The Existence of Aboriginal Governance Rights within the Canadian Legal System

Maria Morellato
Blake, Cassels & Graydon LLP
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Recognizing Aboriginal Governance Rights

The recognition and protection of aboriginal governance rights, at this point in our history, is both daunting and straightforward; it is a straightforward matter because our sense of social justice and honour places us at a cross-road, squarely faced with both the opportunity and the imperative to significantly advance the legal and political relationship between Canada and the First Nations peoples who have lived in this land since before Canada came into existence. It is a daunting matter because as a society we have the clear responsibility of finding and forging legal and political common grounds between our Canadian laws and legal system and those laws and legal systems of the aboriginal peoples who have always lived here as distinct self-governing polities. The challenge is clear; the road to resolution is not.

This paper will approach the topic of reconciliation and aboriginal governance from a particular vantage point: the guiding principles of law articulated by leading court decisions which inform the issue of Crown responsibility and accountability. This vantage point is admittedly only one of many, yet the legal principles outlined below can be useful tools in focusing efforts to clarify and manage the complexity of the reconciliation process that lies before us. That is, the reconciliation of the rights of First Nations peoples to govern themselves as distinct, self-governing peoples within our Canadian constitutional structure.

Part I of this paper begins by addressing process: how we choose to work together to achieve reconciliation in light of the guidance provided by leading Supreme Court of Canada decisions and what we can learn from the mistakes we have made in the past. Part II addresses the content of governance rights as articulated by our courts. Part III addresses how the parameters of governance rights, as articulated

by our courts, impose fiduciary and legal obligations on the Crown to accommodate those rights.

Part I: The Process of Reconciliation

Any reconciliation process must consider the Supreme Court's direction in *Delgamuukw*[1]:

> Since the purpose of s. 35(1) is to reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty, it is clear from this statement that s. 35(1) must recognize and affirm both aspects of that prior presence – first, the occupation of land, and second, the prior social organization and distinctive cultures of aboriginal peoples on that land. (para 141)
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> (emphasis added)

Logic dictates that the constitutional recognition and affirmation of the "prior social organization and distinctive cultures of aboriginal peoples" as described in the above passage would include the protection of those "distinctive cultures" as distinct cultures. These cultures necessarily embody how aboriginal peoples govern themselves. Yet, those who deny the existence of inherent governance rights effectively ignore this critical passage in *Delgamuukw,* including the meaning of s. 35(1) of the *Constitution Act 1982* as prescribed by the Supreme Court of Canada. That is, they effectively deny the affirmation in s. 35(1) of the social organization and distinctive cultures of aboriginal peoples prior to the assertion of Crown sovereignty. They also deny what is clearly patent today: the continued existence of distinctive aboriginal cultures and governments in 2003

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1 *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010

whose rights do not depend on Crown grants or delegated authority[2]. The position that aboriginal governance rights are not inherent pre-existing rights is an untenable position logically or legally, yet it is one that continues to be espoused by Crown officials today.

The pretence of ignoring the existence of distinct aboriginal polities within Canada can stop by recognizing that reconciling the prior occupation and existence of aboriginal peoples with the assertion of sovereignty by the Crown necessarily involves adapting our common law and legal system in a manner that respects, facilitates and accommodates First Nations governance initiatives. Specifically, this accommodation or adaptation must not only protect aboriginal governance rights but must also provide opportunities for their expression and exercise.

Our current Canadian jurisprudence directs that such reconciliation be achieved through accommodation and, further, through negotiations with First Nations on how to achieve that accommodation. Cases such as *Delgamuukw*, *Sparrow*[3] and *Campbell*[4] as well as the more recent *Haida*[5] and *Taku River*[6] decisions make this legal imperative abundantly clear.

On the question of process, one must also not lose sight of what history has repeatedly illustrated: the dynamic, complicated process of reconciliation cannot be achieved by unilateral legislative Crown action. This is simply because it takes

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2 *Guerin et al. v. The Queen* (1984), 2 S.C.R. 338

3 *R. v. Sparrow*, [1990] 1 S.C.R. 1075

4 *Campbell v. British Columbia (Attorney General)*, 2000 B.C.S.C. 1123; 79 B.C.L.R. (3d) 122

5 *Council of Haida Nations v. B.C. and Weyerhaeuser* (2002) BCCA 147; and (2002) BCCA 462

6 *Taku River Tlingit v. Ringstad* (2002) BCCA 59, 31 January 2002

the commitment and effort of both the Crown and First Nations to reconcile any conflict; legislation, however, is decidedly a one-sided affair. Nor can our judicial system be terribly effective in defining the nature and scope of aboriginal governance rights since, in the final analysis, it is not individual judges or courts but political leaders, aboriginal and non-aboriginal, who have the capacity and legitimacy to forge new government-to-government relationships. The failure to recognize this pragmatic reality has, for example, plagued and undermined legislative change to the *Indian Act* over the years. Any legislative change must provide space and opportunity for First Nations to institute their own ways and means of governing, otherwise it simply will not work – it never has.

The Supreme Court of Canada has in fact recognized that aboriginal rights issues of this magnitude cannot be ultimately resolved in the courtroom or through unilateral legislative action. In *Sparrow*, the Court reasoned:

> Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiation can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power. (p.1101)
>
> . . .
>
> The constitutional recognition afforded by the provision (s. 35) therefore gives a measure of control over government conduct and a strong check on legislative power. (p. 1110)

In *Delgamuukw*, the Court similarly reasoned:

> Ultimately, it is through negotiated settlements, with good faith and give and take on all sides,…that we will achieve… "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." (para.186)

The process of negotiating self-government agreements or treaties, while no doubt lengthy and complicated, is in the author's opinion, ultimately the only viable solution to true reconciliation. Again, any legislative initiative by the Crown must enable rather than hinder First Nations in defining and articulating their own vision and rules of self-government. The failure of any government initiative to accommodate aboriginal governance practices in this manner will inevitably be challenged as an unjustified infringement of aboriginal governance rights.[7]

Part II: Parameters of Aboriginal Governance Rights

In addition to providing guidance on the process of reconciliation, various Courts have also provided some profound insights on the nature and scope of the aboriginal governance rights which will be recognized. These merit particular consideration.

The source of aboriginal governance rights is the same as all other aboriginal rights generally, including aboriginal title; that is, these rights arise from the existence of distinct aboriginal societies occupying certain lands and governing themselves prior to European contact. Indeed, this logical postulate seems to have been understood and accepted by the Court in *Van der Peet* in its reference to the majority decision in *Mabo v. Queensland*, [No. 2] 1992, 175 C.L.R. 1; the court in *Van der Peet* relied on the following passage in *Mabo* which indicates that aboriginal title has been given content by the traditional laws and customs observed by aboriginal people:

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[7] See *Sparrow, supra* and *Delgamuukw, supra* on the infringement and justification analysis

> This position is the same as that being adopted here "[T]raditional laws" and "traditional customs" are those things passed down, and arising from the pre-existing culture and customs of aboriginal peoples. The very meaning of the word "tradition" -- that which is "handed down from ancestors to posterity", Concise Oxford Dictionary (9th Ed.), -- implies these origins for the customs and laws that the Australian High Court in *Mabo* is asserting to be relevant for the determination of the exercise of aboriginal title. To base aboriginal title in traditional laws and customs, as was done in *Mabo*, is, therefore, to base that title on the pre-existing societies of aboriginal peoples. This is the same basis as that asserted here for aboriginal rights. (para. 40)
>
> (emphasis added)

The Court then refers to Professor Slattery's observations that the law of aboriginal rights is "neither english nor aboriginal in origin: it is a form of inter-societal law that evolved from long-standing practices linking the various communities" and that such rights concern "the status of native peoples living under the Crown's protection, and the position of their lands, customary laws and political institutions" (emphasis added).

The court's analysis in *Van der Peet*, therefore, directly addresses and acknowledges the pre-existing customs, laws and political institutions of First Nations in this country. This analytical focus of acknowledging aboriginal practices, traditions and customs, coupled with the court's reference to "traditional laws" and "pre-existing societies" suggests that our Supreme Court will be receptive in recognizing self-government rights. Indeed, such recognition would be consistent with Chief Justice Lamer's reasoning in *R. v. Sioui* (1990), 3 C.N.L.R. 127:

> The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with

> them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible. (p. 147)
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> (emphasis added)

The Supreme Court of Canada's receptiveness in the *Van der Peet* case to the "general principles" espoused in the *Marshall Court* decisions is also instructive. In *Worcestor v. Georgia*, 31 U.S. (6th) Pet. (515) 1832, the Supreme Court of the United States recognized that the aboriginal right of self-government, just like aboriginal title to land, is based on aboriginal historic occupation and possession of tribal territory. Again, this recognition is very much aligned with the source of aboriginal rights as articulated by the Supreme Court of Canada in *Van der Peet* when Lamer, CJC, writing for a majority of the Court, stated that "the doctrine of aboriginal rights exists and is recognized and affirmed in our constitution because, when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries" (at para. 30).

Moreover, the Supreme Court in *Worcester* reasoned that the Crown's paramount sovereignty did not eradicate aboriginal government rights:

> Our history furnishes no example, from the first settlement of our country, of any attempt on the part of the Crown to interfere with internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traitors or otherwise, might seduce them into foreign alliances. The King purchased their lands when they were willing to sell, at a price that they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.

> … the settled doctrine of the Law of Nations is that a weaker power does not surrender its independence – its right to self-government by associating with the stronger and taking its protection. A weaker state, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government and ceasing to be a state. (at p. 551-552)
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> (emphasis added)

Worcestor, therefore, clearly acknowledged that the distinct powers of autonomy and self-government were held by the Cherokee both prior to and following the assertion of British sovereignty. This "general principle" from the *Marshall Court* decisions appears equally applicable in Canada; just as aboriginal title survived the assertion of British sovereignty, so did aboriginal governance rights.

Consider also the following passage from the often cited American decision on Indian self-government, namely *U.S. v. Wheeler*, 435 U.S. 313, 55 L.Ed. (2d) 303 at 312-315 (L.Ed.):

> The powers of Indian tribes are, in general, "inherent powers of a limited sovereignty which have never been extinguished." F. Cohen, Handbook of Federal Indian Law… Before the coming of Europeans the tribes were self-governing, sovereign, political communities… Like all sovereign bodies, they then had the inherent power to prescribe laws for their own members and to punish infractions of those laws.
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> Indian tribes are, of course, no longer "possessed of the full attributes of sovereignty." Their incorporation into the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of sovereignty which they had previously exercised. By specific treaty provisions, they yielded up other sovereign powers; by statute in the exercise of its plenary control, Congress has removed still others.

> But our cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory …
>
> (emphasis added)

The analogue between pre-existing aboriginal land rights and pre-existing rights of self-government is clear. Both sets of rights arise from the fact that, at the time Europeans settled in North America, aboriginal peoples were living on the lands in organized societies governing themselves.

This conclusion is consistent with the Canadian decision in *Connolly v. Woolrich* (1867), 11 L.C. Jur. 197 (Que. S.C.). In that case, the Court recognized the marriage customs of the Cree people in litigation concerning the estate of a deceased man who had married a Cree woman. In finding that the marriage had the basic requirements for recognition by the Courts of Lower Canada (i.e., a voluntariness, permanence and exclusivity), the Court determined that the Cree marriage was valid and the decision was upheld on appeal ((1869) 1 R.L.O.S., 253 (Que. C.A.)).

The first Supreme Court of Canada case to squarely deal with the issue of aboriginal governance rights was *Pamajewon.*[8] As Professor McNeil points out in his article "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty,"[9] the Supreme Court of Canada was willing to assume that aboriginal self-government rights exist but expressly declined to decide the issue on the facts

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8 *R. v. Pamajewon*, [1996] 2 S.C.R. 821

9 K. McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" published in *Emerging Justice? Essays on Indigenous Rights in Canada and Australia*, Native Law Centre, University of Saskatchewan 2001

of the case before it. The Court in its decision did, however, reason that self-government rights are "no different from other claims to enjoyment of aboriginal rights and must, as such, be measured against the same standard."[10] The standard to which the court was referring to is the test for proof of aboriginal rights found in *Van der Peet*.[11] In *Van der Peet*, the Court set out the following test:

> In order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. (para. 46)

Therefore, the Supreme Court of Canada in *Pamajewon* signalled that self-government rights could be proven with reference to practices, customs or traditions which are integral to the distinctive culture of the aboriginal people claiming the right, provided such a practice, custom or tradition existed prior to European contact and continues to the present day, albeit in a modern form.[12]

The Court's application of the *Van der Peet* test to a determination of whether a right to self-government exists is not surprising. What makes the *Pamajewon* decision particularly difficult for First Nations who wish to assert self-government rights is the manner in which the Court requires self-government rights to be characterized. In this regard, the Court reasons as follows:

> The appellants themselves would have this Court characterize their claim as to "a broad right to manage the use of their reserve lands." To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the

10 *Pamajewon, supra* at para. 24
11 *R. v. Van der Peet*, [1996] 2 S.C.R. 507
12 *Pamajewon, supra* at pps. 832-836

> aboriginal group claiming the right. The factors laid out in *Van der Peet*, and applied *supra*, allow the court to consider the appellants' claim at the appropriate level of specificity… (para. 27)
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> (emphasis added)

The appropriate level of specificity identified by the Court in *Pamajewon* was a claim to "the right to participate in and to regulate, high stakes gambling activities on the reservation."[13]

The Court's ruling that it will not accept characterizations of self-government rights in any general sense requires proof on a specific practice-by-practice basis. Nevertheless, the capacity to prove that a particular governance practice constitutes an aboriginal right within s. 35 is clearly contemplated and endorsed by the Court's reasoning in *Van der Peet* and *Pamajewon*.

It is also noteworthy that the Supreme Court of Canada in *Gladstone*,[14] reasons that to be recognized as an aboriginal right, an activity must be "an element of a tradition, custom, practice or law integral to the distinctive culture of the aboriginal group claiming the right"[15] (emphasis added). The Court's analysis in this case expressly acknowledges that an aboriginal right could include the pre-contact laws of an aboriginal people.

This approach is not inconsistent with a decision of our British Columbia Court of Appeal in *Casimel v. ICBC*[16] wherein the Court reasoned that an adoption, in accordance with the customs of the Carrier people, was valid to bring the adopting

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13 *Pamajewon, supra* at para. 26
14 *R. v. Gladstone*, [1996] 2 S.C.R. 723
15 See, for example, *Gladstone* at para. 22
16 *Casimel v. ICBC* (1993), 82 B.C.L.R. (2d) 387

parents within the definition of dependent parents for purposes of the *Insurance(Motor Vehicle) Act*. The Court found that customary aboriginal adoptions, as an aspect of social self-regulation or self-government by an aboriginal community, was not subject to any form of blanket extinguishment and, further, qualified as an aboriginal right recognized and affirmed under s. 35(1). The Court expressly reasons as follows:

> There is a well-established body of authority in Canada for the proposition that the status conferred by aboriginal customary adoption will be recognized by the courts for the purposes of application of the principles of the common law and the provisions of statute law to the persons whose status is established by the customary adoption. (para. 42)

In his dissenting Court of Appeal judgment in *Delgamuukw v. the Queen,*[17] Mr. Justice Lambert describes the right to self-government as a form of internal community authority and regulation:

> . . . what they [the plaintiffs] are asking for is surely a right to exercise control over themselves as a community, and over their own lands and institutions in that community. (para. 964)

Later in his decision, Mr. Justice Lambert states:

> They [the plaintiffs] are claiming the right to manage and control the exercise of the community rights of possession, occupation, use and enjoyment of the land and its resources which constitutes their aboriginal title; and they are claiming the right to organize their social systems on those matters that are integral to their distinctive cultures in accordance with their own customs, traditions and practices which define their culture. (paras. 970-1)

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17 *Delgamuukw v. The Queen,* [1993] 5 C.N.L.R. 1 (C.A.)

This passage in Mr. Justice Lambert's decision foreshadows the reasoning of the Supreme Court of Canada, on appeal, four years later. The Supreme Court in *Delgamuukw* begins its analysis by referring to one source of aboriginal title as "the relationship between common law and pre-existing systems of aboriginal law"[18] and then reasons that a further dimension of aboriginal title is the fact that it is held communally.[19] That is, the Supreme Court of Canada expressly recognizes that prior occupation by First Nations of traditional lands is significant not only because of the physical fact of occupation but also "because aboriginal title originates in part from pre-existing systems of aboriginal law."[20]

The following passage in the Court's decision is also instructive:

> . . . the law of aboriginal title does not only seek to determine historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present day. Implicit in the protection of historic patterns of occupation is the recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time. (para. 126)
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> (emphasis added)

In the author's opinion, the emphasis in this passage on "affording legal protection to prior occupation in the present day" and protecting "historic patterns of occupation" invokes the recognition and protection of those systems of aboriginal law which informed and guided "historic patterns of occupation" as well as the "relationship of the aboriginal community to its land." Clearly, the Supreme Court has recognized that prior to the assertion of sovereignty, there was an internal

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18 *Delgamuukw, supra* (S.C.C.) at para. 114
19 *Delgamuukw, supra* (S.C.C.) at para. 115
20 *Delgamuukw, supra* (S.C.C.) at para. 126

system of governance that regulated how land could be used, who could use it, when, and for what purpose (e.g., what tract of land belonged to which "house", "clan" or "tribe"). To recognize land rights without recognizing the system of governance which internally regulated the exercise of those land rights simply defies common sense. These are clearly inherent rights: governance rights that existed prior to European contact which are now protected and embodied in section 35(1).

Aboriginal title rights which are held communally and which arise from "pre-existing systems of aboriginal law"[21] must by definition embody rules or mechanisms through which decisions are made about communally held land. For a First Nation to have aboriginal title, and a right to the exclusive occupation of land including the use of the resources of that land (which *Delgamuukw* clearly affirms), it must logically have the right to internally regulate how the lands and its resources are to be used and allocated. Clearly, such inherent rights of self-government concerning land use and occupation are implicit in the Court's analysis in *Delgamuukw*.

The logical conclusion that aboriginal title as a communal right invokes rights of community decision-making and governance is again underscored in that portion of the Court's reasoning in *Delgamuukw* which states that aboriginal title includes the right of an aboriginal community to choose how its traditional lands are to be used.[22] Because aboriginal title: (a) is a communal right; (b) which encompasses the right to choose how land is to be used; and (c) finds its source, in part, in "pre-existing systems of aboriginal law," which are "taken into account when

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21 *Delgamuukw, supra* (S.C.C.) at para. 126

establishing proof of title," it stands to reason that aboriginal laws and customs governing land use are inherent rights found within s. 35(1).[23]

The decision of our Supreme Court in *Campbell v. British Columbia (Attorney General)*, is also very instructive in this regard. In that case, Mr. Justice Williamson reviews the law relating to aboriginal governance rights, including the inherent right to self-government, within the context of a constitutional challenge of the Nisga'a Treaty. The Plaintiffs sought an order declaring the Nisga'a Treaty to be, in part, inconsistent with the Constitution of Canada and, therefore, of no force and effect. Specifically, the Plaintiffs argued that the Treaty violates the Constitution because parts of it purport to bestow, upon the governing body of the Nisga'a Nation, legislative jurisdiction inconsistent with the existing division of powers granted to Parliament and the Legislative Assemblies of the Province by ss. 91 and 92 of the *Constitution Act, 1867*. Second, the Plaintiffs also argued that the legislative powers set out in the Treaty interfere with the concept of Royal Assent. Third, the Plaintiffs argued that by granting legislative power to citizens of the Nisga'a Nation, non-Nisga'a Canadian citizens who reside in or have other interests in the territory subject to Nisga'a government are denied rights guaranteed to them by s. 3 of the *Canadian Charter of Rights and Freedoms*. The Court dismissed the Plaintiffs' action on all three grounds. The case remains good law today.

The Court in *Campbell* concluded that the right of aboriginal peoples to govern themselves was not extinguished after the assertion of sovereignty by the Crown and reasons as follows:

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22 *Delgamuukw, supra* (S.C.C.) at paras. 111 and 165

> The right to aboriginal title "in its full form", including the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is, I conclude, constitutionally guaranteed by Section 35. (para. 137)

Later in his decision, Williamson J. concludes:

> I have also concluded that the *Constitution Act, 1867* did not distribute all legislative power to the Parliament and the legislatures. Those bodies have exclusive powers in the areas listed in Sections 91 and 92. . . . But the *Constitution Act, 1867*, did not purport to, and does not end, what remains of the Royal prerogative or aboriginal and treaty rights, including the diminished but not extinguished power of self-government which remained with the Nisga'a people in 1982. (para. 180)

The reasoning in *Campbell* effectively creates constitutional space for accommodating and giving force to aboriginal governance rights within our Canadian system of law. The question then becomes: how can aboriginal governance rights be meaningfully expressed within Canadian constitutional law, structure and process? How can these rights to govern (e.g., choice of leadership, leadership structures and land use) manifest themselves within the fabric of existing legislation and laws? These questions will be addressed below. For present purposes, suffice it to say that the answers will ultimately be found through both good faith government-to-government negotiation and, failing that, litigation.

Part III: Crown Responsibility and Obligations

The Courts' reasons in the above-noted cases indicate that our provincial and federal leaders have the responsibility to ensure that aboriginal governance rights are accommodated and given expression. The Court of Appeal in the recent

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[23] See *Delgamuukw* (S.C.C.), paras. 126, 147, and 148

decisions of the *Taku River*[24] and *Haida*[25] cases provides specific direction on how this can be achieved, as does the Supreme Court of Canada in *Delgamuukw*. Each of these cases will be addressed below.

In its decision of *Taku River Tlingit,* the Court of Appeal ruled that there was an obligation on the Crown to consult the aboriginal people who had claimed aboriginal title and aboriginal rights, and that the obligation to consult arose prior to the time that a court of competent jurisdiction decided on the existence and scope of the aboriginal title and aboriginal rights in dispute. Specifically, the Court reasoned as follows:

> To accept the Crown's position that the obligation to consult is only triggered when an aboriginal right has been established in court proceedings would ignore the substance of what the Supreme Court has said, not only in ***Sparrow*** but in earlier decisions which have emphasized the responsibility of the government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation. . . . Indeed, if the Crown's position were accepted, it would have the effect of robbing s. 35(1) of much of its constitutional significance. (para. 173)

Once again, as the Supreme Court of Canada did in *Sparrow*, *Delgamuukw*, and *Campbell*, the Court of Appeal in *Taku River* underscored the importance of negotiating and settling aboriginal land claims and, in particular, the importance of meaningful consultation:

> Moreover, decisions of the Supreme Court of Canada have referred to the importance of s. 35(1) of the ***Constitution Act, 1982*** in providing a foundation for the negotiation and settlement of aboriginal land claims. To say, as the Crown does here, that

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24 *Taku River, supra*

25 *Haida, supra*

> establishment of the aboriginal rights or title in court proceedings is required before consultation is required, would effectively end any prospect of meaningful negotiation or settlement of aboriginal land claims. (at para. 174)

Again, the court is acknowledging that there must be negotiations and discussion with the First Nations concerning the accommodation of their aboriginal rights. The significance of this repeated assertion by our courts becomes obvious when one recognizes that effective discussion with the First Nations about their aboriginal rights inevitably engages the leadership structures of a First Nation's people as well as the traditional rules within which they govern and exercise their aboriginal rights. The Crown, in negotiating with the First Nations, must know with whom to negotiate and must learn to accept and respect how the communal aboriginal right to land is exercised and governed by the First Nation in question. Ultimately, the Crown, in accommodating aboriginal title, must also recognize and accommodate the manner in which First Nations choose to use their lands since the right to choose how aboriginal title lands are used is clearly part of that right.

The decision in *Taku River* specifically directs that Ministers of the Crown must be "mindful of the possibility that their decision might infringe aboriginal rights' and, accordingly, to be careful to ensure that the substance of the Tlingits' concerns had been addressed."[26] Indeed, it is instructive that in *Taku River* the Crown did not argue, either before the Chambers Judge or before the appellate court, that the Tlingit's concerns had been met or accommodated prior to the issuance of the project approval certificate.[27] In the author's view, had evidence been adduced of

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26 *Taku River, supra* at para. 193

27 *Taku River, supra* at para. 199

substantial accommodation, the project approval certificate may have been approved rather than quashed.

The decision in *Council of Haida Nations v. B.C. and Weyerhaeuser* followed on the heels of *Taku River*. The principle issue before the court in that case was whether there is an obligation on the Crown and on third parties to consult with an aboriginal people, who have specifically claimed aboriginal title or aboriginal rights, about potential infringements, before the aboriginal title or rights have been determined by a court. The Court of Appeal found that the obligation to consult arose prior to the time that aboriginal title or aboriginal rights had been proven in the court system. Further, the Court found that such a legal obligation to consult applies not only to the Crown but also to the resource company who was issued a licence by the Crown to harvest timber on lands over which aboriginal title is asserted.

It is important to note that the Court of Appeal also found the Crown and the company in question had an obligation to seek to accommodate the aboriginal rights of the Haida:

> I regard the reference to "the extent to which aboriginal interests were accommodated" (at para. 169 of *Delgamuukw*) in relation to the determination of compensation for an infringement as being a significant indication that Chief Justice Lamer regarded the accommodation process as a process which preceded the infringement which itself occurred before the aboriginal title is declared by a court of competent jurisdiction in proceedings alleging both the title and infringement. (para. 40)
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> (emphasis added)

Furthermore, the Court states:

> And when Chief Justice Lamer says, in ***Delgamuukw***, that the measure of compensation for an infringement may depend on the extent to which aboriginal interests were accommodated, he is clearly contemplating accommodations decided and put in place before the infringement, and, normally, before the aboriginal right is endorsed by a court of competent jurisdiction. (para. 44)
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> (emphasis added)

In addition, the Court reasons that the strength of the *Haida* case gives content to the obligation to consult and the obligation to seek an accommodation of aboriginal rights:

> I am not saying that if there is something less than a good *prima facie* case then there is no obligation to consult. I do not have to deal with such a case on this appeal. Certainly the scope of the consultation and the strength of the obligation to seek an accommodation will be proportional to the potential soundness of the claim for aboriginal title and aboriginal rights. (para. 51)

The Court then concluded that both the provincial Crown and the resource company who was issued the tree farm licence were in breach of their enforceable legal and equitable duties to the Haida to consult and seek accommodation.

Finally, the Court found that the duty to consult and to seek accommodation does not only arise when an infringement has been proven, and clarified that the obligation to consult and seek accommodation is a "free standing" obligation which arises prior to any infringement taking place:

> The duty to consult and seek an accommodation does not arise simply from a *Sparrow* analysis of s. 35. It stands on the broader fiduciary footing of the Crown's relationship with the Indian people who are under its protection. (para. 55)

The Court did not invalidate the tree farm licence in question but left that issue to be decided at the trial of the aboriginal title case. What this suggests, of course, is that if proper accommodation and consultation has not occurred and the infringement is not justified, the validity of any licence or permit would necessarily be compromised.

The *Haida* and *Taku* cases are very useful in providing guidance on the nature of the Crown's obligations to accommodate aboriginal governance rights *prior* to these rights being proven in a court room. Specifically, our Court of Appeal has made clear that there is an obligation to consult and to seek to accommodate aboriginal rights once a *prima facie* case of their existence is established. In principle, this conclusion should apply equally to all types of aboriginal rights including governance rights. Accordingly, where *prima facie* evidence of aboriginal governance rights and their infringement is demonstrated (prior to their formal proof in the courtroom), *Haida* and *Taku* provide that, if the Crown does not attempt to address the substance of the First Nation's concerns regarding such infringements, Crown actions and authorizations relating to such infringements may very well be rendered void or unenforceable by a court through the judicial review process. Simply put, the infringement of aboriginal governance rights are also subject to judicial scrutiny and remedy prior to their being proven.

The decision in *Delgamuukw* also provides guidance on the nature of the Crown's obligation to address infringements of aboriginal rights and, therefore, the nature of this obligation as it relates to governance rights.

The Court in *Delgamuukw* expressly dealt with the justification analysis and directed that once an infringement has been found, the onus shifts to the Crown to

justify the infringement. To determine whether the infringement can be justified, *Delgamuukw* established the following justification test in relation to the infringement of aboriginal title and aboriginal rights generally:

> (1) Is the infringement in furtherance of a valid legislative objective that is substantial and compelling?
>
> (2) If there is a substantial and compelling legislative objective, has the honour of the Crown been upheld in light of the Crown's fiduciary obligation? This in turn is determined by asking:
>
> (a) Whether the process by which the Crown allocated the resource and the allocation of the resource reflects the prior interest of the holders of aboriginal title;
>
> (b) Has there been as little infringement as possible to effect the desired result?
>
> (c) Has compensation been paid?
>
> (d) Has the aboriginal group been consulted?
>
> (e) Has the Crown bargained in good faith?

There may be other criteria, as *Delgamuukw* does not set out an exhaustive list (see paras. 165-171). It is noteworthy that the aforementioned criteria are reinforced both in *Sparrow* and *Gladstone*.

In determining, therefore, whether the infringement of a governance right is justified, Crown officials would be well advised, prior to proof of the right in question, to address the criteria found at point 2 above, where applicable. If, for example, legislation or government actions pursuant thereto infringe a First Nation's traditional custom of property disposition or land use and if such a custom is not accommodated in any way by the Crown, it is very possible in light of

Delgamuukw, Taku and *Haida* that the offending government action or decision could be quashed and rendered unenforceable.

CONCLUSION

Our courts have repeatedly urged the Crown and First Nations to achieve reconciliation through negotiation. The wisdom of such an approach is equally applicable to issues surrounding aboriginal governance rights. Legislation relating to First Nations governance activities will continue to be wrought with difficulty and failure simply because resolution cannot be achieved by imposition or perceived imposition. Reconciliation can be achieved however through a process of forging new legal and political relationships based on mutually acceptable principles of cooperative governance between First Nations and the Crown.

The Supreme Court of Canada in *Pamajewon* concluded that aboriginal governance rights may be proven, just like hunting and fishing rights, by establishing that the practice, custom or tradition was integral to the distinctive culture of the aboriginal people asserting the right at the time of contact. The test for proving an aboriginal right in *Gladstone* was worded somewhat differently than that in *Van der Peet* by adding the word "law" to the phrase "tradition, custom or practice"; specifically, the majority in *Gladstone* reasoned: "to be recognized as an aboriginal right, an activity must be an element of a tradition, custom, practice or law integral to the distinctive culture of the aboriginal group claiming the right."[28] The inclusion of the word "law" in the *Gladstone* test is consistent with the Court's

[28] *Gladstone, supra* at para. 22

decision in *Pamajewon* that aboriginal governance practices can be proven as rights protected by s. 35(1).

The Supreme Court of Canada's reasoning in *Delgamuukw* indicates that aboriginal governance rights exist in relation to communal decisions relating to land and resource use concerning aboriginal title lands. It would be strange indeed if no inherent aboriginal governance rights existed with respect to the management of aboriginal title lands when aboriginal title includes the right to choose what use may be made of these lands, particularly when the aboriginal title itself is rooted in what the Court has referred to as "pre-existing systems of aboriginal laws"[29] and aboriginal "land tenure system[s] or laws."[30] How can aboriginal governance rights only be the subject of delegated power in these circumstances? They simply cannot be because their existence pre-dates the assertion of Crown sovereignty and is an important source of aboriginal title itself.

In *Campbell*, the Supreme Court of British Columbia ruled that aboriginal governance rights have not been extinguished and that "the right of the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is, I conclude, constitutionally guaranteed by Section 35."[31] The Court dismissed arguments that the governance provisions in the Nisga'a Treaty were unconstitutional.

In the recent decision of our Court of Appeal in the *Haida* case, the Court confirms and underscores the equitable obligation of both the Provincial Crown

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29 *Delgamuukw, supra* (S.C.C.) at para. 126
30 *Delgamuukw, supra* (S.C.C.) at para. 148
31 *Delgamuukw, supra* (S.C.C.) at para. 137

and resource companies to consult with and seek reasonable accommodation of aboriginal interests over lands subject to assertions of aboriginal title. Furthermore, the Court concludes that these legally enforceable obligations arise prior to the time that aboriginal title is proven through the court system. Finally, the Court indicates that the issue of compensation, in addition to that of consultation and accommodation, arises prior to the time an aboriginal right is infringed. This suggests that the degree and adequacy of compensation, consultation and accommodation will be the subject of judicial scrutiny in determining whether licences or certificates permitting third party activity on aboriginal title land will ultimately be enforced and validated.

In the final analysis, the right to choose to what use aboriginal title land can be put is inseparable from the issue of aboriginal governance rights since the latter ultimately informs how these choices are made and managed by aboriginal governments, what the choices will be and who has the authority to make them. This effectively means that aboriginal customs and laws relating to land and resource use must be the subject of consultation and accommodation. If the Crown is to fulfil its fiduciary obligation as articulated in the *Delgamuukw*, *Taku River*, *Campbell* and *Haida* cases, it has the responsibility, in the short term, to ensure that aboriginal peoples are consulted, and are given the opportunity to participate in and direct resource development within their traditional territory. Moreover, these obligations are not predicated on a First Nation having already proven the existence of their aboriginal rights. In the long term, the Crown must exercise its leadership responsibilities and its fiduciary duty to First Nations in the utmost of good faith by entering into treaties which will give expression to governance rights. Such rights would likely include governance rights relating to land use,

development and disposition as discussed above. In addition, such rights would likely address customary laws relating to leadership selection and governance structures as well as social, spiritual, and cultural norms.