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**“ABORIGINAL LANDS AND RESOURCE DEVELOPMENT
- A CASE FOR FEDERAL LEGISLATION”***

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Introduction and Overview

The decision of the Supreme Court of Canada in **Delgamuukw**ⁱ has created considerable uncertainty in those areas of Canada where there are unsettled Comprehensive Land Claims. By defining Aboriginal title as the right to the land itself and entitling the Aboriginal titleholder to determine how the lands are used without much guidance on determination of such title, the court has left Aboriginals and non-Aboriginals alike with little assistance on how to resolve land use issues. The court's declaration that the same lands could have more than one Aboriginal titleholder is a further complicating factor in the case of overlapping land claims. While the court made a strong plea for negotiated settlements, rather than litigation, the court ultimately has little control over whether fruitful negotiations are carried out or litigation is resorted to. On the other hand, the federal government, acting through the federal parliament, can and should shape land claim negotiations with a focus on new treaties as the better alternative to litigation.

In **Delgamuukw**ⁱⁱ, the court also declared that the federal power over Aboriginal lands in Subsection 91(24) of the Canadian Constitutionⁱⁱⁱ excluded provincial authority over the same lands until there was a surrender accepted by the federal government. In effect, where Aboriginal title exists (in many areas an extremely difficult evidentiary matter), provincial legislative power over the lands, forests and minerals under Sections 109 and 92A of the Canadian Constitution^{iv} is inoperative until the exclusive federal power to arrange surrender is successfully exercised to vest the Aboriginal title in the province.

For asterisks see endnotes.

ⁱ Delgamuukw v. British Columbia, (1997) 153 D.L.R. (4th) 193.

ⁱⁱ Ibid, footnote i at paragraph 175.

ⁱⁱⁱ Constitution Act 1867(U.K.), 30 & 31 Vict.,c.3 as amended to date.

^{iv} Ibid, footnote iii.

Many Aboriginal groups argue that wherever Aboriginal title is claimed provincial legislation should be suspended. They say the court declared Aboriginal title as an Aboriginal right recognized and affirmed by Section 35 of the Constitution and such recognition and affirmation must be respected by provincial and territorial officials in exercising the powers granted under their legislation. Recognizing, however, that the non-aboriginal position is that Aboriginal title must be proven in court or through negotiated acceptance, the Assembly of First Nations instituted the Delgamuukw National Process (“DNP”) in mid-1998 with the object of realizing the potential of the Delgamuukw decision for all Aboriginal peoples. Among the many questions to be addressed is “How should Canada change its Comprehensive Claims Policy so that it is based upon the recognition and affirmation of Aboriginal title?” Understandably, much of the effort of the DNP process is directed toward the establishment of Aboriginal title through litigation. Probably, a necessary preparation from the Aboriginal perspective in view of the current cumbersome and ineffective claims policy.

Nonetheless most people recognize the downside of the litigation process. One objective of this Article will be to offer the views of a retired mineral law practitioner on appropriate changes to the federal land claims policy in the light of the Delgamuukw decision. In this writer's view, such changes should assist Aboriginals and non-Aboriginals to negotiate the recognition and affirmation of legitimate Aboriginal rights in the context of economic reality. My focus will be on how changes might assist in mineral project development; however, I believe my comments may have relevance in other situations where there are pending land development projects on lands claimed by Aboriginal organizations or groups.

Unfortunately, the writer has little knowledge of the specific differences in the land claim process in British Columbia but understands that the British Columbia Treaty Commission plays an active role in negotiations so that every treaty table is governed by an openness protocol and advised by a regional advisory committee. Accordingly, some comments may not apply to land claims negotiation in British Columbia. Certainly, the Nisga'a Final Agreement is an indication that complicated and prolonged negotiations have succeeded in that instance.^v

While no mention was made by the court in the Delgamuukw case of the effect on Aboriginal title of federal legislation that gives rights in respect of minerals such as the Yukon Quartz Mining Act (YQA)^{vi} and the Canadian Mining Regulations (CMRs)^{vii}, learned authors are now arguing that such legislation represents a scheme that allows non-Aboriginals to gain competing

^v Final Agreement Initialled August 4,1998, approved by the federal parliament under Bill C-9 and given Royal Assent April 13,2000. The writer wishes to acknowledge the very helpful comments of Chris Corrigan.

^{vi}Yukon Quartz Mining Act, R.S. 1985, c. Y-4, as amended

^{vii}Canada Mining Regulations, CRC, Vol.XVII, c. 1516, as amended (these Regulations are under the Territorial Lands Act).

proprietary interests within the Aboriginally claimed title area that represents an interference with Aboriginal title^{viii}

A similar argument is available with regard to provincial resource legislation dealing with mining, oil and gas and forestry rights. These authors note that there is a prima facie case for the proposition that these legislative schemes which impliedly authorize resource development process are inconsistent with a claim for non extinguished Aboriginal title. They go on to state that, if the Crown is to establish justification for these resource disposition regimes infringement of Aboriginal title, it will be through governments' use of their powers to withdraw Crown lands from acquisition by resource developers. These learned authors point out that the present use of the withdrawal power does not help the government to justify these regimes.

Aided by law professors, such as Kent McNeil in the research paper "Onus of Proof ", Aboriginal groups are aggressively asserting their rights to occupy lands which provincial and territorial governments have licensed to resource companies. The suggestion is that if the resource company is charged with trespass, the non-Aboriginal developer and the government will have to establish a right to possession of a particular piece of land better than the Aboriginal group which claims it. Thus, especially in British Columbia, First Nations are often blockading resource developers in an attempt to conserve the resources they claim before land selection under the land claim settlement process.

In this writer's view, one culprit in this situation is the failure of the government to consult with the claimant aboriginal group about earlier withdrawal of the land in question from licensing. The more important change would be to develop an effective and timely land claims negotiation process that may have to be accelerated where there are legitimate development opportunities. These are increasingly situations in which world economic realities suggest that a resource developer is entitled to know whether the Aboriginal group is a landowner who must be persuaded to permit the development to proceed or whether the provincial or territorial government is the primary authority which must be persuaded. Of course, the Aboriginal organization or group, who are often the vast majority of local residents, will always need to be consulted and persuaded to view the project as acceptable. The inducements to achieve that end will likely be different if Aboriginal lands or rights are necessary to the project proceeding.

One of the federal government's responses to the **Delgamuukw** decision was the appointment of the Post-Delgamuukw Capacity Panel. Chaired by Wendy John, the Associate Regional Director General for Indian and Northern Affairs Canada in the British Columbia Region, this panel consisted of twelve persons knowledgeable in Aboriginal affairs. The panel was concerned with

^{viii}Nigel Bankes and Cheryl Sharvit of the University of Calgary in Northern Minerals Programme Working Paper 2, published by the Canadian Arctic Resources Committee under the title "Aboriginal Title and Free Entry Mining Regimes in Northern Canada", ISBN: 0-919996-77-9.

recommending initiatives to enhance the capacity of First Nations^{ix} in British Columbia to deal with land and resource issues. This panel identified gaps and obstacles in existing government programs and services to Aboriginal peoples and made recommendations as to how capacity and capacity building could be encouraged and supported within First Nations. The Final Report of the Post Delgamuukw Capacity Panel contains many thoughtful suggestions on how Aboriginal peoples should be empowered to effectively participate in the treaty process. It does not, however, address the issue of lack of a structured process referred to in this article. In my view, both actions are required to improve the relationship between Aboriginals and non-Aboriginals in Canada.

While recognizing that much needs to be done to assist Aboriginal peoples to develop the capacity to fully and effectively participate in the treaty making process, in this article I present a case that the process itself, which is embodied in the current voluntary Comprehensive Land Claims Policy, is seriously flawed and in need of substantial overhaul(emphasis added). How can Aboriginal rights and title recognized in Section 35 of the Canadian Constitution be properly protected by a voluntary process that does not compel all necessary parties to participate?

There are several problems with the disposition of resource rights on apparently owned federal and provincial Crown lands in relation to the current voluntary federal Comprehensive Land Claims Policy :

1. Until a Comprehensive Land Claim is negotiated and subsequently approved by the Federal legislation (and, in some cases, a provincial legislature), the existence of a claim accepted for negotiation by the federal government under its Comprehensive Land Claims Policy but not yet proven creates uncertainty over which level of government controls land use on the claimed lands. It also forces the claimant Aboriginal group to challenge provincial and territorial licences which affect land use in their claimed territory.

On the first conceptual point, if the land claim is valid, the claimant Aboriginal group, according to the Supreme Court in **Delgamuukw**, has the right to say how the land is used until there is a valid infringement or extinguishment of that right. For some Aboriginal claimants validity is established when their claim is accepted by the federal government for negotiation. On the other hand, most non-Aboriginals take the position that, without proof, the claim is not valid. As a practical matter, the Aboriginal organization will usually assert that persons wishing to use the claimed lands must have the permission of that organization. These differing perspectives as to the status of the land leads to confrontations such as occurred at Voiseys Bay, Labrador when

^{ix}“First Nations” is a term generally applied to Indian bands subject to the Indian Act, R.S. I-6 whereas “Aboriginal groups or peoples” as used in this article applies to “ Indians, Inuit and Metis peoples” referred to in Section 35 of the Constitution Act.

approximately one hundred members of the Innu Nation faced RCMP Constables and a mining company's employees in a sixteen day stand-off;

2. The federal government has not put in place legislation requiring the provinces "to come to the table" with Aboriginal groups who are asserting a claim. However, where provincial interests are seen to be at stake, both levels of government may follow the voluntary federal land claims policy(emphasis added). While the courts have declared that both the federal and provincial Crowns owe a fiduciary duty of consultation in dealing with Aboriginal and treaty rights^x,if the province in question believes it is in its interest to refuse participation in the voluntary federal land claims process, there is presently no method for the federal government to manage that process in an efficient manner. Furthermore, the federal government has not taken any steps to integrate the YQA, the CMRs or to require provincial governments to do so with respect to their resource legislation with Aboriginal land claims which have been accepted for negotiation. As a matter of minimum change to the role of the mining recorder under the YQA and the CMRs, one would think that those officials should have a legal duty to advise persons staking and recording claims in areas wherever the federal government has accepted a land claim for negotiation that such claim could affect the claim holder's right to bring any mineral rights they hold to lease. Similar duties should be legislated for administrators under other federal resource legislation dealing with forestry and oil and gas rights. As a matter of policy, provincial mining claim recorders will advise individuals and companies who are exploring in the areas under their jurisdiction that a land claim is outstanding that may affect any rights they hold or acquire. However, there is no legal requirement to do so;

3. One of the current methods of dealing with overlapping land claims is to have the two or more Aboriginal groups making the accepted claims to the same areas of land sort out their overlapping claims amongst themselves and then advise the federal government of their resolution. In the case of unequal bargaining power, this is not an equitable method of resolving the issue of overlap.

Furthermore, a province which is interested in a speedy resolution of the land claim or has other reasons for wishing to have the land claim resolved in a particular manner may be tempted to pick sides between the claimant Aboriginal groups.

4. Modern land claim settlements invariably involve a package deal consisting of both cash and land in exchange for the surrender and extinguishment of the land claim. Except for the Yukon, NWT and Nunavut Territories, this usually involves provincial Crown lands being used to settle the Aboriginal land claim. These settlements usually involve a

^xSee Paragraph 84 from decision of Richard ACJ in Nunavik Inuit as represented by Makivik Corporation v .The Minister of Canadian Heritage et al Fed.Ct.Trial Division, File T-545-97, Aug.4,1998.

compensation package that sometimes affects existing transfer payment arrangements between the federal and the concerned provincial government; and,

5. A connected objective of the settlement of the Aboriginal land claim is often that a resource development will be allowed to proceed. In such a case, there are business interests who are excluded from the land claim negotiations even though they have a significant stake not only in the timing, but also in the monetary part of the settlement process. While it is clear that governments often attempt to delegate their duty to consult to the resource developer, especially in the context of specific developments, this can not relieve the governments of their fiduciary duties including that of consultation with claimant Aboriginal groups. Wherever a resource developer is seeking to proceed in the face of a land claim that has been recognized for negotiation, governments should provide guidance and rules to both the Aboriginal claimant and the resource developer^{xi}.

Thesis

In order to address these problems, a legislated policy on land settlement agreements designed to produce timely and responsible development and realisation of Aboriginal and treaty rights is necessary. Furthermore, if the federal government has the political will, many of these problems can be avoided. In this writer's view, new federal legislation and amendments to existing federal legislation can be made without a constitutional amendment based on the exclusive federal power in Subsection 91(24) over "Indians, and Lands reserved for the Indians"^{xii}. The Privy Council in Attorney General for Quebec v. Nipissing Central Rwy. Co etal [1926] A.C. 708 at pages 723-724 recognized that the power to legislate in respect of any matter must necessarily affect property rights and that where the legislative power of the federal Government cannot be effectively exercised without affecting the proprietary rights both of individuals in a province and of the Provincial Government, the power to affect those rights is necessarily involved in the federal legislative power(emphasis added).

In this writer's view, the Canadian courts should uphold new federal legislation designed to require relevant provinces and all other required participants to participate in a structured procedure for resolving Comprehensive Aboriginal land claims as within the federal power to legislate for "the Peace, Order, and good Government of Canada" supplemented by the exclusive federal power in Subsection 91(24).

General Discussion of Thesis

^{xi}Section 4.1.1 of "Resource Developments on Traditional Lands: The Duty to Consult"
Canadian Institute of Resources Law Occasional Paper # 6 February 1999 By Cheryl Sharvit,
Michael Robinson and Monique M. Ross.

^{xii}Supra, footnote iii.

In those cases where provincial crown lands are affected, the above thesis is dependent on the willingness of Canadian courts to declare the kind of new federal legislation proposed in this article effective to compel the appropriate provincial government to be part of the land claims negotiation process. The premise is that legislation that requires a province to engage in negotiations with respect to Aboriginal rights claimed within that province's boundaries will be determined to be "in pith and substance" within the general power of the federal Parliament to legislate and the exclusive federal power under Subsection 91(24). The effect on "Property and Civil Rights in the Province" and other exclusive legislative powers of the provinces, will be determined to be necessarily incidental to the exercise of these federal powers.^{xiii}

In cases where only federal lands are affected, such as in the Yukon, NWT and Nunavut Territories and the offshore of Canada, the amendment of existing legislation should be such that notification of accepted land claims would be given to resource developers at an early stage. Whenever a specific claim has been accepted for negotiation, the territorial government in question should be required to consult with the claimant Aboriginal group prior to issuing any development type license. This would allow developers, whose projects seriously affect lands claimed by Aboriginal groups the opportunity to be part of the process of resolving land claims and not apprehensive bystanders, as exists in the present situation. New and amended legislation which accomplishes this should also result in mandated Impact and Benefit Agreements that are part of the land settlement process and a condition to significant development projects proceeding.

At present, provinces often adopt the position that Aboriginal groups and their rights and lands are an exclusive federal concern of which the province wants no part. Provinces adopt this view even though the Aboriginal groups are claiming the use or ownership of provincially regulated Crown lands. Undoubtedly, for a province to take a part in such matters involves financial considerations and this may often be the reason for the provincial attitude. However, such an attitude is not consistent with the judicially determined fiduciary duty that is owed not only by the federal but also by the provincial Crown?

Where a province persists in disavowing a duty to participate in the determination of Aboriginal rights and title, would Canadian courts accept that position as valid in the context of new legislation dealing with the process for resolving Aboriginal land claims? Aboriginal title is only a subset of Aboriginal rights which include the inherent right of self government and claims to exclusive rights to harvest, hunt, fish and trap on traditional lands. The broader question is: "Can the federal government force provincial governments to negotiate these issues under an effective federally managed process?"

One suggestion is that the federal government might adopt new legislation which gives it the power to expropriate such provincial Crown lands as it deemed necessary for the compensation of Aboriginal titleholders (who had established their title). The federal government could then

^{xiii}Supra, footnote iii.

deliver those provincial Crown lands to the Aboriginal titleholder in order to effect the surrender of the claimed lands to the federal Crown. Such proposed federal legislation should provide a detailed procedure for the establishment of Aboriginal title, perhaps involving a National Claims Commission with power to determine disputes. It could also further provide that the provincial government might receive such monetary compensation as the federal and provincial governments might agree on as fair compensation. Furthermore, if there were no federal-provincial agreement on the exchange of land being fair and the new federal legislation declared that, in such case, the matter would be determined under the procedures of the federal Expropriation Act, would Canadian courts uphold such new federal legislation? Would the courts characterize such federal legislation as necessary to an exclusive legislative power similar to an expropriation for a post office? Would the courts determine the situation was different because the province was being forced to take Aboriginal claimed lands as partial or complete compensation for the expropriation of provincial Crown lands and not just cash?

Such proposed federal legislation describes a legal framework for forcing recalcitrant provincial governments to act in a manner considered responsible by the federal government in relation to Aboriginal rights recognized in Section 35^{xiv}. The question arises whether the courts would characterize the proposed legislation as in relation to “Indians and Indian lands” or declare it to be legislation in relation to lands and matters within exclusive provincial jurisdiction, at least until the Aboriginal title was established by the claimant Aboriginal group?

While the provinces can argue that until Aboriginal title is proven, the power to legislate over “indian (read “aboriginal”) lands” does not permit such legislation by the federal Parliament. The same timing issue applies to the power to legislate over “indians” themselves. In my view, progressive courts could characterize legislation to make the process of recognizing “aboriginal and treaty rights” workable as legislation in “pith and substance” in relation to indians (read aboriginals). Unless steps are taken soon to resolve Aboriginal land claims in a fair and effective manner, legislation to correct the present inadequacies will become clearly sustainable under the federal emergency power or the “peace, order and good government” provisions of the Constitution.

From a non-legal perspective, it is likely that if such proposed federal legislation also provided for any resource developer who required access or use of lands claimed by one or more Aboriginal groups to be given a place at the negotiation table, the province’s desire for new economic activity might bring an otherwise recalcitrant province into the negotiations. Unfortunately, from a legal perspective, if the suggested federal legislation did admit resource developers to the negotiation table, any province opposed to that would have an argument that the object of the federal legislation was to allow the federal government to encroach on exclusive provincial power to make laws in relation to the development, conservation and management of

^{xiv}Supra, footnote iii.

the resources referred to in Subparagraph 92A(1)(b) of the Canadian Constitution^{xv}, namely “non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom”.

Whether such a provincial argument would be weakened or strengthened if the proposed federal legislation also mandated that all developers of significant resource projects enter into an Impact and Benefits Agreement (IBA) with all local Aboriginal organizations, is another point; however, there are a number of reasons why including a requirement for IBAs in Aboriginal land claim settlement agreements would be an appropriate exercise of federal responsibility in relation to Aboriginal affairs. Being part of the land claims negotiation and providing certain benefits (such as those contained in negotiated IBA's) in conjunction with the federal and provincial government's settlement packages may avoid the developer's concern that it might be forced to give up more compensation than the project can support financially.

At present, in a mostly secret process (British Columbia may have more openness than other jurisdictions), governments and Aboriginal groups create a package of land, monies and royalties. A good part of this is passed on to the resource developer through increased provincial taxes and duties. Notwithstanding the pass through of the government negotiated compensation, the resource developer will likely still have to pay compensation and royalties to the aboriginal organization under a subsequently negotiated IBA. If IBAs were part of the process of creating a land claim settlement entitled to protection under Sections 25 and 35 of the Canadian Constitution^{xvi}, it is likely that two concerns of resource developers would be eliminated. First, the concern with the possibility of having to pay more than the project can financially support and secondly, with possible violations of provincial and territorial human rights legislation and federal competition legislation in granting special employment and contracting treatment, such as employment targets and contract preferences, to Aboriginal workers and contractors.

Finally, any new legislation which gives resource developers a greater role in the land claim process would necessarily need to have provisions which would make it acceptable to the majority of Aboriginal groups. Even if new legislation provided that any resource developer whose proposed project was going to be significantly affected by a land claims settlement under negotiation with an Aboriginal group was only entitled to participate on Consultation Committees related to the land claims negotiation, would be an improvement in the existing process.

Furthermore, it is my understanding that Aboriginal groups are extremely unhappy with the part of the land settlement or treaty process which results in “extinguishment”, “infringement” or “modification” of their aboriginal rights. While I doubt the word “suspension”, without extensive conditions and time limits, will achieve general acceptance from Aboriginal groups, it does

^{xv}Supra, footnote iii.

^{xvi}Supra, footnote iii.

introduce the concept of a temporal limitation not necessarily found in the other concepts. From the perspective of many resource developers certainty within a specific time horizon is all that is necessary after which the development lands might be returned to their original use to the extent that the operation of a well regulated development permitted that. The concept of “reclamation” of mining lands requires the mining operator to return the lands to their original condition or a safe condition acceptable to a regulator, having the public interest in mind. Perhaps, Aboriginal organizations and groups would be prepared to enter into co-management agreements (as part of a mandated IBA). This would give the Aboriginal group a significant role in preserving the lands in a viable condition to be returned to Aboriginal control at the economic exhaustion of the development project. These arrangements would be similar to the common law’s balance between “life tenant” and “remainder man”. At least, there are a number of resource developments where such concepts should be workable.

Australian Model

Analogous to the recently amended Native Title Act of Australia^{xvii}, any proposed federal legislation should also allow a resource developer, who required the settlement of Aboriginal land claims in order to develop its project, to invoke the proposed legislative process as part of the government approvals for its project. It should also mandate time frames for the process to reach a conclusion. Legislating any multiparty negotiation process will have certain problems. However, putting together a resource industry developer, two levels of governments and one or more Aboriginal groups in negotiations followed by a hearing process to obtain public support will clearly involve careful and detailed drafting. Perhaps, the hearing process presently provided for in the Canadian Environmental Assessment Act might form the core of the public consultation process based on a negotiated memorandum of understanding among the participants. It is my proposal that the resource developer not be excluded from the negotiation. The degree of involvement might range from membership, if desired on a Consultation Committee to a seat at the actual land settlement table. Also, some dispute resolution process should be mandated if the parties are unable or unwilling to reach a negotiated milestone within certain time frames. However, as the proponent, the resource developers’ rights and powers in the negotiation of any land settlement agreement allowing its proposed project to proceed would have to be appropriately circumscribed by the public and Aboriginal interests.

Protection for the Aboriginal Claimant

In the past, Aboriginal organizations and groups have lacked the financial resources and business experience of governments and private industry. The recommendations of the Post-Degamuukw Capacity Panel referred to above are steps toward addressing this concern. Nonetheless the concern exists that with the commercial pressure of a developer at the negotiation table along with the Aboriginal claimant, the Aboriginal claimant would be at even more of a negotiating disadvantage than at present. Among other problems of multiparty negotiations, the imbalance of

^{xvii}Native Title Act 1993, as amended by the Native Title Amendment Act 1998.

negotiating power would present a challenge for the drafters of such proposed legislation. However, redressing the imbalance in favour of the federal and provincial Crowns and private interest negotiators is surely one aspect of the fiduciary duty owed by the federal and provincial Crowns once negotiations for the settlement of an Aboriginal land claim commence. What is in place now is non-transparent, cumbersome, untimely, and largely unworkable. This is so especially in major commercial development situations of which Voiseys Bay would be a current example.

Faced with the constitutional enshrinement of Aboriginal and treaty rights in Section 35 of the Constitution, there is no legislative power to deny an Aboriginal organization or group access to the courts for a declaration of their constitutionally protected rights. Nonetheless, if the existing Comprehensive Land Claims process was reformed and legislated to be effective along the lines suggested in this article, then I believe Aboriginal organizations or groups could be put to a one time election at the time of filing a request to have the claim accepted for negotiation. If the claim is submitted for negotiation and accepted, then neither the Aboriginal claimant or the governments involved can thereafter resort to litigation. Furthermore, if a land claim is presently under negotiation and one party wants out of the reformed land claims settlement process, then if that party resorts to litigation, it can not thereafter without the approval of the other parties return to negotiation. For this purpose, I would limit “parties” to the Aboriginal organizations or groups and the federal and provincial governments. In my view, such an approach would be beneficial in preventing forum shopping and in expediting the existing process.

Inuit - Agreement-in-Principle Labrador

In support of the proposition that the current voluntary and separate Aboriginal group Comprehensive Land Claims Policy is ineffective, this author would point to the Agreement-in-Principle(AIP) with the Labrador Inuit Association^{xviii} (LIA)and background press releases associated with such AIP. The “Milestones” portion of the press release details the commencement of the process in 1977. More than twenty years later the process is unfortunately still far from complete. Notwithstanding the announcement of the major nickel, copper and cobalt deposit near Voiseys Bay in 1994 and the agreement in July 1996 by the three parties to “fast track” the negotiations, only in May of 1999 were the parties able to initial the AIP.

While Premier Brian Tobin concludes his statement at the time of initialling the AIP with the comment that he “looks forward to the ceremony a year or so from now that will celebrate the culmination of this process in a Final Agreement...”, it is important to note what is still left for negotiation. In over 20 places, the AIP contains provisions to the effect that “Prior to the

^{xviii}Agreement-in-Principle Between The Inuit of Labrador as represented by the Labrador Inuit Association, Newfoundland as represented by the Minister of Labrador and Aboriginal Affairs and Canada as represented by the Minister of Indian Affairs and Northern Development initialled on May 10,1999.

Agreement, the Parties will negotiate, or may negotiate or will do...” such and such. The Agreement referred to is the Final Agreement which will become a constitutionally protected Land Claims Settlement Agreement.

Chapter 4, entitled “Identification and Selection of Labrador Inuit Lands” does not define these lands but rather sets forth the principles, guidelines and process to be used for this purpose. These are limited to 6,100 sq. miles plus 1,525 sq. miles of lands to be used for construction materials and agricultural purposes, both within the boundaries of the Labrador Settlement Area which is not to exceed 28,000 sq. miles.

Among the matters to be negotiated before there is a Final Agreement are:

1. what are exempt improvements on Labrador Inuit Lands and Community Lands for purposes of the taxation provisions;
2. whether any interest will be paid on capital transfers;
3. the manner in which the Inuit Central Government’s own source revenue capacity will be taken into account in the negotiation of Fiscal Financing Agreements;
4. certain areas of self-government jurisdiction for the Inuit Central Government including Environmental protection in Labrador Inuit Lands and the Inuit Communities;
5. compensation awards for adverse effects on Labrador Inuit Lands;
6. a sharing with the Inuit of water, including water power potential, in the Labrador Settlement Area ;
7. determine whether the consultations between the Inuit Central Government and a Developer with a Major Development in the Tidal Waters part of the Labrador Inuit Settlement Area will be carried out with a view to concluding management plans with the Inuit Central Government;
8. define the Voiseys Bay Project;
9. negotiate rights in relation to lands and resources within the Voiseys Bay Area;
10. Newfoundland and Canada to negotiate an agreement providing for the transfer to Canada of administration and control of the Crown lands necessary for the Torngat Mountains National Park Reserve (“Torngat Reserve”) and Canada and the LIA to negotiate a Torngat Reserve Impacts and Benefits Agreement^{xix};and,

^{xix}.See discussion in footnote x of the prior litigation by the Makivik Corporation representing the Nunavik Inuit regarding the entitlement of Canada, Newfoundland and the LIA to proceed

11. whether provisions dealing with limitations on the Inuit Domestic Harvest in the Labrador Inuit Settlement Area are necessary in light of any overlap agreements made between the Inuit and other Aboriginal peoples who have traditionally harvested Wildlife and Plants and the effect this has on the Total Allowable Harvest, a similar provision is made with respect to the harvesting of Fish and Aquatic Plants in the Labrador Inuit Settlement Area by other Aboriginal peoples.

Chapter 25 of the AIP, entitled “Overlapping Claims” states that “Provisions in overlap agreements, if any, in respect of any overlapping interests between Inuit and other aboriginal claimant groups may, with the agreement of the Parties, (the parties to the AIP), be set out in the Agreement (the Final Agreement)”. With regard to overlapping claims, there is the Accepted Claim of the assertive Innu Nation now at the Framework Agreement stage, the Accepted Claim to the offshore of Labrador of the Makivik Corporation on behalf of the Nunavik Inuit, the claim of the Labrador Metis still in negotiation with the federal Government. All Aboriginal groups whose claims have been notified to the developer at Voiseys Bay as affecting its mining property.

The list of matters to be negotiated in the Final Agreement contains many subjects of consequence. Thus, while one can hope that negotiators acting in “good faith” can settle these matters in the “year or so” that Premier Tobin anticipates, the important economic aspects of the matters still to be negotiated and the history of this land claim, dating back to 1977, makes this unlikely.

As stated at the end of the “Backgrounder” section of the accompanying releases, the AIP must now be presented to the parties to begin the review and ratification process. While the LIA have ratified the AIP, the status of the land selection is unknown. Ratification by Newfoundland and Canada will follow and thereafter the AIP will be the basis for negotiation of a Final Agreement, which will still require confirmation in federal and Newfoundland legislation.

What if Canada needed nickel, copper and cobalt production from Voiseys Bay to maintain its economic position in the world’s metal markets? What if there was not disagreement between Inco, the project developer, and Newfoundland about the feasibility of a new smelter? Is this cumbersome process appropriate in the interests of all Canadians, Aboriginal and non-Aboriginal alike?

In this writer’s view, it is unlikely that Aboriginal groups will accede to economic arguments on more timely resolution of land claims unless the process is drastically amended.

Federal Policy Instituted in 1973

with the Torngat Mountains National Park without settlement of their land claim covering 80% of the proposed park area.

The existing Land Claims policy was instituted following the split decision of the Supreme Court in Calder^{xx}. Fundamentally it has not changed notwithstanding that the number of claims has grown to the hundreds and continues to grow. The number of settled claims in over 25 years is less than a dozen.

There is no doubt that negotiating a Comprehensive Land Claim Settlement Agreement is a difficult and time consuming process. Section 25 of the Canadian Constitution^{xxi} provides that the guarantee of certain rights and freedoms in the Canadian Charter of Rights and Freedoms (the "Charter") is not to be construed so as to abrogate or derogate from any Aboriginal treaty or other rights or freedoms that pertain to the Aboriginal Peoples of Canada under land claim agreements negotiated or to be negotiated. Thus, guaranteed Charter rights have to be considered in land claim settlement agreements.

At present, the acceptance of a Comprehensive Land Claim for negotiation is initially determined by officials in the federal Departments of Indian and Northern Affairs and Justice. There is much criticism of the obvious conflict of interest in this procedure and some pressure for a national body independent of the federal Government to adjudicate the merits of Specific and Comprehensive Claims. However, even after a statement in the federal Liberal's 1992 Red Book on policy direction that called for the creation of a new national body to deal with land claims, nothing has happened. However, it is understood that in British Columbia the B.C. Treaty Commission is playing a constructive role in advancing the process. Perhaps, necessity will result in constructive changes in other parts of Canada!

Generally, after a land claim has been accepted for negotiation, there are four more sequential steps:

- (i) the federal and provincial or territorial Governments and the Aboriginal claimant organization must conclude a Framework Agreement that will create a negotiating timetable and determine the amount of funding available to the Aboriginal organization. In the case of the Makivik Corporation's Labrador claim, because the Province of Newfoundland was unwilling to recognize any legitimacy to the land claim, the federal government and the Makivik were left to proceed with the Makivik's claim to the offshore of northern Labrador as the only part of the claim exclusively within federal jurisdiction. The thesis of this article is that the federal government did not make the right decision in the case of the Makivik Labrador claim having regard to the conclusions of the Supreme

^{xx}Calder v. Attorney-General of British Columbia [1973] S.C.R. 313 (SCC).

^{xxi}Supra, footnote iii.

Court of Canada in the **Delgamuukw**^{xxii} case on the supremacy of federal power under Subsection 91(24) over provincial power in Section 109;

- (ii) assuming the appropriate governments and Aboriginal organization(s) are at the table and are able to reach agreement, an Agreement- in- Principle is signed. If there are overlapping claims, rather than the federal Government guiding the resolution of the competing claims, the current policy is that the Aboriginal organizations work out their differences before the claims are negotiated. However, since the Supreme Court in **Delgamuukw**^{xxiii} recognized that more than one Aboriginal organization could establish title to the same lands and described the general criteria for establishing such co-ownership, this policy should be revised;
- (iii) once an Agreement-in-Principle is signed, the aboriginal group can request that the specific lands which they are seeking in settlement of their claim not be disposed of to third parties while the Final Agreement is being negotiated. In this author's view, that is too late in the resolution of the land claim for the possible effect of the claim to be brought home to third parties. I favour notice to the public and resource developers that the land claim may affect the rights they hold or are planning to acquire immediately after the land claim is accepted for negotiation. I understand that this is in fact the way in which provincial and territorial governments administering disputed lands deal with the matter, although this is not a legal requirement. As noted in reference to the duty of consultation, there may even be a case for withdrawal of claimed lands as soon as there is a Comprehensive Land Claim accepted by the federal Government for negotiation; and,
- (iv) after the parties determine the land area awarded, the monetary compensation and the royalty amounts that traditionally have been part of a land claim settlement agreement, a Final Agreement is prepared for ratification by the Aboriginal organization and by the Governments involved in the form of confirming legislation.

Then, it represents a modern treaty entitled to the protection of Sections 25 and 35 of the Constitution^{xxiv}. In the case of the LIA AIP of May 10,1999 the AIP itself was required to be ratified by the Aboriginal group and the Governments involved prior to the negotiation of the

^{xxii}Supra, footnote i.

^{xxiii}.Supra, footnote i.

^{xxiv}Supra, footnote iii.

Final Agreement which will require federal and provincial legislative confirmation. The earlier ratification by the Aboriginal group with authority to negotiate a Final Agreement seems a step in the right direction

Recent Cases That Indicate the Present System is Not Working

In an August 1998 decision, Richard ACJ (of the Federal Court in **Nunavik Inuit as represented by Makivik Corporation v. The Minister of Canadian Heritage et al**(hereinafter called the “Makivik” case)^{xxv} declared that:

- (i) the federal Government had a duty to consult with the Nunavik Inuit represented by the Makivik including the duty to inform and listen before establishing a park reserve in Northern Labrador;
- (ii) the federal Government had a duty to negotiate in good faith with the Makivik on their claims to aboriginal rights prior to the establishment of a national park in Northern Labrador; and,
- (iii) any agreement between the Government of Canada and the Government of Newfoundland and Labrador regarding the establishment of the Torngat National Park had to set aside the lands agreed upon as a national park reserve (emphasis added), pending the completion of land claim negotiations and not as a national park itself.

While not a land claims case itself, the facts are of interest. Parks Canada first proposed the establishment of the Torngat National Park in the mid-1970's. Further consideration of the proposal was delayed due to unsettled land claims over the area. Towards the end of 1992 a study to determine the feasibility of a new park was announced by the federal and provincial Ministers responsible for parks and the President of the LIA. The LIA is a rival aboriginal claimant to the Makivik to a part of the lands which were being studied for their suitability for inclusion in the proposed park . Thereafter, the Makivik attempted to have input to the proposed park through seeking to become part of the Steering Committee set up by Parks Canada and by trying to negotiate an overlap agreement with the LIA which would have addressed the park planning process. The Government of Newfoundland refused the Makivik's request to participate in the feasibility study. Parks Canada accepted that position and refused to allow the Makivik to participate notwithstanding that the proposed boundaries for the park involved 80% of the lands claimed by the Makivik under a land claim previously accepted by the federal Government for negotiation. Furthermore, the federal Government's **Parks Guiding Principles and Operational Policies** provided that consideration be given to “the implications for aboriginal rights, comprehensive land claims and treaties with Aboriginal Peoples” in the selection of park lands.

^{xxv}Supra, footnote x.

Against this background, on November 5, 1997, the two levels of Government and the LIA announced an agreement, described by the Newfoundland Government as an agreement-in-principle, to settle the LIA's comprehensive land claim. This provided, among other things, that the proposed Torngat Mountains National Park would be within the LIA Settlement Area and the LIA would have priority subsistence harvesting rights and the right to participate with governments in wildlife management. On May 10, 1999, the three parties announced a formal "Agreement-in-Principle" discussed above, which is to be the basis for the Final Agreement.

Among other allegations, Makivik alleged that the boundaries of the proposed park were arranged to favour the interests of the LIA and the interests of the Province of Newfoundland with regard to mineral development (Voiseys Bay). On a more specific basis, Makivik alleged that the northern most portion of the park which comprised 806 square kilometres within the area the federal government had agreed was subject to negotiation under its framework agreement with the Makivik, was included within the park boundaries in exchange for southern lands desired by the Newfoundland Government for mineral development including Voiseys Bay. The Newfoundland Government had rejected any participation under that Framework Agreement leaving the federal Government and the Makivik to negotiate the offshore portion of the accepted claim as the only portion within the exclusive legislative jurisdiction of the federal Government.

While the court did not determine whether the general or specific allegations of the Makivik were true or false, it did not have to in order to make the declarations requested. Accordingly, the court declared that the boundaries of the proposed park could not be finalized without a conclusion to the Makivik's land claim. In the course of giving that declaration and the other declarations relating to the duty to consult, the court made the following comments on the submissions of the parties and the two interveners, the Government of the Province of Newfoundland and Labrador and the LIA:

- (a) the treaty process or land claims negotiations are primarily a process which is federal in nature and it is the Government of Canada which is, under the Constitution, ultimately responsible for the conduct of negotiations (Makivik Submission);
- (b) by agreeing with the government of Newfoundland to negotiate the creation of the park in the absence of the Makivik, the federal government preferred Newfoundland's wishes and its own goal of park creation to the successful completion of the treaty process in which it was also engaged. This was contrary to the federal government's fiduciary duty owed to the Makivik (Makivik Submission);
- (c) the jurisprudence of the past three decades gives direction concerning the role of the Crown in protecting the right of Aboriginal Peoples and in this regard the "Crown" refers to both levels of Government (Observation By The Court);

- (d) the Royal Commission on Aboriginal Peoples concluded that the federal government's task is to determine, define, recognize and affirm whatever Aboriginal rights existed and urged the courts to design their remedies to facilitate negotiations (Observation By The Court);
- (e) by virtue of Sections 109 and 92 of the Constitution, the provinces have exclusive jurisdiction over their lands and resources unless and until administration and control of those lands is passed to the federal government. What is protected under Section 35 of the Constitution is a concluded land claims agreement, i.e. the treaty, not the process (Newfoundland's Submission);
- (f) since the treaty process is entered into for the mutual benefit of both the Crown and the Aboriginal Peoples, it should be solemnly respected. The honour of the Crown is at stake in its dealings with Aboriginal People. Thus, the fiduciary duty is enforceable and includes protection against unwarranted effects upon Aboriginal interests which include not only the rights of Aboriginal Peoples in the land but also which relate to the land (Observation By The Court);
- (g) fiduciary relationship between the Crown and Aboriginal Peoples can be satisfied by consultation in good faith and with the intention of substantially addressing the concerns of the Aboriginal Peoples whose rights and lands are at issue (Analysis By The Court); and,
- (h) negotiations should also include other Aboriginal groups which have a stake in the territory and the agreement in principle between the federal Government and the Makivik recognizes that a park as opposed to a national park reserve cannot be established until negotiations are completed; however, even when a national park reserve is established there is a duty to have meaningful consultation.

The decision of Rothstein, J.(as he then was) in **Anderson et al (on behalf of all members of the Fairford First Nation) v. A-G Canada**^{xxvi} is another case which illustrates the urgent need for legislation detailing the lead role of the federal government in dealings between Aboriginal Peoples and provincial governments involving land use issues. The court dealt extensively with the plaintiff's allegations that the defendant was in violation of its fiduciary duties to the Fairford Band in a number of respects and in the course of its reasoning clarified the basis of the federal Government's fiduciary duties to Aboriginal Peoples generally.

A summary of the court's overview of the facts in this case will indicate the relevance of the case to the new legislation proposed herein:

^{xxvi}Fed.Ct.Trial Div. File T-2243-93,relased Nov.12,1998.

1. in 1960 and 1961 the Government of Manitoba, with the knowledge and financial assistance of Canada, constructed the Fairford River Water Control Structure or dam and deepened the channel in the Fairford River which ran adjacent to the Fairford Indian Reserve;
2. commencing in 1967 and in many following years, there was extensive flooding of the Fairford Reserve, which Manitoba accepted responsibility for. Negotiations were entered into between Manitoba and the Band whereby Manitoba was to provide the Band with land as compensation for the land that was being flooded;
3. in 1974 a three party agreement was proposed, whereby Manitoba would transfer certain lands to the Band and release Manitoba from further obligations, which Canada refused to sign. At first the objection was that the transfer of land should not be to the Band directly but to Canada; however, other objections were later raised to the substance of the proposed agreement;
4. by 1979 the members of the Band were occupying the compensation land even though it had not been transferred to Canada nor made part of their Reserve;
5. in 1984, Canada focussed on the fact that the agreement was deficient in not having a maximum flood limit and further discussions took place between Canada and Manitoba of which the Band was from time to time informed. Eventually, Manitoba acknowledged the need for a maximum flood limit and that the compensation land was to be considered only partial compensation to the Band and this agreement was reflected in a memorandum of understanding entered into between Canada and Manitoba. Then, the compensation lands were transferred to Canada and made part of the Fairford Indian Reserve; and,
6. the Band was not satisfied with the compensation lands. Even though Manitoba was the source of their problems, the Band decided to sue only Canada on the basis of breach of fiduciary duties and asserted no claim against Manitoba.

In this case, the court found that the period of over six and one half years constituted a period of unreasonable delay in failing to address competently the deficiencies in a tripartite compensation agreement among the Province of Manitoba, Canada and the Fairford Band in a timely manner and in failing to consult with the Band once the deficiencies should have been discovered to determine a course of action to be taken. Hence, the finding in favour of the Band was that the failure to consult over an unreasonable period constituted a breach of the federal Government's fiduciary obligation to the Band.

Conclusions

The writer believes that the recent cases cited above, while not directly related to the present land claims process, illustrate ways in which whether intentionally, as in the case of the Makivik, or

unintentionally, in the case of the Fairford Band, a province seeking to acquire Aboriginal lands or rights over them can frustrate the current arrangements for the resolution of land use issues involving Aboriginal peoples.

Having regard to the need for the federal and provincial governments to deal honourably and fairly with Aboriginal claimants, the current process of resolving Comprehensive and Specific Land Claims can not be oversimplified. Thus, the current procedure involving a series of agreements probably should not be changed. However, if the process is reformed to involve all stakeholders at appropriate times in open and fair negotiations under new federal legislation replacing the existing land claims policy, it will allow for public acceptance and timely resolution of legitimate land use issues involving Aboriginal groups. In this writer's view, the present unstructured voluntary process does nothing to alleviate non-Aboriginal dissatisfaction with legitimate Aboriginal claims. While Aboriginal groups undoubtedly need to build their capacity to deal effectively with their claims in any mandated process that involves concurrent resolution of resource development proposals, this can be dealt with by incorporating certain of the recommendations of the Post-Delgamuukw Capacity Panel at the same time as the present voluntary and unstructured Comprehensive Land Claim process is overhauled.

In addition to provisions mandating relevant provincial involvement referred to above, this writer suggests provisions dealing with the following be included in overhauling legislation:

1. detailed guidelines for appropriate anthropological and other acceptable evidence necessary to establish a negotiable Comprehensive and/or Specific Aboriginal Claim;
2. an independent National Claims Commission (with provincial and territorial representation) which is entitled to adjudicate disputes regarding the acceptance of Aboriginal claims for negotiation and, if requested by any party to ongoing negotiations, entitled to facilitate negotiations;
3. involvement of resource developers where their projects are dependant on the resolution of a pending Comprehensive or Specific Aboriginal Claim, including the requirement of public hearings under specific memorandums of understanding related to each project and an negotiated IBA on significant projects, unless rejected by the local Aboriginal group(s);
4. a dispute resolution process that can be invoked by any participant if agreements are not negotiated within a realistic timeframe;
5. detailed guidelines for the management of monies paid to or for the benefit of the Aboriginal groups involved in the project; and
6. specific rules for the ratification of negotiated Land Claim Settlement Agreements and IBAs when part of the claim settlement.

ENDNOTES

*The views expressed in this Article regarding the desirability of new legislation to deal with Aboriginal land issues are solely those of the author and should not be taken to be views shared by members of the firm of Osler, Hoskin & Harcourt or any of its clients.

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