lands does not jeopardize the intimate relationship that links them to the lands or the nature of their historical occupation.[6] For example, if a band has fished on land since time immemorial, it would not be appropriate for that community to start up activities that might endanger marine wildlife.

To hold Aboriginal title, an Aboriginal group must prove three things: that it occupied the land in question before the assertion of British sovereignty; that this occupation was physical and continuous until the present; and that it .was, in general, the only group to have prerogatives and control over the land in question.[7]

However, Aboriginal title does not offer absolute protection for the First Nations that hold it or might hold it.[8] Governments may infringe title if they pursue pressing, serious and real objectives that are useful to society as a whole. Hydroelectric, logging or mining operations are examples of these kinds of important objectives. The *Delgamuukw* decision provides that each situation or planned operation must be justified or reviewed separately.

We now come to one of the most significant and new points in the judgment for Aboriginals in Canada, and particularly in Québec. *Delga-*

muukw stipulates that, prior to the implementation of projects that may infringe Aboriginal title, governments must consult Aboriginal bands affected by the projects in question. In certain major cases, these projects may not be carried out without the consent of the First Nations who have Aboriginal title. In a general way, *Delgamuukw* provides that governments will have to pay Aboriginals compensation in regard with the economic aspect of the title, but does not state the specific criteria for determining the value of such compensation. It states that the extent of the compensation will be based in particular on the severity of the title infringement.[9]

Following this brief review of the principles involved in *Delgamuukw*, let us now look at some of the practical implications of this judgment in and around Québec.

Delgamuukw: Its Practical Implications in and around Québec

Shortly after the decision was published in December 1997, a number of observers expressed considerable fears as to its consequences. In British Columbia, where 51 Aboriginal bands are negotiating with governments, the situation seemed particularly explosive.

In Québec, unlike British Columbia, 90 percent of lands occupied by Aboriginals are governed by modern treaties: the James Bay Agreement (1975) and the Northeastern Québec Agreement (1978). These regions are precisely where the Cree, Naskapis and Inuit live. The remaining 5 per cent of lands are occupied by 30,000 inhabitants. I mention this because *Delgamuukw* essentially applies to non-treaty lands that have not been surrendered.

Instead of resulting in a slew of land claims, it appears that in Québec, *Delgamuukw* first of all conferred new power on various Aboriginal communities in their relations with the federal and provincial governments in the numerous negotiations under way. It seems relatively clear that the prescriptions of *Delgamuukw* in regard to the obligation to consult Aboriginal nations and pay them appropriate compensation where their title has been infringed has been particularly helpful to them in strengthening their position in this relationship of power. As the constitutional law expert from the University of Toronto, Brian Slattery, said in December 1997, under this judgment, Aboriginals have become equals with their opposites at the various bargaining tables.[10]

In fact, even more than other important documents such as the report of the Royal Commission on Aboriginal Peoples and the United Nations recommendations, the *Delgamuukw* judgment has added serious legal weight to the traditional positions of Québec's Aboriginal communities on these specific points. While they can disregard a Royal

Commission's proposals, governments cannot afford to ignore the prescriptions of Supreme Court judgments without exposing themselves to legal action. *Delgamuukw* is thus an invaluable tool and lever in asserting Aboriginal political rights and Aboriginal title where circumstances require.

Nor should the public impact of a decision be neglected. Everyone in Aboriginal circles is familiar with the judgment and refers to it constantly. Once again, governments cannot shelve a judgment of this kind and hope it will be forgotten. They must comply with it and, moreover, are gradually altering their approaches to the Aboriginal communities on this subject, particularly in regard to their natural resource policies. If a planned project affects an Aboriginal title, governments must consult on and negotiate the activity and grant appropriate compensation.

I will now turn to three cases that concern Québec and neighbouring areas, cases in which *Delgamuukw* serves or may serve as a reference point in finding solutions to certain infringements of Aboriginal title, or to resolve land claims.

The first case is the mining project at Voisey's Bay in Labrador. A company wants to open a nickel, copper and cobalt mine at a location near Davis Inlet. These mining operations would undoubtedly have major consequences for the ecosystem of this region where Innu and Inuit live. In the report[11] published last spring on this mining project, the Canadian Environmental Assessment Agency, a federal government body, expressly analyzed the situation in relation to the guidelines set down in *Delgamuukw*. What were its conclusions? The Agency states in its report that, prior to authorizing any mining project, governments must first consult Aboriginals living in the region, involve them in the process of introducing this economic activity and compensate them in an appropriate manner. According to the Agency, governments cannot authorize the project, as they have previously done, and promise to negotiate with the First Nations at a later date. This is an actual case in which both the native communities and the government itself use Delgamuukw as a reference point.

Another example of the tangible influence of *Delgamuukw* is the hydroelectric project at Churchill Falls in Labrador, which would affect the Innu of both Labrador and Québec. The governments of Newfoundland and Québec are negotiating with the Innu to implement this new hydroelectric development project. Throughout the process, the Innu have publicly hammered home the principles of *Delgamuukw*: no hydroelectric development without consultation and the consent of the Innu community. The Innu further state that no new phase of operations can begin at Churchill Falls unless an agreement is reached on their territorial rights in the region. As may be seen from this brief overview, *Del-*

gamuukw has now strongly influenced the Aboriginal nations' argument in territorial negotiations and strengthened their positions relative to provincial governments.

A third interesting case in which the logic of *Delgamuukw* could apply is the situation of the islands claimed by the Cree and Inuit nations of Québec. These islands are located near the Québec coastline in the James Bay and Hudson Bay region. The islands and surrounding waters and seabed were until recently part of the Northwest Territories. With the creation of the territory of Nunavut on April 1, 1999, this region is now under the jurisdiction of the government of Iqaluit. The Cree and Inuit have historically occupied this area and these First Nations have a long tradition of hunting and trapping on the islands. The federal government has publicly acknowledged the problem since 1974. As a result of numerous disputes, progress on the issue has stopped and talks between the federal government and the Cree are at a standstill. In accordance with the explanations and criteria set out in *Delgamuukw,* it is highly likely that the Cree and Inuit hold Aboriginal title to the islands, waters and seabed. If this were the case, they could occupy and fully and freely use the land in question for their own purposes. The federal government would do well to reflect on this delicate situation which has already dragged on far too long.

To sum up, the *Delgamuukw* judgment is a legal decision of the highest importance. It explains, for the first time, the content of Aboriginal title, the criteria for establishing such title and the rules that must be followed when such title is threatened by third party activities. As we have seen in Québec, the judgment has conferred greater power on the Aboriginal communities in their dealings with the federal and provincial governments. They now carry invaluable legal weight to support their claims and demands and can press governments to consult and compensate them adequately where their Aboriginal title is infringed. In my opinion, the three cases I have cited show that the logic of *Delgamuukw* is now firmly rooted in the First Nations' arguments, that their constituent governments make express reference to it and that there is still considerable room for its practical application.

The legal consequences of this decision are numerous. It is fundamentally important that legislators understand these implications and attempt to address them adequately in their work in the House of Commons.

Notes

1 Mary C. Hurley, *Aboriginal Title: The Supreme Court of Canada Decision in Delgamuukw v. British Columbia,* Ottawa: Library of Parliament, 1998, p.1.
2 *Ibid.*, pp. 2-3.
3 Julien Bauer, *Le système politique canadien*. Paris: Presses universitaires de France, 1998, p. 80.
4 Hurley, *op. cit.*, pp. 9-10; Hugues Melançon, "Le titre aborigène en Cour suprême : la création d'un régime juridique dissuasif," *Recherches amérindiennes au Québec*, Vol. 28, No. 1, 1998, p. 123; André Émond, "L'affaire Delgamuukw ou la réactualisation du droit américain au regard des conditions d'existence et d'extinction du titre aborigène au Canada," *Les cahiers de Droit*, Vol. 39, No. 4, December 1998, p. 854; Andrew Purvis, "Our Home and Native Land," *Time*, December 22, 1997, pp. 18-19.
5 Cf. the statement by Phil Fontaine on this subject. Phil Fontaine, "Colonialist Approach to Aboriginal Issues," *Globe and Mail*, December 31, 1997, p. A23.
6 Hurley, *op. cit.*, p. 11.
7 Émond, *loc. cit.*, p. 855.
8 For a more thorough analysis, see Hugues Melançon, *loc. cit.*, pp. 123-24.
9 Hurley, *op. cit.*, pp. 17; Melançon, *loc. cit.*, p. 124.
10 Andrew Purvis. "Our Home and Native Land," *Time*, December 22, 1997, p. 19.
11 Government of Canada, Canadian Environmental Assessment Agency, *Report of the Environmental Assessment Panel—Voisey's Bay Project*, Ottawa, CEAA, 1999.

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