COMPENSATION AFTER *DELGAMUUKW*

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I. INTRODUCTION

There is only a brief discussion of compensation in the *Delgamuukw* decision[1] itself. The relevant passage is at paragraphs 169 of the decision, and may conveniently be set out here in full:

> [A]boriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put. The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well [as well as consultation and/or consent], a possibility suggested in *Sparrow* and which I repeated in *Gladstone.* Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights: *Guerin.* In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation will vary with the nature of the particular aboriginal title affected and the extent to which aboriginal interests were accommodated. Since the issue of damages was severed from the principle action, we received no submissions on the appropriate legal principles that would be relevant to determining the appropriate level of compensation of infringements of aboriginal title. In the circumstances, it is best that we leave those difficult questions to another day.

In this paper I will discuss the conclusions regarding compensation which may be drawn from this passage, in the context of the *Delgamuukw* decision as a whole, and in light of the previous and subsequent case law. I will also address certain questions regarding compensation which, as yet, remain unanswered.

II. WHEN IS COMPENSATION PAYABLE?

A. GENERAL

The first thing to note about *Delgamuukw is* that compensation for infringements of aboriginal title is dealt with as one element of the overall justification analysis. In order to justify an infringement of aboriginal title, a number of criteria must be satisfied, the two most significant being consultation and compensation.

1*(Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010,(1997) 153 D.L.R. (4th) 193, (1997) 220 N.R. 161, (1997) 99 B.C.A.C. 161, [1998] 1 C.N.L.R. 14. For ease of reference, paragraph references rather than page references will be used in this paper.

Compensation is to be paid as part of the justification process in relation to a proposed infringement, and, given the consultation requirements which are also part of the justification process, it may be assumed that compensation is to be negotiated, or at least that negotiations in relation to compensation must take place. Compensation in the *Delgamuukw* sense is not something to be ordered by a court after the fact as a remedy for infringement. like damages for the breach of an ordinary, common law right. Rather, the payment of compensation is a prerequisite to the valid, constitutional exercise of power by the infringing government body, and a failure to address the issue will render the infringement unconstitutional. For that reason, government bodies who take the position that compensation is not payable, or who impose pre-conditions for the payment of compensation which are not legally justified, take the risk that any subsequent action that they take which is found to be an infringement of aboriginal title will be struck down as unconstitutional.

Moreover, the reference in *Delgamuukw* to compensation as a justification for infringement should not be taken as suggesting that governments have a right of expropriation in respect of aboriginal title lands, provided that they pay reasonable compensation. The discussion of compensation in *Delgamuukw* is in relation to the infringement of aboriginal title and not in relation to the extinguishment of aboriginal title or rights. The expropriation of aboriginal title lands would constitute an extinguishment of aboriginal title and not merely an infringement. It is clear from *Delgamuukw* itself that the provincial government does not have, and has never had, the power to unilaterally extinguish aboriginal title or rights.[2] Since the enactment of s.35 of the *Constitution Act, 1982,* it is very likely that the federal government no longer has this power.[3] Secondly, to the extent that the justification analysis is relevant in considering the validity of a surrender or extinguishment of aboriginal title[4], extinguishment would surely fall within the category of cases requiring consent on the part of the First Nation in question.[5] At any rate, nothing in *Delgamuukw* suggests that aboriginal lands may be unilaterally expropriated, subject only to the payment of compensation.

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2 *Delgamuukw,* at paras. 172-183
3 *Delgamuukw v. British Columbia,* [1993] 5 W.W.R. 97 at 319 (per Lambert JA.)
4 See *Chippewas of Sarnia Band v. Attorney General of Canada et al.* (unreported), April 30, 1999, Ontario Superior Court of Justice, Court File No. 95-CU-92484, at par. 745, for an example of a case where the justification analysis was applied by analogy, in that case in circumstances to which s. 35 of the *Constitution Act, 1982,* did not directly apply.
5 *Delgamuukw, supra (S.C.C.),* at para. 168.

Although the *Delgamuukw* decision does not deal with either damages for interference with aboriginal interests in land, or with the appropriate level of compensation which might be negotiated on a surrender, it is likely that similar principles of assessment and valuation are likely to develop in all three contexts. Indeed, the Court in *Delgamuukw* makes express reference to the case law in relation to compensation for breach of fiduciary duty. in particular to the *Guerin* case[6] which deals with compensation for breach of fiduciary duty in relation to the surrender of a reserve. These cases, thus, may provide some guidance in fixing the appropriate level of compensation to be paid in relation to an infringement of aboriginal title. The question of how fair compensation is to be measured will be discussed below.

An issue which one hears discussed fairly frequently is whether compensation is payable only in cases where aboriginal title has been "established", i.e. either proven in court or acknowledged by government. In a practical sense, of course, if a First Nation seeks a judgment or court order regarding compensation, or striking down an infringement on the ground that fair compensation has not been paid, the nation will have to prove to the court that it has aboriginal title. However, this does not mean that compensation is not payable in the absence of proof. The case law to date clearly demonstrates that the *prima facie* infringement of an aboriginal right must be justified or it will be unconstitutional, irrespective of whether the aboriginal right was proven or acknowledged at the time of the infringement. In *Sparrow,*[7] for example, the aboriginal fishing right in question had not been proven in a court at the time of the imposition of the net length restriction which was later struck down by the Court as an unjustified infringement of that right. If the right exists, proven or not, any infringement of it must be justified and, according to *Delgamuukw,* justification in relation to aboriginal title will normally require the payment of compensation. As a result, parties who refuse compensation on the ground that aboriginal title has not been proven run the risk of unjustifiably infringing aboriginal title. If aboriginal title is proven in subsequent court proceedings, the infringing act or instrument will likely be struck down, with resulting losses in many cases to the government or third parties who have expended time and money in reliance upon the invalid act or instrument.

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6 *Guerin v. The Queen, [1984]* 2 S.C.R. 335.
7 *R. v. Sparrow, [1990]* 1 S.C.R. 1075.

B LIMITATIONS PERIODS

Another issue, which was not considered in *Delgamuukw* but which has been the subject of several recent cases, is the applicability of provincial limitations periods to claims for compensation in relation to aboriginal or Indian interests in land. Two recent cases involving reserves are of note, but before discussing them I should make it clear that the relevance of provincial limitations periods, and the issue of their applicability, will depend upon the manner in which the question of compensation arises. If a First Nation is challenging the validity of a statute, instrument or governmental act on the basis of an infringement of aboriginal title or rights, and the lack or inadequacy of compensation is raised in the context of the justification analysis, then provincial limitations periods applying to an action for damages or other monetary relief are clearly not relevant. If fair compensation was not paid at the time, then the infringement will not have been justified and will be invalid. The fact that provincial limitations periods may have since barred any right on the part of the First Nation to bring an action for damages, or a for a money judgment, is irrelevant to the issue of whether the infringement was justified at the time. However, in many cases a First Nation might choose to bring an action seeking compensation in addition to, or in the alternative to, or in substitution for an order striking down the infringing act or instrument. In these circumstances, the cases dealing with the applicability of provincial limitations periods to damages claims in relation to reserve lands may be relevant, although, of course, caution should be exercised in extending principles developed in relation to reserves to aboriginal title lands.

There are several cases, now, dealing with the issue of limitations periods in relation to reserve lands. The most well-known is *Apsassin et al. (Blueberry River Indian Band) v. The Queen*,[8] which was decided prior to *Delgamuukw*. In *Apsassin*, the Supreme Court of Canada held that, pursuant to s.39 of the *Federal Court Act*, provincial limitations periods were applicable to the claim against the federal Crown for damages for breach of fiduciary duty in relation to the surrender of a reserve. However, because of the facts and the nature of the action in *Apsassin*, certain constitutional issues which might arise in other cases did not arise. In particular:

(a) section 39 of the *Federal Court Act* was applicable in *Apsassin*. Section 39 is a federal enactment incorporating by reference provincial limitations periods in

relation to claims brought in Federal Court.[9] Because s.39 is federal. no issue arose in *Apsassin* regarding the constitutional power of the provincial legislatures to legislate in relation to claims in respect of aboriginal or Indian lands; and

(b) the Plaintiffs' action was commenced prior to 1982 and concerned events well before 1982. In the circumstances. it was very difficult to argue that federal jurisdiction to extinguish aboriginal or Indian claims was limited by s.35 of the *Constitution Act, 1982.*[10]

Thus, *Apsassin* did not address provincial jurisdiction to enact limitations legislation affecting claims in respect of aboriginal lands and rights, and did not address federal jurisdiction, post-1982, to do the same.

The issue of provincial jurisdiction arose in *Thomas et al. (Stoney Creek Indian Band) v. Alcan Aluminum,* [1999] 1 C.N.L.R. 192.[11] *Thomas* involved an action for various remedies, including damages, for trespass by way of the unauthorized construction of a road across the Plaintiffs' reserve. The Defendant, Alcan, brought a motion for summary judgment alleging that the Plaintiffs' claim for damages was, for the most part, statute barred. The trial Judge held that the action was not statute-barred as the British Columbia *Limitation Act* was constitutionally inapplicable in respect of a claim for damages arising out of interference with the possession and use of reserve lands. The Court held that:

(a) as a matter of constitutional law, jurisdiction to legislate in relation to "Lands reserved for the Indians" is reserved to Parliament;

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8 [1995] 4 S.C.R. 344.

9 A similar provision exists in relation to claims brought against the federal Crown generally: *Crown Liability and Proceedings Act,* R.S.C. 1985, c. C-50, s. 32.

10 Generally speaking, the limitations periods in effect at the time an action is commenced will govern, unless the action has already become statute-barred by previous legislation. In *Apsassin,* the timing was such that the claim in respect of the original surrender became statute barred between the enactment of the new limitations legislation in 1975, which introduced the 30 year ultimate limitation period, and the enactment of s. 35 of the *Constitution Act,* 1982. Ironically, the Plaintiffs in *Apsassin* might have had a stronger case in relation to limitations if they had delayed further in commencing their action since, after 1982, it would be possible to argue that s. 39 of the *Federal Court Act* was rendered constitutionally inapplicable by virtue of s. 35 of the *Constitution Act, 1982.*

11 The decision is under appeal. I understand that the appeal was argued in late April but at the time this paper was written the Court of Appeal had not yet pronounced judgment.

(b) section 88 of the *Indian Act* does not widen the ambit of provincial laws in relation to "Indian lands" (as opposed to in relation to "Indians");

(c) as a result, provincial laws of general application are constitutionally inapplicable to affect occupancy or possession of reserves; and

(d) a claim for damages for interference with reserve lands is wholly dependent upon a Band's possession or claim to possession of an Indian reserve and is sufficiently integral to such possession to come within the exclusive jurisdiction of Parliament.

Thus, the British Columbia *Limitation Act* was held constitutionally inapplicable to the Plaintiffs' action. The decision is currently under appeal.[12]

The applicability of provincial limitations periods was also considered in the very recent decision of the Ontario Superior Court of Justice in *Chippewas of Sarnia Band, supra* (April 30, 1999). This is a very lengthy decision and I will attempt to summarize it very briefly.

In about 1853 a Crown patent was issued in relation to a portion of the Sarnia Chippewas' reserve. However, as the Court found, the lands were not surrendered and therefore the Crown grant was invalid. The Chippewas claimed the return of the lands as well as damages against the Crown. One of the issues raised for the decision of the Court[13] was whether the claims were statute barred.

The Court considered various statutory limitations, both pre- and post-confederation, and held them all inapplicable. However, the Court imposed a 60-year "equitable limitation period" in respect of the claim to recover lands from innocent third party purchasers for value. Since the area in question had been populated by citizens of Sarnia for a very lengthy period of time, and the Court found that the current occupiers could not have discovered the defect in the original grant even with due diligence, the effect was that the Chippewas were essentially barred from recovering any of the reserve lands, but were entitled to pursue their claim in damages against the Crown.

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12 See note 11.

13 The decision relates to various summary judgment motions brought by the parties/

The statutory limitations considered by the court included:

(a) Ontario limitations statutes passed after confederation. For reasons similar to those given by the British Columbia Supreme Court in *Thomas*. the Court held that the province after confederation had no power to extinguish Indian title, because the question of Indian title to a reserve was within the exclusive jurisdiction of Parliament, and that s. 88 of the *Indian Act* did not incorporate such laws by reference. In addition to the reasons given in *Thomas,* the Court relied upon the paramountcy of treaty rights under s. 88 (in this case, the lands were reserved by treaty);

b) Section 39 of the *Federal Court Act* and s. 32 of the *Crown Liability and Proceedings Act.*[14] Section 39 was not applicable since the proceedings were not in Federal Court. Section 32 was not applicable because the federal Crown had not raised it. The section was not available to parties other than the Crown. In addition, the Court gave two further reasons why section 32 was not effective to extinguish the Chippewas' claim: (1) section 32 does not express a clear and plain intention to extinguish aboriginal title; and (2) section 32 is expressly subject to any contrary provision in a federal statute, and "the Indian Act otherwise provides a comprehensive system for the alienation of Indian land, a system completely inconsistent with extinguishment by provincial statute". [15]

c) Pre-confederation statutes of the colony of Upper Canada. While the colony in most respects had legislative jurisdiction equivalent to Parliament, the pre-confederation statutes did not have the effect of extinguishing the Chippewas' claim because (1) they did not express a clear and plain intention to extinguish aboriginal title; (2) even prior to 1982, Parliament had no power to unilaterally extinguish a treaty right (in this respect, the Court held that treaty rights "add an extra level of protection to aboriginal rights"[16]); (3) the power to extinguish

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14 See note 9, above.
15 Paragraph 502.
16 Paragraph 593.

> aboriginal or treaty rights prior to confederation was reserved to Imperial Crown and was beyond the competence of the colonies.

The Court thus rejected all statutory limitations. In addition, the Court rejected defences based on acquiescence and laches, given the knowledge and circumstances of the Chippewas at relevant times. However, the Court held that the equitable principles protecting third party purchasers for value without notice were applicable to the claim for the return of the reserve lands.

The Court took an interesting approach to the question of third party purchasers. First, it recognized that "the defence of good faith purchaser for value without notice is a fundamental aspect of our real property regime designed to protect the truly innocent purchaser who buys land without any notice of a potential claim by a previous owner"[17] . However, if the traditional equitable rule were applied, untempered by any recognition of the special status and historical circumstances of First Nations, the result would be that aboriginal or Indian interests would be extinguished immediately on purchase by an innocent third party. In order to arrive at a more appropriate formulation of the rule in the circumstances, the Court held that it should apply the contemporary doctrines of justification and reconciliation to arrive at a result consistent with the honour of the Crown. The application of the test in the circumstances of that particular case, which I will not go into in detail, resulted in the adoption of a 60-year limitation "by analogy" with an Ontario limitation period for claims involving the Crown.

There is much to consider and digest in the reasons for judgment in the *Chippewas of Sarnia* case. It should be remembered, however, that the analysis in the case is dependant to a substantial degree upon the particular facts and circumstances in the case. In particular, the application of an equitable limitation period was based upon the recognition by the Court that the Band had an adequate alternative claim in damages against the Crown,[18] and the very clear evidence that the purchasers could not have known about the Band's claim. In the latter respect, it seems to me that many cases in British Columbia will be easily distinguishable.

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7 Paragraph 740.

8 The result may have been different if the Crown had pursued a limitations defence.

A final note to the practitioner regarding limitation periods in relation to aboriginal and Indian lands. In two recent cases, First Nations have been prevented from challenging the constitutional applicability of limitation periods due to a failure to serve notices of constitutional question: *Fairford First Nation v. Canada,* [1998] F.C.J. No. *1632; Bearspaw, Chiniki and Wesley. Bands v. Pan Canadian Petroleum Ltd.,* [1999] 1W.W.R. 41 (QB).

III. HOW MUCH COMPENSATION IS PAYABLE

An issue which has not received any direct judicial consideration, since *Delgamuukw* was decided approximately a year and a half ago, is how "fair compensation" should be calculated.

The *Delgamuukw* decision itself gives us one or two clues as to the Court's thinking on this subject. First, the brief discussion regarding compensation is premised on an explicit reference to the "economic aspect of aboriginal title. In this respect, aboriginal title is contrasted with food fishing rights. Food fishing rights differ from aboriginal title in a number of ways, but probably most importantly they do not have commercial value, being limited to sustenance and other non-commercial uses, and they are not exclusive. The exclusive right to use lands and resources has an obvious commercial value. It would appear that it is this commercial value in respect of which compensation is to be paid.

A further clue is provided by the reference to cases involving breach of fiduciary duty. The reference is likely to cases such as *Guerin*[19] and *Apsassin*[20] involving breach of fiduciary duty in relation to the surrender of reserve lands. There is a natural tendency in such cases to focus upon the commercial value of the lands, given that a surrender is normally given in order to exploit that commercial value, and in particular the cases have focussed upon the financial benefit which the Band would have reaped if the Crown had lived up to the terms of the surrender or had more prudently exercised its powers in relation to the surrendered lands.

Leaving aside, for a moment, the question of whether a purely commercial approach to compensation for aboriginal title infringements is appropriate, I note that it now appears to have been settled that no "discount" is to be applied in assessing the commercial value of Indian or aboriginal title lands simply because the aboriginal or Indian interest is not the same as a fee

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19 *Supra*, note 6.

simple interest. In *Musqueam Indian Band v. Glass,*[21] the Federal Court of Appeal overruled a series of trial level decisions, dealing with the rent payable for leasehold lands on reserve. Which had held that Indian interest in reserve lands was less valuable than a fee simple interest in similar lands off reserve because, *inter alia,* the Indian interest was something less than a fee simple. The Court of Appeal concluded:

> The fact that these lands are reserve lands does not, in my view. diminish the market value of the property in question. To hold that the aboriginal interest in this piece of land has made it worth less than its open market value is an untenable concept. [22]

The reasons for judgment of the Court of Appeal in the *Musqueam* case are well reasoned and persuasive.

As to whether a purely commercial, or market approach should be taken to the valuation of aboriginal interests in the context of the justification analysis is a question which is not easy to answer. Obviously, as the Chief Justice pointed out in *Delgamuukw,* the aboriginal interest in land has a commercial aspect, and one of the effects of an infringement may be to diminish the commercial value of the land for the First Nation. Obviously, also, non-monetary values cannot be adequately or precisely calculated in terms of monetary compensation, and for this reason our judicial system has given limited recognition to non-economic losses in terms of damage awards and monetary compensation. There are exceptions, such as non-pecuniary loss in personal injury cases and "solatium" payments in expropriation cases,[23] but these are generally kept within strict limits. Thus, to the extent that the adequacy of compensation is something that must be determined by a court as part of the justification analysis, the emphasis is likely to be upon the economic or "market value" of the resource in question and the extent to which that value has been diminished by the infringement.

That said, it seems to me that to focus exclusively on economic issues would not only create inherent injustices, but would appear to miss the point to some extent with respect to the nature and importance of aboriginal title. Market values are influenced by a number of factors, many of

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20 *Supra,* note 8.
21 (1998) 137 F.T.R. 1, decided in December of 1998.
22 Paragraph 73.
23 See, for example, Lavarch and Riding, "A New Way of Compensating: Maintenance of Culture Through Agreement", *Lands, Rights, Laws: Issues of Native Title,* Issue paper no. 2 1, April, 1998.

which have nothing to do with the relationship between a First Nation and its territory. The proximity or distance of a traditional territory to a major urban centre. for example. may have a very substantial influence on market values while having nothing to do with the value of the land to its people. Certainly, there is no reason why a First Nation in negotiating compensation for a surrender or diminishment of its interest in traditional lands should settle for market value, and I do not think that there is anything in *Delgamuukw* which ought to persuade it to do so. In negotiating compensation, obviously, there will be many additional factors to be taken into account, including the unique value of the land to present and future generations. The ultimate question, of course, will be at what price the First Nation is prepared to part with its land or an interest in it, in light of all of the circumstances, economic or otherwise.