Questions of Compensation
An Overview of Economic Impacts

J. KEITH LOWES

Introduction

In order to analyze the economic impact of the Supreme Court of Canada decision in *Delgamuukw,* it is necessary to make at least two distinctions. First, it is important to distinguish between the case as a legal decision and the case as a political event. Second, it is important to distinguish the matters actually decided from those left to further litigation. It is my thesis that, at least in the short term, the economic impact of the case as a political event will be more important than that as a legal decision, and that the impact of the undecided issues and will be more severe than that of those actually decided.

Legal Decision/Political Event

(a) Legal Decision

The case decided by the Supreme Court of Canada was changed substantially from that put before the Trial Judge and from that decided by the British Columbia Court of Appeal. The important issues of substance became issues of process. The practical question of who controls the lands and resources was diffused into that of the constitutional mechanism for reconciling Crown sovereignty with the fact of pre-existing indigenous occupation.

Notes will be found on page 424.

At trial, the Court was presented with a claim by a number of individual Chiefs to the "ownership" of and "jurisdiction" over a number of individual territories. The claims of ownership failed because the plaintiffs could not prove with sufficient certainty that their ancestors controlled the specific territories to the extent necessary to establish common law possessory title. The claims to jurisdiction also failed on the evidence. In addition, the Trial Judge concluded that aboriginal "jurisdiction" was contrary to the basic constitutional principles of the sovereignty of the Crown and the distribution of that sovereign power within the Canadian federation. The Trial Judge concluded that, in any event, any such ownership and jurisdiction was extinguished by Colonial enactments, which also extinguished any aboriginal rights short of ownership and jurisdiction.

The majority in the Court of Appeal supported the Trial Judge's conclusions about ownership and jurisdiction. It reversed him, however, on his conclusion about extinguishment: it declared that there were unextinguished and undefined aboriginal rights within the territory. It rejected the plaintiffs' attempt to recast their claims for ownership and jurisdiction of individual parcels to claims to communal aboriginal title over larger areas comprising those individual parcels.

Each of the plaintiffs appealed. They asked the Supreme Court of Canada for declarations that the Gitksan and Wet'suwet'en peoples had existing aboriginal title to territory comprising the individual parcels originally claimed by the individual plaintiffs. Since both the federal and provincial governments had conceded that the Trial Judge was wrong on the issue of extinguishment by the Colonial enactments, the issue of such extinguishment was not appealed by anyone. The provincial government, however, did appeal the Court of Appeal's decision that since joining Canada in 1871, British Columbia had no constitutional authority to extinguish aboriginal rights.

The Supreme Court of Canada ordered a new trial on the issue whether the plaintiffs, (representing the Gitksan and Wet'suwet'en peoples) had aboriginal title in the territory. Essentially, it decided that the tests applied by the Trial Judge more than six years earlier were too strict according to the standards which had been developed in other cases as *Delgamuukw* was proceeding through the Courts.

There are two judgements: one, by Chief Justice Antonio Lamer, concurred in by Justices Peter Cory and John C. Major; the other by Justice Gerard La Forest, concurred in by Justice Claire L'Heureux-Dubé. Justice Beverley McLachlin agreed with both.

The judgement of Justice La Forest is unremarkable. Although he agreed that there should be a new trial, he took the cautionary approach of not expounding on issues beyond the degree necessary to

reach his decision. He confined his definition of "aboriginal title" to the traditional language used by Justice Judson in *Calder v. Attorney General of British Columbia,*[1] who stated: "... the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means ..."

Chief Justice Lamer took another approach. Noting that the Supreme Court of Canada had avoided defining aboriginal title, he set out general principles about the content of aboriginal title, the way in which it is protected by section 35(1) of the *Constitution Act, 1982* and the requirements necessary to prove it.

Chief Justice Lamer stated that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures. The protected uses, however, must not be irreconcilable with the nature of the group's attachment to that land. Aboriginal title is a right to the land itself.

In order to establish a claim to aboriginal title, the Chief Justice stated, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title. The occupation must have been exclusive: however, joint title can arise from shared exclusivity. In determining whether sufficient occupation has been shown to establish aboriginal title, the "aboriginal perspective" on occupation must be taken into account together with the common law.

Chief Justice Lamer stated that constitutionally recognized aboriginal rights fall along a spectrum with respect to their degree of connection with the land. At one end, are aboriginal rights which are practices, customs and traditions integral to the distinctive aboriginal culture of the group claiming the right, but where the use and occupation of the land where the activity is taking place is not sufficient to support a claim of title to the land. In the middle are activities which might be intimately related to a particular piece of land, thus founding a site-specific right to engage in a particular activity. At the other end of the spectrum is aboriginal title itself.

Chief Justice Lamer affirmed that like other aboriginal rights, aboriginal title can be infringed by government, but that such infringement must be justified through the two-stage test set out in *Sparrow.*[2] On the first branch of the test, he stated that generally speaking, the economic development of the Province was a valid legislative objective for the purposes of justification. In determining whether the infringement met the second branch of the justification test (i.e. whether it was

compatible with the fiduciary relationship between the Crown and the aboriginal peoples), The Chief Justice emphasized the requirement for consultation about the use of land subject to aboriginal title and compensation for the infringement.

(b) Political Event

The general statements of Chief Justice Lamer about aboriginal title and the consequent obligation of government to consult with the holders of aboriginal title about the use of lands subject to it have caused a good deal of confusion, controversy and concern in the province. It is not unusual to see the case described in the media as one "establishing" or "granting" aboriginal title in British Columbia. Many have argued that aboriginal title over large areas of the province can be easily established and, consequently, ought to be presumed between the provincial government and aboriginal claimants for the purposes of treaty negotiations and consultation protocols about land and resource use.

These arguments are having considerable effect. They are among a number of reasons driving a re-design of the treaty negotiation process. They inform demands by aboriginal groups for increased participation, if not a veto in land and resource use planning. They are probably influencing the current push to conclude negotiations with the Nishga. The effect is to increase the speed and turn up the volume in a process that is already confused and confusing.

Matters Decided/Matters Undecided

Theoretically, political pressures resulting from a major court decision might be helpful in resolving negotiations bogged down because of disputes about the parties' existing rights. This logjam-breaking role, however, requires a degree of certainty about the law that the *Delgamuukw* decision for good reason cannot, and does not, deliver. The decision leaves more issues undecided than it decides. Further, in those areas it does deal with, it lays down general principles that require refinement and the establishment of benchmarks—in other words, further litigation.

(a) Matters Decided

The primary reason for the ordering of a new trial was that the case as shaped at the trial was not amenable to the application of the principles which the Supreme Court of Canada had developed in other cases, as *Delgamuukw* was working its way through the courts. The pleading was directed at individual claims to specific parcels rather than to a communal claim to the entire territory. More importantly, the Supreme Court of Canada now required an appreciation of the "aboriginal perspective"

and had developed a more flexible approach to the evidence, particularly of oral history, to provide this perspective. In essence, the general approach to aboriginal rights had shifted. A new trial was ordered so that the claims could be subjected to that new approach. Consequently, it is difficult to isolate issues that can be said to be conclusively determined.

The one hard conclusion arising from the case is that lands subject to aboriginal title (and aboriginal rights generally) are matters which fall within the scope of federal jurisdiction under section 91(24) of the *Constitution Act, 1867*. As a result, British Columbia has had no constitutional authority to extinguish aboriginal title since it joined Canada in 1871.

Other hard conclusions are difficult to find. Chief Justice Lamer's principles about aboriginal title are clearly articulated, but they are general and abstract. They need substance and the establishment of benchmarks. This can come only as a result of their application to specific, factual situations. The same can be said about the call by the Chief Justice for the development of a new appreciation of the "aboriginal perspective" and for the development of new rules of evidence directed at discovering that "aboriginal perspective."

(b) Matters Undecided

It is much easier to list the issues that the Court left undecided, either in the sense that they resulted in general principles needing further litigation to refine and flesh them out, or in the sense that they are issues which were simply left for another day.

A list of the former includes:

(1) The scope of section 91(24) of the *Constitution Act 1867* with respect to aboriginal rights, aboriginal title and the extinguishment thereof;

(2) The scope of changes to the rules of evidence to accommodate claims to aboriginal rights;

(3) The definition of "occupancy" as a test for aboriginal title;

(4) The scope and consequences of the "inherent limit" of aboriginal title;

(5) The application to specific fact situations of the various "spectra" identified by the Court: namely, the spectra of: aboriginal rights; degrees of judicial scrutiny of infringing legislation; requirements for consultation; priorities to aboriginal rights; and other methods of justifying infringements of aboriginal rights; and

(6) The concept of continuity of the "special relationship" of the aboriginal group and the land which justifies and founds aboriginal title.

Further, there are important legal issues that the Supreme Court did not deal with at all. Among these are:

(1) Self government;

(2) Colonial extinguishment;

(3) The mechanism for ultimately resolving the inconsistency of aboriginal rights with Crown Sovereignty or other, non-aboriginal, rights; and

(4) Remedies for the infringement of aboriginal rights past, present and future.

The latter two issues are, from a practical point of view, the most important. The central practical question is whether and to what extent aboriginal title and aboriginal rights limit the rights of others and the powers of government, particularly the power to make valid grants of lands and resources.

Conclusion

The decision of the Supreme Court of Canada in *Delgamuukw* has added even more uncertainty to an uncertain economic climate. Interpreted strictly, in terms of legal precedent, the decision lays down general principles at a high level of abstraction, reaffirms a case-by-case, fact specific approach, and does not deal at all with most of the issues of practical importance. This uncertainty is aggravated by a public focus that is more on what the case may *imply* than on what it actually says.

Notes

1 *Calder v. Attorney General of British Columbia* [1973] 1SCR313 (SCC) at page 328.
2 *R. v. Sparrow* [1990] 1 SCR 1075 (SCC).