

Land, Rights, Laws: Issues of Native Title

Native Title Research Unit

Australian Institute of Aboriginal and Torres Strait Islander Studies

Editor: Penelope Moore

April 1998

Issues paper no. 22

*The recognition of native title by the High Court in *Mabo v Queensland [No.2]*, and the legislative regime of the Native Title Act 1993 (Cth), have transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementing that recognition has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion.*

*The courts continue to play an important role in the recognition and protection of rights. In developing the law in this area, the courts consider decisions from jurisdictions that share common histories of colonisation and common legal structures. In this light, Lisa Strelein reviews the recent decision of the Supreme Court of Canada in *Delgamuukw v British Columbia* and reflects on some issues that may be relevant for Australian courts.*

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'BELIEFS, FEELINGS AND JUSTICE'

DELGAMUUKW V BRITISH COLUMBIA: A JUDICIAL CONSIDERATION OF INDIGENOUS PEOPLES' RIGHTS IN CANADA

Lisa Strelein

In Australia, where rights are not enshrined in the Constitution, the common law plays an important role in recognising and protecting rights. In this role, the common law, by its nature, is a developing system of law. While responding to new circumstances, the common law also has roots in the earliest English law. Australia shares these roots with other common law countries, many of which also share a history of colonisation. Therefore, when considering the common law of Indigenous rights, the courts in Australia draw on the experiences of countries like Canada, New Zealand and the United States.

These countries have different political structures, particularly in the constitutional protection of rights, and different histories of recognition in the common law, that would make uncritical evaluation misleading. Yet, the theorising of courts in Canada and other places is an important source from which the courts can draw to structure the development of the common law in Australia.

This paper examines the most recent authoritative decision on Indigenous rights from the Canadian Supreme Court, including the history of the case, to highlight the significance and relevance of the judgement. *Delgamuukw v British Columbia* has been watched carefully by commentators and practitioners because of the assertions of Indigenous peoples rights of self-government. The final decision of the Supreme Court did not address this issue but discussed general principles of the nature and proof of Aboriginal rights and, in particular, how the courts should conduct cases concerning Indigenous peoples' claims. In both of these contexts, the decision is important to the development of common law native title in this country.

The history of the claim

The *Delgamuukw case* concerned the claims of the Gitksan and Wet'suwet'en peoples to 58,000 square kilometres of their traditional lands, which are located within the Canadian Province of British Columbia. Delgamuukw, hereditary chief of the House of Delgamuukw, along with 35 Gitksan and 13 Wet'suwet'en chiefs, took their claim to traditional territories to the courts in 1984. The *Delgamuukw case* began in the Supreme Court of British Columbia before Chief Justice Alan McEachern who, after 374 days of evidence and argument, handed down 400 pages of reasons, with another 100 pages of schedules.¹ The bulk of the evidence provided to the court was from the Gitksan and Wet'suwet'en peoples themselves, explaining their social and legal systems and histories to establish their ownership and jurisdiction claims. Much of this was explained through *adaawk*, the Gitksan sacred histories, and the *kungax*, the songs and performances of the Wet'suwet'en relationship to the land.

In all, McEachern CJ showed a disturbing lack of respect for the plaintiffs' claims. McEachern CJ rejected the plaintiffs claims based on a narrow construction of Aboriginal rights under Canadian law and also dismissed much of the evidence provided by the plaintiffs. In addition, McEachern CJ rejected any rights of Indigenous peoples to self-government except those conferred by provincial and federal government. McEachern CJ went even further to limit the rights of Indigenous peoples, called Aboriginal rights in Canadian law, to traditional use and occupation of vacant Crown lands, for sustenance purposes only. These rights were characterised as communal but not proprietary in any sense. Moreover, the rights depended not on any notion of inherent rights but on the fiduciary obligation of the Crown. That is, Aboriginal rights are subject to the pleasure of the Crown, until that land is dedicated for another purpose.

The first appeal

The plaintiffs first appealed against the decision of the trial judge to the Court of Appeal for British Columbia, before a full court.² The decision of the Appeal Court was handed down in June 1993 and was therefore able to consider the decision of the High Court of Australia in *Mabo v Queensland [no. 2]*.³ A majority of the Court (3-2) dismissed the appeal. The lead judgement of the majority by MacFarlane JA (with Taggart JA concurring) agreed with the trial judge that the claim of ownership had not been made out and that a claim to jurisdiction could not be entertained. MacFarlane JA upheld the findings with respect to limited Aboriginal rights over the areas of vacant Crown land.

MacFarlane JA did recognise that Aboriginal rights in land do not depend on recognition by the Crown but have their source in historic occupation. Relying on the decision of the Supreme Court of Canada in *R v Sparrow*,⁴ the nature of Aboriginal rights was characterised as *sui generis*, or unique, to be determined by what the Aboriginal society regarded as an integral part of their distinctive culture. However, Aboriginal rights were said to be subject to regulation, impairment or extinguishment by valid exercise of governmental power. While this was not thought to be the case in relation to the general legislation referred to by McEachern CJ, the trial judge's findings were not disturbed.

Any claim to jurisdiction or government rights was dismissed, and instead Indigenous peoples were likened to any voluntary association that may have rules to which people agree to be bound. Anything else, it was suggested, would derogate from the division of powers between federal and provincial governments, as set out in the Constitution, and would at any rate be an issue for negotiation. Wallace JA went further to suggest that a claim to jurisdiction was a claim to sovereignty which was incompatible with the principles of parliamentary sovereignty and supreme legal authority.

In contrast, Lambert JA, dissenting, provided a comprehensive review of the case law on Aboriginal rights including consideration of *Mabo's case*. Here too, the characterisation of rights from *Sparrow* was adopted and Lambert JA agreed that such rights were subject to extinguishment and regulation so long as a clear and plain intention is revealed, which, he felt, had not been the case in relation to the facts before the court. Lambert JA criticised the trial judge's treatment of the evidence in the case. He argued that such evidence should be weighed, like all other evidence, against counterveiling evidence not against some absolute standard. When the bulk of the evidence in Indigenous peoples' claims are oral accounts of law and country, the treatment of those accounts is vital. To this end, Lambert JA agreed with Justice Brennan in *Mabo's case* that the difficulty of establishing things by oral evidence should not be used to deny the existence of title.⁵

Lambert JA also criticised the legal tests applied to determine whether the claims had been made out. At the heart of the errors, Lambert JA suggested, was a fundamental misconception of the nature of Aboriginal title. Citing with approval Justice Brennan's conceptualisation of native title in *Mabo's case*, Lambert JA observed that, 'it is a mistake to try and understand aboriginal title in terms of common law concepts'.⁶ Lambert JA felt that the claim to jurisdiction had similarly been misconstrued, concluding that rights of self-government, like other Aboriginal rights depend on the customs, traditions and practices which form an integral part of the culture of the Aboriginal people.

The final appeal

The Gitksan and Wet'suwet'en plaintiffs appealed again to the highest court in Canada - the Supreme Court of Canada. This Court was unanimous in allowing the appeal.⁷ The outcome, however, was not a comprehensive consideration of the claims put forward by the Gitksan and Wet'suwet'en peoples. While acknowledging that some flexibility is required in developing areas of law, the amalgamation of the smaller claims of the houses into two communal claims was thought to require a new trial. The court was therefore unable to consider the merits of the case in relation to these issues. The importance of the case however, led the court to examine the approach taken by the trial judge and to

comment on the general principles applicable to cases involving Aboriginal title. Broadly, these issues are: the treatment of evidence in Aboriginal claims; the nature of Aboriginal title; the requirements of proof; infringement; and negotiation and good faith.

Evidentiary issues in Aboriginal title cases

As a general rule throughout common law countries, an appeal court will be reticent to substitute its own findings of fact for those made at trial, particularly where they were based on an assessment of the testimony and credibility of witnesses, unless there is a palpable error by the trial judge. However, Lamer CJ stated that in cases concerning Aboriginal rights, intervention is warranted where the trial judge fails to 'appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims', when either applying the rules of evidence or interpreting the evidence before the court. Such cases demand a unique approach which accords due weight to the perspective of Aboriginal peoples.

Lamer CJ suggested that, in practical terms, where oral histories of Aboriginal peoples may be the only record of their past, rules of evidence need to be adapted so that evidence, like the *adaawk* and *kungax*, can be accepted 'on an equal footing' with other forms of historical evidence. For Lamer CJ, to do otherwise would place 'an impossible burden of proof' on Aboriginal peoples.⁸ Lamer CJ criticised the trial judge for giving the oral histories no independent weight and expressed grave fear that if the trial judge's reasoning were followed, 'the oral histories of aboriginal peoples would be consistently and systematically undervalued by the Canadian legal system'.⁹

Lamer CJ also expressed concern over the trial judge's decision to exclude evidence that could notionally have been received under an exception to the hearsay rule. The trial judge had suggested that the evidence was not reliable due to the limited number of people who knew the history, disputes as to its content, and most importantly, the fact that the witnesses and their peoples had been discussing the land claim for many years. This view was rejected by the Chief Justice, who acknowledged the 'perversity' of such a finding if the Court were to use the refusal of governments to acknowledge the rights of Aboriginal peoples and the need to resort to the courts as the basis for excluding evidence that may prove the existence of those rights.

The nature of Aboriginal title

The justification for a 'special approach' to evidence in Aboriginal rights cases lies in the nature of those rights as a bridge between Aboriginal and non-Aboriginal societies. To this end, Lamer CJ reiterated the *sui generis* nature of Aboriginal rights, in terms reminiscent of the judges in *Mabo's case*, that Aboriginal title is a right in land but, '[a]s with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives'. Aboriginal title was characterised, again in similar terms to *Mabo's case*, as inalienable, though not non-proprietary, and communal. Its source is in the prior occupation of Canada by Aboriginal peoples and in this sense, predates and survives colonisation.¹⁰

Importantly, for Canadian jurisprudence, Lamer CJ and La Forest JA distinguished between Aboriginal title and other Aboriginal rights. Recent jurisprudence had focused on *activities*, such as hunting, fishing or ceremony, in which it was determined that for such

activities to be protected as Aboriginal rights, they must be aspects of Aboriginal practices, customs and traditions which are integral to the distinctive Aboriginal culture.¹¹ Lamer CJ presented a different view. Aboriginal *title* encompasses something more than activities associated with the land, it encompasses more than a legal right to use and possess the land and it is not limited by reference to traditional use and custom, it confers ‘the right to the land itself’.¹² This characterisation places central importance on the ‘continuity of the relationship of an aboriginal community to its land over time’.¹³ Therefore, the only limitation on the use of Aboriginal lands would be those that threaten that continuity. This aspect of the decision is important for self-government claims because characterising Aboriginal title as an all encompassing, exclusive and collective right to the land provides the foundations for an effective right of self-government.

Proving Aboriginal title

The Chief Justice identified the elements required to prove Aboriginal title. First, the claimant group must be able to prove that they occupied the lands claimed prior to occupation. Aboriginal title in a sense ‘crystallised’ at the time that sovereignty was asserted, when it became a burden on the Crown’s sovereign title. This may appear to contradict what was said in *Mabo’s case*, that native title was not frozen at the time of occupation, but there, the court was referring to the ‘content’ of native title.

The *Delgamuukw case*, in contrast, characterises Aboriginal title in such a way that the customs and traditions (the content of native title in *Mabo’s case*) are less relevant to the proof of Aboriginal title and does not determine the nature of the title. Again, in this assessment, both common law understandings of possession and Aboriginal law perspectives must be taken into account, as well as factors such as the group’s size, way of life, resources and technology, as well as the character of the land itself.¹⁴ Like other Aboriginal rights, the claimants must show that the connection to the land forms a central and significant part of the culture. However, this is more or less proven by occupation.

Similarly, acknowledging the difficulty of establishing pre-sovereignty occupation, present occupation was considered proof of pre-sovereignty occupation so long as proof of continuity can be shown. Continuity, however, did not mean an unbroken chain of occupation, for to require that, it was thought, would merely perpetuate historical injustices. Instead, Lamer CJ cited with approval the requirement in *Mabo’s case* that there be a substantial maintenance of the connection between the people and the land.¹⁵ Moreover, the nature of occupation, and perhaps even the location, may change over time, but the title will not be diminished

Lastly, when sovereignty was asserted, possession must have been exclusive, that is, the claimants must have had the ability to exclude others from the land. However, ‘just as the common law concept of possession must be sensitive to the realities of aboriginal society, so must the concept of exclusivity’.¹⁶ The possibility of joint title was recognised, but also, the fact that others were present or frequented the land did not preclude title so long as the claimant group had the intention and capacity to retain control. Where exclusivity cannot be shown, Lamer CJ reiterated that Aboriginal rights to certain activities in connection with that land or in relation to particular sites may still exist. However, the distinction between Aboriginal title and other Aboriginal rights is retained.

Infringement

It was recognised by the court that Aboriginal rights, including Aboriginal title, could be infringed by both federal and provincial governments. This aspect of the decision will be disappointing to some because it reinforces a hierarchical relationship between Indigenous peoples and other levels of government in Canada. However, unlike Australia, any infringement must satisfy ‘the test of justification’. The test is reasonably onerous and there are two aspects. First, an infringement must be in furtherance of a legitimate legislative objective that is ‘compelling and substantial’.¹⁷ The public interest/purpose flavour of such a justification raises concern over the potential breadth of acts that may come within its ambit.

However, the infringement must also be justified under the special requirements of the Crown’s fiduciary obligations which demand that Aboriginal interests be placed first. This does not necessarily mean that Aboriginal interests will always receive priority. In circumstances where environmental, economic development or resource allocation issues are to be considered, the Court considered that an infringement may be justified. While the test of justification for infringement appears quite broad it requires something more than merely clear intent.

The test of justification, while developed in the context of Constitutional protection, does not find its source in the words of the section. It is often difficult to separate out the source of limitations of state power in this sense. However, the test can equally find its roots in the nature of the common law protection and the recognised fiduciary duty of the Crown and could therefore develop here. However, the added force that constitutional protection gives to the justification test should be recognised.

Negotiation and good faith

Lamer CJ recognised that Aboriginal title has economic as well as cultural importance to future generations of Aboriginal peoples and that, subject to the limitation outlined earlier, it is an exclusive right that encompasses ‘*the right to choose*’ what uses will be made of the land.¹⁸ This creates an obligation on the part of the government to ensure that the process by which, for example, resources are allocated, both reflects the prior interest of Aboriginal title holders and involves them in the decisions taken with respect to their land. La Forest J included, more broadly, the payment of fair compensation that reflects the nature of Aboriginal rights and the honour of the Crown.

Both Lamer CJ and La Forest J discussed the importance and, indeed, the requirement that any consultation be carried out with good faith. That is, ‘with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue’. In this sense, it requires something ‘deeper’ than consultation and may even require full consent.¹⁹ The parting comments of Chief Justice Lamer reinforced the importance of good faith, suggesting that this obligation extends to all negotiations including the treaty and negotiated settlement process. Tying all of these issues together, Lamer CJ pleaded that the way to achieve reconciliation was through ‘negotiated settlements, with good faith . . . reinforced by judgements of this court’.²⁰

Concluding remarks on relevance

After the decision of McEachern CJ at trial, Michael Asch and Catherine Bell argued for ‘a new jurisprudence’ based on the equality of peoples.²¹ In part, the Supreme Court has responded to that call by recognising that, in considering Aboriginal rights, both the common law and Aboriginal perspectives must be taken into account. In this way, the Court has endeavoured to understand the unique, or *sui generis*, character of Aboriginal title from a perspective outside their own. This approach also clearly reiterates the sentiment of *Mabo’s case*, that Aboriginal rights are neither a creature of common law or of Aboriginal law, but are a site of interaction and recognition.²² Respect for Indigenous peoples can also be seen in the characterisation of Aboriginal title as an all encompassing interest with its source in prior Aboriginal occupation; in the elements of proof of occupation and continuity; and the constraints placed on infringement. While equality before the law was the basis for recognising native title in *Mabo’s case*, Australian law has yet to take the further step of embracing the equality of Indigenous peoples as peoples and placing real limits on the power of the Crown to deny their authority.

The distinction drawn between Aboriginal title and Aboriginal rights is a salient reminder of the movement of the legislative framework in Australia toward a proprietary focus. At the same time, more restrictive and onerous requirements of proof are being introduced into the native title process. A similar distinction between land and other rights was not drawn in *Mabo’s case* and instead native title was defined in a way that encompasses the laws and customs of the native title holders. In the *Delgamuukw case*, the focus on occupation and continuity provides for an inquiry that is inclusive of the Aboriginal perspective and in which the details of laws and customs becomes less central. Similarly, the *Delgamuukw case* may prompt a return to the courts to seek common law recognition and protection of other rights with different requirements of proof along similar lines to that established by the Canadian common law.

The extent of the rights encompassed by Aboriginal title are also an important development, recognising the right of Indigenous peoples to develop lands in ways not limited to any conception of traditional use or custom. In a sense, the test, or limitation imposed by the Supreme Court of Canada, regarding the maintenance of continuity, builds upon the reasoning of the High Court of Australia in *Mabo’s case*. In that case, native title is based on continuity of connection and the laws and customs recognised by native title are not frozen in time. The common law in Australia may draw from the *Delgamuukw case* to recognise a more expansive concept of native title.

The question of whether self-government was an Aboriginal right that had the protection of the common law and the Canadian Constitution was left open. The need for a new trial made it impossible for the court to determine whether such a right existed and had been established in this case. However, the claim, when raised again, will benefit from the comments of Lamer CJ. In particular, the Chief Justice warned that a claim to self-government should not be ‘framed in excessively general terms’ because there are many significant conceptual issues which must be addressed, including conceptions of territory, citizenship, jurisdiction and government.²³ This is important advice too for Indigenous peoples in Australia who will be examining self-government and jurisdiction claims in the near future. The successful appeal adds weight to the dissenting judgement of Lambert JA in the Court of Appeal, which considered the Aboriginal right to self-government. The

Supreme Court decision also provides a jurisprudential basis for self-government by recognising the communal nature of Aboriginal title and the breadth of its content.

In essence, a new trial was ordered in the *Delgamuukw* case due to the failure of the trial judge to pay sufficient regard to the oral histories of the Gitksan and Wet'suwet'en peoples. The lack of respect for Indigenous peoples' histories and evidence, and for the claimants views of what is relevant to their claim, has now been decisively rejected by the Supreme Court of Canada. This aspect of the decision is directly relevant to Australia because it addresses issues that are central to the nature of the common law and the trial process. Therefore, the *Delgamuukw* case is relevant not merely because it is a case concerning Indigenous peoples, indeed, Indigenous peoples are not interchangeable objects of law. The history of Indigenous relations with the state in Canada is sufficiently different, for example in the existence of treaties, the Royal Proclamation and the Constitutional protection of Aboriginal rights, that policies and doctrines cannot merely be superimposed over Australia's legal landscape. However, the common law and the rules of evidence in our two countries have a common history. What the Canadian courts have learned about the nature of common law rules relating to testimony should be a useful reflection for our own courts.

¹ *Delgamuukw v The Queen* (1991) 79 DLR (4th) 185. (references to Canadian cases in this paper refer to the standardised paragraph references adopted by the Courts in that jurisdiction).

² *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470.

³ *Mabo v Queensland [no. 2]* (1992) 175 CLR 1.

⁴ [1990] 1 SCR 1075.

⁵ *Mabo v Queensland [no. 2]* (1992) 175 CLR 1, per Brennan J, at p. 51.

⁶ *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470, per Lambert JA at para. 908.

⁷ *Delgamuukw v Canada* (unreported decision, Supreme Court of Canada, No. 23799, 11 December 1997). Lamer CJ, with whom Cory and Major JJ agreed, wrote the lead judgement, while La Forest J, with L'Heureux Dube J, differed on some issues and McLachlin J did not give separate reasons but both concurred with the majority and was in substantial agreement with La Forest J.

⁸ *ibid.*, per Lamer CJ, at paras. 84-7, citing *Simon v The Queen* [1985] 1 2SCR 387, at p. 408.

⁹ *ibid.*, para. 98.

¹⁰ *ibid.*, paras 112-15. See *Mabo v Queensland* *op. cit.*, per Brennan J, at p. 59.

¹¹ See for example, *R v Van der Peet* [1996] 2 SCR 507.

¹² *Delgamuukw v Canada* (Supreme Court of Canada), *op. cit.*, per Lamer CJ para. 138 (parentheses omitted), paras 124, 140. La Forest J, at para. 194, chose a narrower construction. Lamer CJ, at para. 122, specifically rejected any limitation.

¹³ *ibid.*, paras 126-30.

¹⁴ *ibid.*, para. 146-8; para. 149 citing Brian Slattery, 'Understanding Aboriginal rights'. *Canadian Bar Review*, vol. 64, 1987. Compare *Mabo v Queensland [no. 2]* (1992) 175 CLR 1, per Toohey J. at p. 187.

¹⁵ *Delgamuukw v Canada* (Supreme Court of Canada), *op. cit.*, para. 153. Compare for example *Mabo v Queensland* *op. cit.*, per Brennan J, at p. 60.

¹⁶ *Delgamuukw v Canada* (Supreme Court of Canada), *op. cit.*, para. 156 citing Kent McNeil *Common Law Aboriginal Title*, Clarendon, Oxford, 1989.

¹⁷ *Delgamuukw v Canada* (Supreme Court of Canada), *op. cit.*, para 160-1. For a full discussion see paras 172-83. Per La Forest J, at paras 201-2, 206.

¹⁸ *ibid.*, para. 166.

¹⁹ *ibid.*, per Lamer CJ at para. 168, also La Forest J at paras 203, 207.

²⁰ *ibid.*, per Lamer CJ, at para. 186. Also La Forest J, at para. 207.

²¹ Michael Asch and Catherine Bell, 'Definition and interpretation of fact in Canadian aboriginal title litigation: An analysis of *Delgamuukw*', *Queen's Law Journal*, vol. 19(2), 1994, p. 549.

²² Webber, 'Relations of force and relations of justice: The emergence of normative community between colonists and Aboriginal peoples', *Osgoode Hall Law Journal*, vol. 33(4), 1995, p. 623.

²³ *Delgamuukw v Canada* (Supreme Court of Canada), *op. cit.*, paras 170-1, citing the Report of the Canadian Royal Commission on Aboriginal Peoples, 1996.

ISSN 1326 - 0316

ISBN 0 85575 333 1

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