

ABORIGINAL TITLE UPDATE

Provincial Jurisdiction After Delgamuukw

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PROVINCIAL JURISDICTION AFTER DELGAMUUKW

I Legislative Jurisdiction

A. Introduction

In *Delgamuukw v. B. C.* (11 December 1997), No. 23 799 (S.C.C.), Chief Justice Lamer said this at paragraph 160 of his reasons:

The aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., Sparrow) and provincial (e.g., Cote) governments. However, s. 35(1) requires that those infringements satisfy the test of justification.

He also said this at paragraphs 177 and 178:

As I explain below, the Court has held that s. 91(24) protects a 'core' of Indianness from provincial intrusion, through the doctrine of interjurisdictional immunity.

It follows, at the very least, that this core falls within the scope of federal jurisdiction over Indians. That core, for reasons I will develop, encompasses aboriginal rights, including the rights that are recognized and affirmed by s. 35(1). Laws which purport to extinguish those rights, therefore, touch the core of Indianness which lies at the heart of s. 91(24), and are beyond the legislative competence of the provinces to enact. The core of Indianness encompasses the whole range of aboriginal rights that are protected by s. 35(1). Those rights include rights in relation to land; that part of the core derives from s. 91(24)'s reference to 'Lands reserved for the Indians.' But those rights also encompass practices, customs and traditions which are not tied to land as well; that part of the core can be traced to federal jurisdiction over 'Indians.' Provincial governments are prevented from legislating in relation to both types of aboriginal rights.

Between these two statements is a good deal of uncertainty. In that uncertainty a study of provincial jurisdiction after *Delgamuukw* begins.

B. Interjurisdictional Immunity

The leading decision on interjurisdictional immunity is *Bell Canada v. Quebec*, [1988] 1 S.C.R. 749. At 762 Mr. Justice Beetz, writing for the Court said this:

works, such as federal railways, things, such as lands reserved for Indians, and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, whether municipal legislation, legislation on adoption, hunting, or the distribution of family property; provided, however, that the application of these provincial laws does not bear on those subjects in what makes them specifically of federal jurisdiction.

When provincial laws of general application bear on what makes federal subjects like Indians and lands reserved for the Indians specifically of federal jurisdiction, those laws are prevented from applying to those subjects by the constitutional doctrine of interjurisdictional immunity. The laws are read down and are of no force or effect.

When Chief Justice Lamer says that aboriginal rights-and aboriginal title is a subset of aboriginal rights-fall within the core of federal jurisdiction, the necessary corollary of this conclusion is that provincial laws do not apply to aboriginal rights including aboriginal title.

So we are left with a mystery. If aboriginal title is protected by interjurisdictional immunity from the application of provincial law, it seems that the statement by the Chief Justice at paragraph 160 of his reasons, that provincial governments can infringe aboriginal rights, including aboriginal title, cannot be unqualified. I propose to identify and examine two instances of provincial interference with aboriginal title in the following sections.

C. The Doctrine of Incidental Effect

The Constitutional law of Canada has long recognized that valid provincial legislation may incidentally affect a subject matter exclusively assigned to the federal legislature. So in *Cardinal v. Attorney General for Alberta*, [1974] S.C.R. 695 at 702-03, Mr. Justice Martland said:

A Province cannot legislate in relation to a subject matter exclusively assigned to the Federal Parliament by s. 91. But it is also well established that Provincial legislation does not necessarily become invalid because it affects something which is subject to Federal legislation.

Provincial legislation may incidentally affect matters assigned exclusively to the federal government, including aboriginal title and rights. Any effect of provincial laws upon aboriginal title and rights would seem to come within this principle. But the doctrine of interjurisdictional immunity qualifies the power of the provinces to affect incidentally matters assigned exclusively to

the federal government, as Chief Justice Dickson noted in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 at 18, In my opinion, the line between the doctrines of incidental affect and interjurisdictional immunity qualifies the power of a province to affect aboriginal title.

Turning again to *Delgamuukw*, at paragraph 160 Chief Justice Lamer uses as authority for the proposition that provincial legislation may infringe aboriginal rights and title (subject to justification under the test laid out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075) the case of *R. v. Cote*, [1996] 3 S.C.R. 139. It is important to note, however, that the provincial legislation in *Cote* did not constitute a *prima facie* infringement of aboriginal rights (paragraph 80), and so was not subject to justification (paragraph 83). The provincial law incidentally affected Indians and lands reserved for the Indians, to put it in terms of the doctrines we have been discussing, but it did not touch the central federal core of head s. 91(24) of the *Constitution Act, 1867*. In that case, the Indian who was engaged in the exercise of aboriginal rights committed an offence under provincial law, and was not protected by s. 35(1) of the *Constitution Act, 1982*. He could not establish a *prima facie* infringement of his aboriginal rights by that law. Examples of this type of situation are not hard to envisage. If an Indian is going out to hunt, for example, and on the way to the hunting ground speeds, it is no defence to the speeding ticket to say he was hunting.

D. Section 88 of the Indian Act

If the provincial law had constituted an infringement of aboriginal rights or title, the doctrine of interjurisdictional immunity would have been engaged. Provincial laws cannot apply of their own force to matters at the core of subjects within exclusive jurisdiction of the federal Parliament. In that case, federal referential incorporation of that provincial law must occur before that provincial law can apply. Such an incorporation by reference can occur by virtue of s. 88 of the *Indian Act* which reads:

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation, or bylaw made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

As Mr. Justice Beetz wrote in *Dick v. the Queen*, [1985] 2 S.C.R. 309 at 326 and 327:

I believe a distinction should be drawn between two categories of provincial laws. There are, on the one hand, provincial laws which can be applied to Indians without touching their Indianness, like traffic legislation; there are, on the other hand, provincial laws which cannot apply to Indians without regulating them qua Indians ...

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I have come to the view that it is to the laws of the second category that s. 88 refers. I agree with what Laskin CJ wrote in *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751 at 763:

When s. 88 refers to 'all laws of general application from time to time in force in any province' it cannot be assumed to have legislated a nullity but, rather, to have in mind provincial legislation which *per se*, would not apply to Indians unless given force by federal reference ...

So when Chief Justice Lamer said, at paragraph 160, that provincial legislation may infringe aboriginal rights and title, he was either saying that provincial laws could incidentally affect aboriginal rights, provided that that effect did not amount to a *prima facie* infringement under the test laid down in *Sparrow*, or that they could amount to a *prima facie* infringement, subject to referential incorporation and subject to justification. Questions about the test for establishing a *prima facie* infringement, as laid out in *Sparrow*, loom very large. There are two possibilities: either provincial laws are not a *prima facie* infringement of aboriginal title, but only incidentally affect it, in which case they apply to but do not infringe aboriginal title, or they are a *prima facie* infringement of aboriginal title, in which case they cannot apply without federal referential incorporation. But a provincial law given federal force applies only as a federal law.

E. Section 88 and Aboriginal Title

The application of s. 88 to aboriginal title and rights is not without controversy. In the first place, aboriginal title constitutes an interest in land and relates to lands reserved for the Indians, the second subject matter of head 91(24) of the *Constitution Act*, 1867. Section 88 speaks only of Indians, the first subject matter of that head of power. In the second place, no infringement of aboriginal title can take place without justification, and there is a strong argument that no provincial law of general application can be justified according to the dictates of s. 35 of the *Constitution Act*, 1982. This second point applies with equal force to all aboriginal rights.

As to the first point, Chief Justice Lamer in *Delgamuukw* was careful to distinguish between aboriginal title and other aboriginal rights in this respect. At paragraph 3 he said the case concerned

title, which ... is a right *in land*, and its relationship to the definition of the aboriginal rights recognized and affirmed by s. 35(1) in *Van der Peet* in terms of *activities*.

Aboriginal title is a right in land on which s. 88 is silent. It is far easier to see how that section can apply to Indian persons and their activities than it is to see how it can apply to rights in land. Aboriginal title is land reserved for the Indians under the second subject matter of head 91(24), as Chief Justice Lamer said at paragraph 174.

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More to the point, the Supreme Court has never determined that s. 88 does in fact apply to reserve lands. In *Derrickson v. Derrickson*, [1986] 2 S.C.R. 285 at 297-99 the question was reviewed but left undecided. Provincial laws would have to be read down because of the doctrine of interjurisdictional immunity, and could not be read up through s. 88 if they amounted to a *prima facie* infringement of aboriginal title, unless s. 88 applies to Indian lands.

As to the second point, justification requires that the law be implemented in accordance with the special fiduciary relationship between the Crown and the Indians. *Sparrow* lays down that in the context of the Indian food fishery, s. 35(1) requires that that fishery be given priority over competing users, and at 1119 says this:

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.

Chief Justice Lamer discusses aboriginal title and justification generally at paragraphs 162-164 of his reasons. The question which is not answered is whether a provincial law of general application can be a law implemented in a manner consistent with the fiduciary relationship of the Indians and the Crown. In *R. v. Adams*, [1996] 3 S.C.R. 101 at paragraph 54 Chief Justice Lamer said this:

In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfill their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.

In my view, any law which contains specific guidance on the accommodation of aboriginal title or aboriginal rights, is, with respect to that guidance, no longer a law of general application but a law in relation to aboriginal title and rights which are matters exclusively within the jurisdiction of the federal government. It would be an invalid law—a law beyond provincial competence to enact. An invalid law cannot be referentially incorporated by s. 88, because that section only gives federal force to provincial laws which are valid but inapplicable to Indians, so that those valid laws apply to Indians. See in this respect the reasons of Mr. Justice Beetz in *Natural Parents v. Superintendent of Child Welfare*, at 487, who said that even a paragraph in a provincial statute which said that nothing in the section affected the status, rights, privileges,

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disabilities and limitations of an Indian was beyond provincial competence, since whether the status, rights, privileges, disabilities and limitations of an Indian were affected was a matter exclusively for Parliament to determine, under head 91(24) of the *Constitution Act*. To similar effect are the words in *Dick*, where Mr. Justice Beetz distinguished laws of general application and laws which discriminate between various classes of persons. A provincial law which attempts to conform to the dictates of s. 35(1) must give special recognition to the Indians with respect to their aboriginal rights because that is the only way a law can be implemented in a manner consistent with the fiduciary relationship between the Crown and the Indians. Such a law, of necessity, discriminates between various classes of persons, Indians and non-Indians, even if it does not discriminate against Indians. It is not a law of general application, but a law in relation to head 91(24).

There is Supreme Court of Canada authority for this position. In *R. v. Badger*, [1996]1 S.C.R. 771 at paragraph 69, Mr. Justice Cory said:

Pursuant to the provisions of s. 88 of the *Indian Act*, provincial laws of general application will apply to Indians. This is so except where they conflict with aboriginal or treaty rights, in which case the latter must prevail.

The remark shows a preference on the part of the Supreme Court to read aboriginal rights into s. 88, giving them the same status as treaty rights under that section. Chief Justice Lamer shows the same preference in *Delgamuukw* at paragraph 183 when he says the exclusion of treaty rights from the scope of s. 88 demonstrates that s. 88 was not meant to undermine aboriginal rights.

It might be argued that a provincial law infringing aboriginal title could be justified as a matter of administrative discretion. The silence of the legislation, which preserves the surface generality of its application, might be cured by provincial executive decisions which administered the law according to the requirements for justification. This would, however, be contrary to a long line of decisions which make clear that the executive authority in this country is as much subject to the division of powers as is legislative power: *Liquidators of the Maritime Batik v. Receiver General of New Brunswick*, [1892] A.C. 437; *Bonanza Creek Gold Mining Co. v. the King*, [1916]1 A.C. 566; *In re Silver Brothers*, [1932] A.C. 514; and more recently *Air Canada v. Attorney General of British Columbia*, [1986] 2 S.C.R. 539. That case concerned the duty of the Attorney General to give, and the executive to accept, good legal advice, and decided, ironically in light of *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313, that the Attorney General could be compelled to advise the executive to issue a fiat in cases which were not frivolous. Mr. Justice La Forest wrote at 546 that executive

discretion must be exercised in conformity with the dictates of the Constitution, and the Crown's advisors must govern themselves accordingly. Any other course would violate the federal structure of the Constitution.

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So there is no power in the executive to administer a law of general application in a manner consistent with the s. 35(1) requirement for justification, if there is no power for the provincial legislature to legislate in that way. To put it another way, the general application of provincial laws does not empower those administering those laws beyond the scope of provincial competence. In the words of Chief Justice Laskin in *Natural Parents v. Superintendent of Child Welfare*, at 76 1:

Nothing ... accretes to provincial legislative power by the generality of the language of provincial legislation if it does not constitutionally belong there.

As executive power is dependent on legislative power, it can also be said that nothing accretes to provincial executive power by the generality of the language of provincial legislation if it does not belong there. The power of executive decision-making with respect to aboriginal title and rights rests solely with the federal executive.

The problem of administrative discretion and aboriginal rights was addressed in *R. v. Adams*. I repeat what I cited earlier at paragraph 54:

In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfill their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.

Can it be said that s. 88 meets this test for fulfillment of the federal Crown's fiduciary duty? It allows massive encroachment on aboriginal rights by all manner of provincial laws without any direction whatsoever, and it leaves those enacting those laws-the provinces-powerless to give those directions. In *Cote*, addressing s. 88 in the context of justification and treaty rights, the Chief Justice said at paragraph 87:

The statutory provision does not *expressly* incorporate a justification requirement analogous to the justification stage included in the *Sparrow* framework. But the precise boundaries of the protection of s. 88 [afforded to treaty rights] remains a topic for future consideration. I know of no case which has authoritatively discounted the potential existence of an *implicit* justification stage under s. 88. In the near future, Parliament will no doubt wish to re-examine the existence and scope of this statutory protection in light of the parallel constitutionalization of treaty rights under s. 35(1).

A parliamentary solution, incorporating guidelines for justification of infringements into s. 88, may be viable as a matter of administrative discretion. However, Parliament probably cannot delegate to provincial legislatures the power to enact those guidelines without running afoul of the rule against interdelegation set out in *Attorney General for Nova Scotia v. Attorney General for Canada*, [1951] S.C.R. 31. But the point that s. 88 needs to be brought into conformity with s. 35(1) is surely well taken. As it now stands, all issues of justification rest squarely with the federal government, including issues of compensation. I am sure the Province will like to hear that it is not the one who has to pay compensation to the aboriginal nations, but I am not sure that it appreciates the wider implications of the conclusion that justification is a federal matter. Perhaps the financial interests of the federal government will motivate them to re-examine this law, if their fiduciary responsibility does not.

I should add that if the aboriginal peoples own the land, they only need to be compensated for interferences with their title. All the people who bought the land in good faith and in reliance on provincial statutes also have a right to compensation from the Province. So, paradoxically, the more land the aboriginal people keep the less money Canada has to pay. The more land they keep, the more money the province will have to pay to third parties. Our Constitution is so well designed that the fiduciary duties and financial interests of Canada coincide. The two governments will have to negotiate against one another with respect to money, rather than them both negotiating against the aboriginal people.

II. Proprietary Jurisdiction

Delgamuukw follows *St. Catherine's Milling and Lumber Co. v. The Queen* (1888) 14 App. Cas. 46, which long ago decided that Indian land rights were "an interest other than that of a Province" in land in the Province. The quoted words come from s. 109 of the *Constitution Act, 1867*, which gives to the Province the ownership of the land in the Province subject to interests "other than that of the Province." In other words the Province does not own the land to the extent that it is burdened by Indian land rights, whether aboriginal title, or site specific rights of a more limited nature.

It is fundamental that aboriginal title is an exclusive or shared exclusive right. The land burdened by aboriginal title is not available to the province as a source of revenue until the land is disencumbered of aboriginal title (*St. Catherine's Milling* at 59). *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 at 409 and 410, discussing aboriginal title there said that it "may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference." In my opinion, those rights of administrative interference rest exclusively with the federal government by virtue of the division of powers, and the provincial power, absent federal referential incorporation, is only that which falls within the doctrine of incidental effect. Exclusive power of administrative interference over aboriginal title as aboriginal title rests with the federal government.

Of course, it all depends upon the ability of aboriginal peoples to prove exclusive or shared exclusive aboriginal title. But in the absence of title, there may be another sort of aboriginal

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interest in land, involving aboriginal site specific rights which are not exclusive. Those rights, tied as they are to specific land, probably also constitute a burden on provincial title, but only to the extent of the aboriginal right. See *Mabo v. Queensland* (1992), 175 C.L.R. 1 at 88 where Deane and Gaudron JJ. wrote:

The content of such a common law native title will, of course, vary according to the extent of the pre-existing interest of the relevant individual, group or community. It may be an entitlement of an individual, through his or her family, band or tribe, to a limited special use of land in a context where notions of property in land and distinctions between ownership, possession and use are all but unknown. In contrast, it may be a community title which is practically 'equivalent to full ownership' (footnotes omitted).

III. Conclusion

Delgamuukw ends with the encouragement of negotiations, and one can only agree that successful negotiations are desirable. But in my view those negotiations must be guided by past and future court decisions which gave and will give them their impetus. The courts, it seems to me, must be a significant part of the negotiations, since the constitutional questions involved cannot be negotiated away. To take one example, the provincial desire to deem treaty land not to be land reserved for the Indians seems to be a false hope, given that land reserved for the Indians is broad enough to encompass all land reserved for the Indians on any terms. Surely treaty land fits within that definition. Perhaps now, given that governmental powers and revenues are questionable, the governments have a real reason to see those negotiations through to the end, even though that will require tough political choices. In my view constitutional limitations on the ability of governments to take what was formerly the path of least resistance with respect to aboriginal peoples may provide the key to negotiating fair and honourable treaties. These limits, however, are only revealed in court decisions. In the final analysis, any ambiguity in the reasons for judgment in *Delgamuukw* can best be seen as an inducement to negotiate solutions which work for all parties, not as a way of ignoring the legal reality of aboriginal title in British Columbia.