Potential Impact on Forestry

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Since the release of the decision of the Supreme Court of Canada in *Delgamuukw,* there has been significant uncertainty, speculation and controversy concerning the potential impact of the decision on vested private-sector interests, including forest tenures. The First Nations Summit has interpreted the decision as stating that First Nations "have aboriginal title in our territories," and have called on Canada and British Columbia to "put an immediate freeze on any further alienation of land resources within the province" until province-wide interim measures agreements have been negotiated.[1] Is this truly the implication of *Delgamuukw* for forest companies in British Columbia?

In this paper, I will address the following questions:

- What does the decision say about aboriginal title?
- How can aboriginal title be proven?
- Is aboriginal title absolute?
- What degree of consultation with First Nations is required?
- Do First Nations have a veto over development on their traditional lands?

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- How will this work in practice in the forest sector?
- Will First Nations be able to obtain injunctions to stop development?

What Does the Decision Say about Aboriginal Title?

Before attempting to explain what the decision will mean for the forest industry, it may be helpful to review what the decision actually says. The first point of importance is that unlike most judicial decisions, this decision does not actually decide the case that was before the Court. Instead, the Court sent the Gitksan-Wet'suwet'en land claim back to the trial court for a new trial. The Court did not decide whether the Gitksan-Wet'suwet'en, in fact, have aboriginal title to the land they claim. What the Court did was to explain the law in relation to aboriginal title, and it is these comments rather than any actual decision in the *Delgamuukw* case that have importance for both First Nations and resource companies seeking to understand the nature of these rights and how their interact with the forest tenure rights. Unfortunately, for every question the Court has answered in this judgment, a number of new questions arise.

The Court began by explaining that aboriginal title was different from aboriginal rights. Aboriginal rights are rights to do something (such as hunt, trap or fish) which was done by the aboriginal group at the time of contact with Europeans. Aboriginal rights may or may not be connected to the use of land. Prior to the decision of the Supreme Court of Canada, it was generally believed by the non-First Nations side that aboriginal title and aboriginal rights were intermingled concepts, and that any land rights of a First Nation were tied up in the exercise of the traditional aboriginal pursuits. Other uses of the land by non-First Nations interests would be permitted to the extent that they were not incompatible with the exercise of the aboriginal rights.

The Supreme Court of Canada decision, for the first time, separated the concepts of aboriginal rights and aboriginal title. The Court explained that aboriginal *title* is a right to the land itself. The Court explained that where a First Nation has aboriginal title, it has the right to exclusive use and occupation of the land. It is not restricted in its uses to traditional uses. The First Nation may use the land for any purpose, including purposes not available in the traditional aboriginal society, so long as those uses are not incompatible with the traditional uses that the aboriginal group exercised in its traditional society.

It is not the case that each First Nation necessarily has aboriginal title over its entire traditional territory. The Court explained that the rights of First Nations "follow along a spectrum with respect to their degree of connection with the land." At one end are aboriginal rights

which have no particular connection with land but which were integral to the distinctive culture of the aboriginal group claiming that right. An example might be the right to speak one's language. In the middle of the spectrum are rights which may be related to specific land, but which fall short of the test for aboriginal title. An example might be the right to hunt on a particular tract of land, where the aboriginal group in question did not exercise that degree of exclusive use and occupation to support a claim for aboriginal title. Finally, at the other end of the spectrum, there is aboriginal title, which confers a right to the land itself.

It appears that the Court contemplates that different aboriginal groups will have different types of rights, depending upon their own particular circumstances and history. For example, one aboriginal group may have site-specific hunting rights without any rights to the land itself, whereas another group may have aboriginal title based on exclusive occupation through hunting. The difference in rights that flow from this distinction appears to be considerable, but to identify this distinction for operational purposes may be quite difficult.

Thus, the assertion of the First Nations Summit that the Supreme Court has decided that First Nations have aboriginal title to their traditional territories needs to be qualified. Some First Nations may have aboriginal title to their traditional territory, but this entitlement will have to be established on a case-by-case basis. That aboriginal title cannot be taken for granted may be seen from the failure of the court to declare that the Gitksan-Wet'suwet'en have aboriginal title over their territory, even after 15 years of litigation and huge evidentiary record.

How Can Aboriginal Title Be Proven?

To establish aboriginal title, an aboriginal group must show that it had exclusive use and occupation of the land in question at the time British sovereignty was declared over that land. For British Columbia, that date is generally taken to be 1846, the date of the Oregon Treaty. Some degree of continuity of connection with the land must be shown. What constitutes occupation for the purposes of this test is likely to give rise to much academic writing and potential litigation in the coming years.

A major part of the judgment examines the use of aboriginal oral history to establish occupation. The Court concluded that oral history must be given "independent weight" and "placed on an equal footing" with historical documents.

As a practical matter, it cannot be known whether a particular aboriginal group has aboriginal title in a particular tract of land (as opposed to aboriginal *rights* on that territory) unless that group establishes such an entitlement in court which, given the history of the *Delgamuukw* litigation, is not a very practical scenario.

Is Aboriginal Title Absolute?

It is clear that aboriginal title, like aboriginal rights, is not absolute. Aboriginal title may be infringed by either the Provincial or the Federal Crown if the infringement meets the test of justification developed in the *Sparrow* case and refined in *Delgamuukw*. Aboriginal title may not, however, be extinguished, other than through surrender by the aboriginal group in question.

The Court sets out a series of tests to determine whether infringement of aboriginal title can be justified. First, the infringement of aboriginal title must be in furtherance of a legislative objective that is compelling and substantial. The Court specifically stated that the development of forestry, as well as mining, hydroelectric power, agriculture and the general economic development of the interior of British Columbia, are the kinds of objectives that meet this test and in principle can justify the infringement of aboriginal title.

The second test for justification relates to the Crown's fiduciary obligations to First Nations and has several components. There must be adequate consultation with the affected First Nation before aboriginal title can be infringed. In most cases, compensation will be required, because of what the Court describes as the "inescapably economic aspect" of aboriginal title. The Court does not discuss the basis on which the amount of compensation is to be assessed but states that the amount of compensation payable will vary with the nature of the aboriginal title affected and the nature and severity of the infringement. Finally, the Court indicates that in many cases, some priority will be required to reduce economic barriers to participation by the aboriginal group.

If these tests of justification are met, the Crown (federal or provincial) may lawfully infringe aboriginal title.

What Degree of Consultation Is Required?

The Court places consultation, like the rights themselves, on a spectrum. There is no single answer as to what degree of consultation will be required to infringe aboriginal title. It will depend on the circumstances.

At one end of the consultation spectrum, when the interference is relatively minor, the obligation will be to discuss the proposed activity in a good faith effort to substantially address the concerns of the aboriginal peoples. In the middle (and what the Court contemplated as "in most cases"), something that is "significantly deeper than mere consultation" will be required. At the other end of the spectrum, the Court stated that some cases will require the full consent of the First Nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

The nature of consultation that is generally required has been the subject of a more recent judgment of the British Columbia Supreme Court concerning the development of the Huckleberry Mine near Houston, B.C. In a judgment released January 29, 1998, the Chief Justice of the Supreme Court held that the consultation process leading to the mine approval certification had been deficient in failing to provide the affected First Nations with data sufficient to enable them to make a reasonable assessment of the impact of the mine on wildlife in their traditional territories. He did not strike down the approval certificate, but ordered further consultation on this issue.

In reaching his decision, the Chief Justice made some interesting observations on the consultation process that suggest a standard of reasonableness and good faith on the part of both governments and First Nations. For example, he pointed out that it would not be open for First Nations to remain silent throughout the consultation process and later try to derail a project by complaining about inadequate information or inadequate consultation. Similarly, First Nations demands for information must meet a standard of reasonableness measured by generally accepted professional, scientific and commercial practices and standards. As well, it would not be open for aboriginal groups to complain if they refuse to be consulted in an effective forum created in good faith for such consultation.

It seems likely that the precise nature of the consultation required will be developed in future case law as different circumstances are addressed. At this point, it cannot be said there is one standard of consultation that must be met, other than to state that it must be meaningful, timely and made in a good faith effort to address legitimate concerns of affected First Nations.

Do First Nations Have a Veto over Development on Their Traditional Lands?

There is nothing in the *Delgamuukw* decision that supports the assertion that consent of First Nations is always required before forestry operations can take place on what might be characterized as aboriginal lands. Indeed, the concept of justifiable infringement is inconsistent with a right of veto.

The Court does state, however, that there will be cases where the consent of a First Nation holding aboriginal title over particular land will be necessary before a particular form of infringement can be characterized as justifiable. The implication of the judgment is that such cases will be limited to circumstances where the proposed infringement prevents aboriginal people from engaging in specific activities, rather than circumstances where the proposed activity simply interferes with the exclusive nature of the First Nation's rights.

The Court does not state whether, in those cases where aboriginal consent is required, there are any limitations on the ability of the aboriginal group to withhold consent (as, for example, in many commercial agreements where consent is required but may not be unreasonably withheld). These matters must presumably be left for another day.

How Will This Work in Practice in the Forest Sector?

One of the difficulties in assessing the practical implications of this judgment is that in setting out in general terms the legal principles which apply, the Court was not faced with the practical difficulty of applying those principles to an actual situation. Most of the difficult questions have been left to be decided in other cases, presumably by trial judges in British Columbia when they are faced with a specific problem with immediate economic implications.

The "spectrum" approach to all the difficult problems, whether the nature of the rights held, the degree of consultation required to infringe or the amount of compensation required to be paid, means that no one can be sure in any given situation precisely what rights an affected First Nation has. Presumably, the Court took this approach to encourage governments and First Nations to resolve these issues through the treaty negotiation process rather than in rights litigation. But in the meantime, it will be necessary for the provincial government in particular to work out a protocol for approaching these issues in a practical way. It is likely that much of the focus of this approach will be on the nature and scope of the consultation that is undertaken with affected First Nations before forestry operations take place.

The government will first have to consider what sort of rights should be assumed to exist in the proposed cutblock or licence area. Does the First Nation (which will undoubtedly be asserting aboriginal title) actually have aboriginal title, or does the aboriginal group have site-specific hunting rights short of title, or something else or no special rights at all? The Court has given some guidance as to how these difficult issues may be established in a courtroom but not much assistance for a District Manager trying to determine the circumstances in which a cutting permit may lawfully be given. There will inevitably be a great temptation to slow down an already cumbersome approval process.

Unless the treaty process can be considerably accelerated (not a very likely scenario), the uncertainty about what precise rights each First Nation has is likely to continue for some time. A practical approach for the government may be to assume that a local First Nation has aboriginal rights that may amount to title, without assuming they *do* amount to title or attempting to resolve that issue in the field. Con-

sultation is certainly required to infringe aboriginal title and is probably required to infringe aboriginal rights, so the safest course for the government would be to consult fully in all cases.

In the absence of certainty that the aboriginal rights amount to title, it would, however, require an unusual factual scenario to justify the government in insisting upon aboriginal consent before cutting permits can be granted. Even if there were certainty that the aboriginal interest amounted to title, it would be a small number of cases where consent would be required.

What the government must consider is what impact the proposed activity will have on the relevant aboriginal group, and, if that impact is material, whether there are practical ways to mitigate the impact. If the impact will be material, and there are no practical ways to mitigate the impact, it may be necessary to consider whether the activity can be justified on a scenario of aboriginal title.

Will First Nations Be Able to Obtain Injunctions to Stop Development?

The ability of First Nations to obtain injunctions to stop development on their traditional territory does not appear to be greatly changed by the *Delgamuukw* decision. Injunctions are very fact-dependent, and the ability of a First Nation to go to court to obtain an injunction before establishing the precise nature of its own rights will depend on the specifics of the activity and its effect on the aboriginal people, as it did prior to the decision.

One additional nuance that will undoubtedly be developed in any injunction applications is the significance of compensation as part of the justification for infringement of aboriginal title. Under conventional injunction law, if the loss can be adequately compensated for in damages, an injunction will not be granted. The Supreme Court appears to contemplate that in cases in which the other justification tests are met, the existence of compensation will provide the basis for legitimizing the infringement, even when the rights amount to aboriginal title. That is not to say that injunctions can never be obtained—it will depend very much on the impact of the proposed activity on the aboriginal people. But it does appear that the judgment in *Delgamuukw* provides arguments that can be used to oppose as well as advance injunction applications.

Thus, the practical effect of *Delgamuukw* remains to be seen. In each case, three questions are likely to arise:

- What is the (likely) nature of the aboriginal interest?
- Will the proposed activity infringe that interest?
- Can the infringement be justified?

Note

1 For example, the First Nations Summit, in their "Statement to Minister Stewart and Minister Cashore regarding *Delgamuukw* Decision," January 30, 1998, made the assertion that "the Supreme Court has now confirmed what First Nations have said all along—we have aboriginal title to our territories."