

Solution or Problem?

GEOFF PLANT AND MELVIN H. SMITH

The following is an excerpt from a conference discussion on the ramifications of the Delgamuukw decision in British Columbia. The two main speakers are Geoff Plant, counsel for the B.C. government during the Delgamuukw trial who was elected to the B.C. Legislative Assembly and is currently opposition critic of the Attorney General's office; and Melvin H. Smith, Q.C., former constitutional advisor to four previous B.C. governments, columnist, university lecturer and author of the best-selling book, Our Home or Native Land?

Geoff Plant

The starting point for my remarks is the now famous statement of Supreme Court Chief Justice Antonio Lamer in the last paragraph of his reasons for judgment in *Delgamuukw*. He said: "Ultimately it is through negotiated settlements with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, the basic purpose of Section 35(1), the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. Let us face it, we are all here to stay."

This is not the first time that the courts have encouraged the resolution of aboriginal claims by negotiation. Justice Macfarlane of the B.C. Court of Appeal expressed a similar sentiment in the *Meares Island* case in 1985. If this statement by Chief Justice Lamer is not the first such statement, it is easily the most powerful. It is a strong hint from the highest court in Canada that the only path to reconciliation is negotiation.

So what lies behind this judicial exhortation? Let me make a suggestion. Perhaps the command to settle is in effect an admission that the framework of legal principles that the Court has around the ideas of aboriginal rights in title is simply unworkable. In other words, the Court has encouraged negotiation because it recognized that the aboriginal rights doctrine that it created has made the business of government, as a practical matter, virtually impossible.

In support of this idea, I want you to consider the following scenario as an example of the model of pre-treaty government created by the Court in *Delgamuukw*. A district forest manager in a small town in British Columbia receives an application for a cutting permit. Before the cutting permit can be issued, this manager, most likely a registered forester by training, must make a decision about the existence, location, and nature of potentially conflicting aboriginal rights or title. This, of course, is over and above all of the other things that district forest managers have to do as part of the planning of the harvesting of forest resources. To make a decision, this official must examine the oral history of whatever aboriginal groups may have had a connection to the proposed license area in 1846, a time when the non-aboriginal population of British Columbia consisted of a few dozen fur traders.

Since oral histories are often jealously guarded, the oral history in question may in fact be completely inaccessible, or accessible only at a price. Assuming, however, we get over that threshold and oral history can be obtained, it will then need to be understood. As someone who has engaged in that exercise at some length, I can assure you that this is not by any means a straightforward task. Once that is done, the official then will be required to weigh that history from the “aboriginal perspective.” He must also ensure—and, as the Chief Justice of British Columbia discovered, woe betide him if he does not—that the oral history is placed “on an equal footing” with other historical evidence, if there is any. From the evidence of historic use and occupation, the official must then determine whether there are aboriginal rights or title on the affected land, and who has them. In this context it may be useful to you, but it probably won’t be to the official, to observe that no court has yet made a judicial determination about the existence of aboriginal title over any specific parcel of land anywhere in British Columbia outside Indian reserves. We have tests for the proof of title, which time does not permit me to critique, but we as yet have no example of their application.

However, having decided—miraculously, I suggest—who if anyone has what aboriginal rights, if any, the official must next determine whether the proposed forest harvesting activity is, first, in pursuance of a judicially acknowledged legitimate public policy objective; and sec-

ond, is consistent with the honour of the Crown. He will make these decisions knowing that he will probably have to defend them in court, and recognizing that the principles which govern the exercise of this discretion are in flux and will probably change significantly between the day he makes his decision and the day the case actually finally reaches the Supreme Court of Canada. You will recall that the Chief Justice reserved to *his* Court the role in respect of giving effect to reconciliation. It is “this Court” were the words that he used.

So our official will probably have to be prepared to defend his decision on the basis of principles and criteria which are in fact unknown to him at the time he makes it. Moreover, while he might hope that there would be a useful framework of principles to guide him, our unlucky civil servant also knows that the question of whether his decision can be justified is, to use the language of *Delgamuukw*, “ultimately a question of fact that will have to be examined on a case-by-case basis.”

The complications don’t end there. Even if the aboriginal interest can be identified with certainty, the official will, as the Court in *Delgamuukw* admits, face difficulties in determining the precise value of that aboriginal interest in the land, and any grants, leases, or licenses given for its exploitation. However, having helpfully admitted that there will be such difficulties, the Supreme Court of Canada has given him absolutely no guidance in how to resolve them, going so far as to cheerfully admit that, “these difficult economic considerations obviously cannot be solved here.”

Of course, depending on circumstances, the official—whose life I’m sure you now truly envy—may have to do more than consult with the affected First Nation. He may need to obtain its consent. What he will know for certain before he makes that decision is that he won’t know for certain whether he has to consult and obtain consent, or consult, or do something in between consulting and getting consent. He certainly won’t know that until long after he has made the decision. All of this, I suggest respectfully and humbly, is—and this is the framework of principles that the Court gave us in *Delgamuukw*—a recipe for bureaucratic, if not economic, paralysis.

As a framework of legal principles that are intended to guide the actions of government, it is entirely impracticable. It is, I suggest, a nightmare. It is no wonder that the Court, which created this framework of principles, has urged the parties to negotiate settlements. But negotiate on what basis? It’s worth pausing for a moment to consider the challenge of undertaking principled treaty negotiations when the fundamental principles underlying the rights at issue are in flux, or admittedly uncertain.

An example: in *Delgamuukw*, after 13 years of litigation, the Court refused to embark upon a consideration of the plaintiff's claims to rights of self-government. In the words of the Chief Justice: "The issue of self-government will fall to be determined at trial." A trial which, I remind you, the Court takes pains at several points during the judgment to strongly urge the parties never to participate in, because of course the preferred alternative is negotiation. Well, the fact is that the Gitksan and the Wet'suwet'en claim self-government rights. So what then is the basis upon which they will be negotiated? If there is no existing aboriginal right to self-government—and there is no recognized aboriginal right to self-government as yet—then there is nothing, I suggest, that can be recognized or affirmed as such under Section 35(1) of the *Constitution Act, 1982*.

What then is the principled basis upon which governments could negotiate Section 35 self-government rights in a treaty? During legislative debate on the Nishga treaty, which is the experience that I have most recently had as a legislator in British Columbia, the government of British Columbia maintained that anything can be negotiated and given Section 35 protection in a treaty. I say, with respect, that that approach ultimately undermines respect for the idea of aboriginal rights, rather than enhances it. But I do recognize the difficulty of attempting to approach the project of treaty-making from a principled perspective, when the principles are impractical, incomplete, and in flux.

Not surprisingly, therefore, there are a number of difficulties with the current B.C. treaty process. Time permits me to give only one example. The issue is the identification of the proper parties to treaty negotiations. The root of the problem is that when the B.C. treaty process began in 1991, aboriginal groups were able to identify themselves in preparation for negotiations. Anyone could participate by making a claim, and they could ask for anything. There were no preconditions. It was unnecessary, for example, for a claimant group to establish its identity as a First Nation, or that it held aboriginal title or rights. All that was required was a statement of intent to negotiate.

Now, I acknowledge the rationale of this approach. One of the flaws in earlier treaty processes is that the white man, if you will, predetermined the scope of negotiations, and the identity of the claimant group. In effect, this meant that the process and its objectives and results were essentially imposed upon First Nations. Not surprisingly, the arrangements forced upon the signatories to these treaties lacked informed acceptance from the start. Therefore, there is great force in the argument that First Nations need to have meaningful influence over the treaty-negotiation process if they are to have any confidence in its outcome.

At the same time, it makes no sense to conclude treaties if there is doubt whether the groups negotiating are those who possess the aboriginal rights and title, which are the fundamental justification for the whole exercise in the first place. The issue here is what the relationship should be between aboriginal rights and the treaty process. In the context of this specific problem, earlier governments chose not to resolve that issue in the interest of making some progress in the treaty process. The consequence, eight years and millions of dollars later, is that questions are being raised—questions rooted in an analysis of *Delgamuukw*—about the ability of the groups who are at the treaty table in British Columbia to conclude binding agreements that will resolve aboriginal rights and title claims with certainty.

Dateline: *The Interior News*, a newspaper published in Smithers, British Columbia, May 12, 1999. A story under the following headline: *Kitsegucla Chiefs Present Demands to Two Ministers*. As the article indicates, a group of Gitksan hereditary chiefs traveled to Victoria in April. There they met with two cabinet ministers to present a list of demands for local control of forest resources and a sawmill. Vernon Milton, chief Skogmlaha says: “In spite of *Delgamuukw*, a decision that is a year-and-a-half old, there has been no real change in the way the province conducts forestry operations in that region.”

Well, taking what he says at face value, I’m tempted to suggest that it’s not difficult to see why there has been no real change in forestry operations in British Columbia. No government ministry with responsibility for lands or resources could do the things that the Supreme Court of Canada in *Delgamuukw* has required of it with any kind of responsible efficiency.

So I return to my original question: What did the Court mean when it said that the pathway to reconciliation is negotiated settlements? The unanswered question is whether aboriginal rights and title—that is, the constitutionalized common-law rights, recognized and affirmed under Section 35(1) of the *Constitution Act*—can be practically reconciled with the day-to-day exercise of Crown sovereignty, which is the underpinning of our economy, at least of the economy of British Columbia. Is there not something odd about a judgment which, having expressly set out to clarify legal principles organized around the idea of reconciliation, then concludes by arguing that it is only through negotiated settlements that reconciliation can in fact be achieved? I suggest that this amounts to an admission that the principles at stake, which are purportedly fundamental, are unworkable. And I leave for consideration the question that if the principles at stake are truly unworkable, are they not also ultimately unsound?

Mel Smith

In an earlier paper, Professor Brian Slattery points out that the Supreme Court of Canada's decision in *Delgamuukw* can be looked upon as either a major departure from established legal precedent (what he called the judicial discretion view), or alternatively, as merely the latest manifestation of an ever-evolving view of the common law on the subject of aboriginal rights, a sort of a natural progression. I believe he holds to the latter view. I might be inclined to agree with him if there were case law in recent years to support the view that indeed the law has been evolving over time. But on the subject of aboriginal rights as it relates to land, I can find no case law on the subject. Oh yes, references made oftentimes to the *Guerin* case of 1984, but that was a case involving a breach of fiduciary duty relating to reserve lands. Reference was also made to the 1990 *Sparrow* case, but that is a case involving aboriginal priorities over fishing for food and ceremonial purposes. These are not cases involving aboriginal land rights.

In fact, before *Delgamuukw*, the most recent case on which the Supreme Court of Canada gave judgment involving aboriginal land rights was the *Bear Island* case in Ontario. I'd suggest that to some degree, the *Bear Island* case was to Ontario what the *Delgamuukw* case was to BC. True, there were treaty rights in issue in that case, but the question of aboriginal land rights was also squarely in issue. Both the Supreme Court of Ontario and the Court of Appeal of Ontario ruled against the claim to aboriginal land rights. The Supreme Court of Canada dismissed the appeal in August 1991 in a brief, two-page judgment that supported many of the findings of the trial judge, which in many respects were similar to those of Chief Justice McEachern's findings in *Delgamuukw*. So I fail to see that the case law leading up to *Delgamuukw* gives support for the view that the Supreme Court of Canada decision in that case is merely but a further evolution of the state of the law on aboriginal rights relating to land.

Rather, I see it as a major departure, an audacious departure, from all that has gone before, by a Court that has come under the influence of the report of the *Royal Commission on Aboriginal Peoples*, and of what the Chief Justice refers to in his judgment as the writings of certain academics that he refers to as "the critical literature." Lots of so-called critical literature, lots of reference to the *Royal Commission on Aboriginal Peoples* report—but very little case law or precedents to support the Court's decision.

What has the Court done in this case? I could summarize it in five or six points.

First, as far as British Columbia is concerned, it has drastically undermined the Crown ownership of as much as 94 percent of the province's land mass. In short, I believe the Court has seriously weakened the meaning and scope of the assertion of British sovereignty in 1846 over the territory of what is now British Columbia. Sovereignty was supposed to do two things: establish English law and its institutions in the territory; and place ownership of all the land in territory in the hand of the Crown in right of the colony, and subsequently the province. It seems to me that the Court's decision has potentially seriously weakened both objectives. Sovereignty would not have been threatened if the Court had found that aboriginal title meant what it has traditionally meant until now; i.e. that it is a user right. But the Court has gone much further than this and found aboriginal title to mean an exclusive right which can almost amount to full ownership, save the requirement to hold it collectively and sell it only to the Crown.

Second, the Court has put almost insurmountable hurdles in the way of the provincial government over present and future land resources decisions. Geoff Plant outlined in detail some of those hurdles which have to be faced in the administration of the land laws of the province in the face of the decision of the Supreme Court. And I agree with him 100 percent. The task is absolutely impossible. The Court says there must be a compelling and substantial legislative objective in order to override aboriginal title wherever it exists. The Court acknowledges that the general economic development of the province may in some cases meet that test, without indicating what those cases are. In some cases, the prior aboriginal interest would need to be preserved, perhaps by allowing natives to have rights of co-management over any tenure granted.

On the matter of compelling and substantial legislative objective, I couldn't help but be amused by a throwaway line in the Court's judgment that suggested that sport fishing wouldn't fall into a compelling and substantive legislative objective. Little did the Court know that the sport-fishing industry in British Columbia has about five times the economic impact of the commercial fishery. Talk about being out of touch with the B.C. realities. There is a perfect illustration.

Moreover, the Court in *Delgamuukw* states that the government can only grant a tenure if it consults. In some cases, that may have to amount to aboriginal consent. Which cases? We don't know. And so on it goes.

Third, the decision has supplanted the common law with a new system of law in which equal credence is to be given in aboriginal cases to the "aboriginal perspective.

Fourth, it has replaced the long established rules of evidence in civil cases with two sets of rules now, one for aboriginal cases only.

Fifth, the Court failed to confirm that in constitutional terms the right to make laws in this country is fully vested in either parliament or provincial legislatures.

Finally, almost as an afterthought, the Court gave the final coup-de-grace to British Columbia in holding that lands covered by aboriginal title, wherever they are, are lands reserved for the Indians under Section 91 (24) of the *Constitution Act*, and therefore under federal jurisdiction. That seems to mean that the federal government, if it so chose, could legislate a full range of land-use management laws over those parts of British Columbia covered by aboriginal title, wherever those parts may be found to be.

Terry Morley, a respected political scientist at the University of Victoria and a man not noted for hyperbole, says this of the *Delgamuukw* case: "This distant and disdainful Court places the economic prosperity of British Columbia in grave peril. Today, a Court in faraway Ottawa with modes of reason foreign to B.C.'s sensibilities has revived our colonial state, and made itself and its subordinate judges our effective rulers." That this has brought about massive uncertainty in British Columbia is an understatement. This isn't just semantics, or some play on words. The uncertainty created by this case is a reality in British Columbia.

The mining industry has all but left the province of British Columbia. No doubt there are other factors that govern that decision as well, but certainly the *Delgamuukw* case is one prominent factor. The forest industry is in little better shape. *Globe and Mail* columnist Jeffrey Simpson wrote that the forest industry would be foolish to spend another nickel on capital plant in British Columbia. Someone asked yesterday, "Is the Torrens system affected?" Who knows whether we have a good safe holding and marketable title that the land registry office of the province assures to the holder of a fee simple interest in British Columbia? Who knows whether that is still the case in the light of the *Delgamuukw* case?

There are at least three solutions. First, more litigation will be necessary. *Delgamuukw* in a sense decided nothing, but undermined everything. Further litigation will be necessary to clarify concepts raised in that case but not fully and properly dealt with. And a future B.C. government, hopefully, will be more inclined to take more of a stand to protect provincial interests in court than has been the case in the recent past. That might well result in the Court pulling back on some of these issues.

We might also get some elucidation in future cases as to just what to base negotiations upon. It's all very well to talk about negotiation. But on what basis? The Court gave us very little help on that issue. At some stage in future litigation, somebody will point out that the British Columbia government has paid its price to the native people. When we entered Confederation in 1871, we agreed to establish reserves under Section 13 of our Terms of Union. We did that in spades over 50 years. Of the approximately 2,300 reserves in the whole of Canada by 1924, 1,600 were in British Columbia.

Now, I am not an advocate for the native people living on reserves. I think the system has been a miserable failure. The current treaty-making process is only building on what has been 130 years of failure. I am referring to B.C.'s obligations on entering into Canada. We developed differently in B.C. Treaties on the Prairies likewise resulted in the establishment of reserves. We achieved the same result in British Columbia prior to our entry into Confederation, and subsequently by the establishment of 1,600 reserves that set aside areas of settlement and fishing sites for the use and benefit of the native people. Unfortunately, the Supreme Court of Canada totally ignored the historical context of British Columbia in its judgment. An aspect that Chief Justice McEachern spent 84 pages of his judgment dealing with was totally cast aside. No, no, treaty-making. It has to be treaty-making.

I suggest that it will be adjudicated upon by the Supreme Court as to whether we as a province have met our obligation. I don't question for a moment that there is such a thing as aboriginal rights which have to be compensated for. But British Columbia may well have done its job. Yet this background has been totally disregarded thus far both in the courts and in the negotiating process. So more litigation will be necessary.

Land claim negotiations of sorts will no doubt hobble along and continue. That will be the second solution. Yet these two solutions will not be enough. In B.C. alone, 50 treaties are yet to be negotiated. Many other bands are not in the treaty-making process, and they either want to negotiate separately or not at all. Litigation is challenging the process in certain cases. All this would take many years. We cannot wait that long. The uncertainty, and what it is doing to the economy of British Columbia, cannot allow it to wait that long.

So a third element is necessary. That element is appropriate legislation, similar to the situation in Australia. In this respect, Australia is strikingly similar to British Columbia. Australia entered into no treaties with its aboriginal people. In 1992 the High Court ruled that native title existed in Australia, but it soon became apparent that the applica-

tion of the ruling was not compatible with workable and certain land management, which is just what we are finding in British Columbia. After more than a year of deliberation in Australia, the *Comprehensive Native Title Act* was introduced by Prime Minister Keating and subsequently passed. It endeavours to strike a balance between the rights of the aboriginal people, as found in the *Mabo* decision on the one hand, and workable and certain land management on the other.

We need something similar in the Canadian context. We need a federal statute that decrees that the granting of any land tenure by the provincial government shall have the effect of lawfully infringing any aboriginal title over the land area covered by the tenure. By any tenure, I include Crown lands, timber licenses, mineral leases, agricultural leases, grazing permits, and rights of way.

In addition, aboriginal title that could be proved in specific cases would continue to exist over untenured Crown land, but only so long as the land remains untenured. Next, federal legislation would establish a statutory regime to provide fair compensation to any aboriginal group that can establish the loss of aboriginal title over any land included in those tenures, based on a graduating scale of compensation set out in the statute, governed by the nature and extent of the aboriginal interest infringement upon it. Finally, a federal statute would establish a duly qualified special tribunal composed of judges, or people having special knowledge in relation to land management and land assessment, to settle the measure of compensation after a full hearing based on the statutory criteria.

I am well aware that in Canada the situation is different from than Australia in that we have constitutionalized rights under Section 35. The Supreme Court of Canada has made it plain in the *Van der Peet* case that aboriginal title can be the subject of regulation. What I am proposing is a regulatory scheme that does just that. This compensation would be primarily monetary compensation awarded on the basis of strict criteria. It would not be, as it is at the present time in land claim negotiations, whatever the traffic will bear, or go to whoever is the best negotiator, speaks the loudest, and makes the best case. We in Canada should embark upon this more rational approach to dealing with this difficult problem. We must deal fairly, but it must be done in a balanced way. Ultimately, this is a matter for governments to decide.

Questions

Brian Slattery As I listened to Mel Smith, I was reminded of Burke's reflections on the French Revolution. Burke warns us against losing touch with our past—the customs, practices and accommodations built up over many years, and the fundamental principles that inform them. And he warns us against the spirit of what might be called rationalist constructivism, where we look at the world as if it were invented yesterday, and set out some fundamental principles and attempt to construct everything anew. I wondered in listening to Mel whether he wasn't operating more in the mode of rationalist constructivism, rather than in the spirit that seeks to grapple with our past and take full account of it.

In relation to the question whether *Delgamuukw* is a dangerous innovation or a natural progression in the jurisprudence, I notice that Mel didn't mention the major United States Supreme Court cases from the 1820s and 1830s. Those cases are interesting for Canada because they represent an attempt to grapple with British law and British policy before the American Revolution, which of course was carried over to Canada. I notice that he didn't mention the *St. Catherine's Milling* case, where a majority of judges on the Supreme Court did recognize the existence of aboriginal title. Nor did he mention the Privy Council decision, which recognized a form of aboriginal title under the Royal Proclamation. Nor, very surprisingly, did he mention the *Calder* case, which of course is a British Columbia case, where the majority of Supreme Court judges recognized the existence of aboriginal title. Nor did he mention that in the *Guerin* case, the Supreme Court specifically said that it was dealing with reserve lands, but it was dealing with them on the basis of principles that applied to aboriginal land because, in this respect, there was no difference between the two. Nor did he mention that in the *Bear Island* case, the Supreme Court of Canada specifically said that it was confining its ruling to the question of whether or not there was an adherence to a treaty, and said it did not necessarily agree with the principles laid down in the lower courts.

If you take full account of that jurisprudence, it's reasonably clear that whether that you like that jurisprudence or not, it's there, and if you follow it through in a reasonable way, *Delgamuukw* can be seen as an evolution, certainly not an innovation. In any case, I think that whatever we may think of that jurisprudence, it is at least an attempt to come to grips with our past. And when I say our past, I don't mean simply the past of us, Canadians viewed at large, but the past that includes the past of aboriginal peoples who were the first people here, and who are a living part of our heritage and tradition.

Mel Smith Well, I would have dealt with some of these in more detail if I'd had more time. But the Royal Proclamation has been found not to apply to the province of British Columbia, in any event, by innumerable courts including the Supreme Court of Canada in the *Calder* case, and certainly the courts in British Columbia. About the *Calder* case, I don't get as excited about the *Calder* case as those who claim that it's a great move in the direction of aboriginal rights and aboriginal title. That case went through three levels of courts. The Supreme Court of British Columbia threw the case out; the Court of Appeal of British Columbia unanimously, five judges to nothing, threw it out; and the Supreme Court of Canada threw it out. It didn't allow the appeal in the *Calder* case. The question in the *Calder* case was not so much whether aboriginal title was or was not a fact, but whether or not it was extinguished. Three judges said it wasn't extinguished; three judges said it was; and the seventh dismissed the appeal on other grounds.

As far as the US cases are concerned, the US cases have been around for a while. They've been adjudicated upon by the courts in Canada up to now, and for one reason or another largely distinguished from the present context of things.

Finally, the *St. Catherine's* case was very important, I like that case. I think Professor Slattery is right, and maybe I should have made reference to it. Let me just give you one small quote from the *St. Catherine's* case. Justice Taschereau said in that case: "The practice of the crown over the years in dealing with Indian claims did not imply that the Indians had legal title to the land." Taschereau said that to find otherwise would mean: "... that all progress of civilization and development in this country is, and always has been, at the mercy of the Indian race. Some of the writers cited by the appellants, influenced by sentimental and philanthropic considerations, do not hesitate to go as far. But legal and constitutional principles are in direct antagonism with their theories." I think that's an appropriate quote in today's context.

As far as grappling with our past, I'm all for grappling with our past. I think the particular past of British Columbia that I briefly touched upon is something that ought to be taken into careful consideration by the courts. In a sense the negotiating process, and also the Supreme Court of Canada in *Delgamuukw*, proceeded on the basis that there is no past. In that respect, it's faulty.

Kent McNeil I have a question for Mr. Plant, but before I ask that, I just want to comment on Mr. Smith's response to Professor Slattery's comments. Regarding the *St. Catherine's* case and the judgment of Mr. Justice Taschereau I think one has to look not at that judgment, but the

judgment of the Privy Council, the highest court in the British Empire at the time. The Privy Council said that aboriginal title, or Indian title as it called it, is an interest in land other than that of the province. And it said as well that the beneficial interest in aboriginal title lands only becomes available to the province after aboriginal title has been surrendered by a treaty. That was what the highest court said. What Justice Taschereau said really is not very relevant, given that decision.

Secondly, the reason why there is so little case law between *St. Catherine's* and the *Calder* decision is that in 1927 the Parliament of Canada enacted an amendment to the Indian Act, which made it virtually impossible for aboriginal peoples to bring claims before the courts. They could not hire legal counsel, they could not raise money to bring claims. This was done specifically to prevent the aboriginal nations of British Columbia from going to the courts to assert their claims. And I think that's one of the most oppressive pieces of legislation that Canada has ever produced, and I think we should be ashamed.

Then the *Calder* case comes along, and six judges say there is such a thing as aboriginal title in British Columbia. They split fifty-fifty over the issue of the application of the Royal Proclamation. And they also split over the question of extinguishment. Well, in the *Delgamuukw* decision, the issue of extinguishment prior to B.C. joining Confederation is no longer an issue.

So I think one has to take the history as it is, rather than picking out bits of it that just seem to support one's own case.

I also wanted to comment very briefly on the Australian situation and *the Native Title Act* there. That legislation has not produced a solution in Australia. If one thinks that that would be the solution to problems in Canada, I would be quite amazed at that kind of approach. Maybe I should give Mr. Smith a chance to respond to that.

Mel Smith I referred to Mr. Justice Taschereau in the Supreme Court of Canada in the *St. Catherine's Milling* [case] because I think Professor Slattery made reference to the decision of the Supreme Court of Canada in *St. Catherine's*. I think the legislation that you referred to about outlawing claims is a dark chapter in our history. Fortunately that Act was repealed, I think in 1951. So it was around for about 25 years. I think the *Native Title Act* and the process that has been followed in Australia, from what I understand it, and I don't profess to be an expert on the Australian situation by any means, has been subject to amendment. I believe it's a work in progress.

I believe we have to step out of the box in Canada to deal with this issue, to deal with it fairly, and deal with it expeditiously. We must not

think that we're limited in the dealing of it with either just litigation or negotiation. I think we need all the policy tools at our disposal to deal with what is indeed a most difficult and complex question. If they're having difficulties with aspects of the *Native Title Act* in Australia, so be it. But it seems to me, a lot of the secondary and collateral issues can be decided by legislation to make decision-making on the main issues much more easy, and much more expeditious. I don't think we should reject other possibilities of dealing with this issue.

Kent McNeil My question concerns the example that Geoff Plant gave of the forestry official trying to make a decision about what to do when granting a forestry license, or lease, or whatever. I think one of the problems here is the authority of that official to grant the license in the first place if, in fact, he first comes to the decision that there is aboriginal title. Then he comes to that position and he has to decide with respect to infringement whether there is a valid legislative objective, and whether the fiduciary obligations of the crown are being respected. But I would put it to you that the official actually has no authority to make those kinds of decisions, never even gets to that point unless that official can point to some specific legislation that gives the official the power to make decisions that infringe aboriginal title. And without that specific legislative authority, the official can't do anything further. And the reason for that is that in our constitutional system, our parliamentary system, executive officers cannot make decisions that infringe on people's rights without fair and plain legislative authority to do that. And that's basic to the rule of law in this country. So I just wondered where you would see the authority for that official to make those kinds of decisions, and whether there is any such legislation in British Columbia. I'm not aware of any.

Geoff Plant Well first of all, let's explore the implications of that helpful piece of insight. The presumption then is that there is probably no provincial official capable of granting a cutting permit in British Columbia, which means that if you thought my scenario was kind of grim one, get ready for the Kent McNeil version of what aboriginal title really means. The scenario I outlined contemplated that a regional manager or a district manager, which are defined terms in the *Forest Act* of British Columbia, would be making the kinds of decisions that they are currently authorized legislatively to make, which include granting cutting permits and related documents.

Now I cannot claim to be an expert on what is becoming a burgeoning jurisprudence around attacking, by way of judicial review, the

issuance of tenures under the *Forest Act* of British Columbia, which is a developing body of law. But if the premise in your question is that the Forest Act would not be capable as a matter of law of operating in a way to authorize a delegated official, like a district manager, to have the power to grant a cutting permit which would take effect according to its terms subject to the resolution of the issues that I talked about, then I think you are launching what seems to me to be a more fundamental attack on the ability of the province to regulate and control the management of the public lands. That's an interesting question. Maybe it's just that I'm a bit Pollyanna-ish, but I assume that the courts in *Delgamuukw* and other decisions are not actually intending to completely conceptually destroy the basis of land and resource management by the provincial government. I think they are just trying to constrain it. But I may have misunderstood your question.

Kent McNeil Well, calling them public lands, I think, begs a question. I think no provincial official would think of granting a forestry permit over lands that are held by fee simple, or over lands that are held by...

Geoff Plant That's your Section-109 point. Which is to say that so long as what purports to be the Crown lands of British Columbia are in fact lands that are burdened by aboriginal title, then as Mel Smith has indicated, their 91(24) [*Constitution Act, 1867*] lands, at best, are subject to a different set of principles. If that's so, then I think the Supreme Court of Canada has actually rewritten the constitution in a way that's pretty significant. Whether conceptually it represents just a gradual evolution or not is one of those questions that I could tell you people who hold chainsaws and use them for a living in order to feed their families in British Columbia, and there are some thousands of people who do that, would have a hard time wrestling with.

One of the striking things about the Supreme Court of Canada judgment—when you read it divorced from the judgments below, and particularly when you read it divorced from the evidentiary context from which it arises—is that the judgment is remarkably ahistorical from a British Columbia perspective. There is almost nothing of the history of British Columbia in that judgment, and we could argue about what that history should mean. But let me give you in two sentences, one theory. It may be a bad theory, but let me give it to you.

If you had told the Fathers of Confederation—that is, those who negotiated the terms of union on behalf of what was to become the province of British Columbia in 1871—that because there was something called aboriginal title, the province was in fact acquiring no prac-

tical ownership of the Crown lands, they would have gone back to the bargaining table. As a reconstruction of what the pact of Confederation was from the province's perspective, that is pre-eminently a position that can only be argued by people who won't look at it through the lens of defending the basic premise upon which British Columbia entered Confederation, which was "give us the lands, because we don't have any money. We need the lands in order to develop an economy."

Kent McNeil: They should have read the Royal Proclamation then.