Delgamuukw v. British Columbia, [1997] 3 SCR 1010 –

Indigenous title

Facts:

When British Columbia joined Canada in 1871, the province did not recognize Indigenous title over land, and did not engage in a treaty process. As a result, most of the land in British Columbia today has never been formally ceded to the Crown by the Indigenous peoples living in the area.

The Gitxsan (spelled *Gitksan* throughout this case) and Wet'suwet'en people of British Columbia attempted to negotiate jurisdiction and ownership of their traditional lands in the 1970s. Although the federal government received their claim, the B.C. government did not participate in the process, and the claim did not go anywhere. Subsequently, the B.C. government began to allow logging operations in the area without consulting with hereditary chiefs.

In 1984, more than 50 hereditary chiefs of the Gitxsan and Wet'suwet'en filed a claim in the British Columbia Supreme Court for ownership and jurisdiction over approximately 58,000 square kilometres of land. This land encompassed most of the area where the 5,500 – 7,000 Gitxsan and Wet'suwet'en people lived, but also overlapped with land over which other Indigenous groups had unsettled land claims. There were also many non-Indigenous people living on this land (over 30,000 people).

The B.C. government claimed that the Gitxsan and Wet'suwet'en had no right or interest to the territory, or alternatively that they should instead seek compensation from the government of Canada.

At trial, the Supreme Court of British Columbia dismissed the land claim. The judge found that while the Gitxsan and Wet'suwet'en were living communally on the area in question and using it for fishing and other sustenance at the time of sovereignty, they did not "own" the territory in any sense that would be recognized by the law. The judge placed little value on the oral histories, totem poles, and crests presented by the Gitxsan and Wet'suwet'en, because he felt they were not sufficiently reliable or site specific. He also felt that the Gitxsan and Wet'suwet'en legal system was too flexible and uncertain to be classified as "law", and ruled against their claim for jurisdiction over this area.

The judge also felt that Indigenous rights could be extinguished or ended by a clear and plain intention of the Crown alone. In his view, Indigenous rights to the land had been extinguished by the Crown granting parcels of this land to third parties in colonial times. Granting land in this way would have made it impossible for Indigenous people to manage the land as they had, and therefore it was clearly the Crown's intention to extinguish the Indigenous land rights. However, he felt that even though there was no remaining Indigenous right to the land, the Crown was still under an obligation to let Indigenous persons use vacant lands until the land was dedicated for another purpose.

Discussion Questions:

1) Do you agree with the Court's decision in this case? Why or why not?

2) The test for Indigenous title requires courts to look at occupation of the land at the time of sovereignty. The *Van der Peet* test for Indigenous rights requires courts to look at practices at the time of European contact. Why do you think these tests use different time periods? Do you agree with this reasoning?

Relevant Law:

The *Constitution Act, 1982*, section 35(1)

Resources:

You can read the entire case at:

https://canlii.ca/t/1fqz8

You can read *The Constitution Act, 1982* at:

https://laws-lois.justice.gc.ca/eng/const/page-12.html#h-39

On appeal, the British Columbia Court of Appeal mostly upheld the trial judge's ruling. The majority of justices found that legal ownership is an exclusive right to occupy land, which did not apply to the Gitxsan and Wet'suwet'en peoples and this land. They also found that when British Columbia entered Confederation, Indigenous people became subject to Canadian legislative authority. While the Gitxsan and Wet'suwet'en did not need the court's permission to govern their own internal affairs, this jurisdiction did not extend to the land on which they lived. The justices disagreed with the trial judge about extinguishing rights. They felt that colonists granting parcels of land did not express a clear intention to extinguish Indigenous rights altogether. Therefore, the court found that while the Gitxsan and Wet'suwet'en may have specific Indigenous rights protected by section 35(1) that are related to this land, ownership and jurisdiction over that land would need to be negotiated.

The Decision:

The Supreme Court of Canada ordered a new trial because the trial judge had failed to properly take into account evidence that was given in the form of oral histories. The Court was able to provide some guidance on the scope of Indigenous title protected under section 35(1).

Indigenous title has three main features:

1) It is inalienable, meaning it cannot be transferred or sold to anyone other than the Crown.
2) It arises out of the fact that Indigenous peoples lived in Canada before European contact.
3) It is held communally, meaning it is a collective right belonging to all members of an Indigenous nation.

Indigenous title under section 35(1) is not the same thing as legal title under English-based laws. It is also not just the ability to use land for practices that are established Indigenous rights under section 35(1). It is somewhere in between. Indigenous title flows from Indigenous societies' connection to the land. Indigenous peoples are not limited to using their lands only for rights protected under section 35(1), but they cannot use their lands for purposes that go against their societies' attachment to the land. For example, if Indigenous title is established because an area was a traditional hunting ground for an Indigenous nation, that nation does not need to use that land *only* for hunting, but they cannot do something to the land that would ruin it as a hunting ground, such as strip mining it.

You do not necessarily have to show Indigenous title in order for certain practices to be protected as Indigenous rights under 35(1). For example, an Indigenous nation may be able to show that they have a right to hunt on a piece of land they do not hold title to. Indigenous title is a type of right that arises specifically because of a connection to the land that is of central significance to an Indigenous culture. On the other hand, an Indigenous nation may be able to show that they have title to the land, but this does not mean every practice done on that land is an Indigenous right under 35(1) in itself.

Following in the footsteps of *R. v. Van der Peet*, a case from the year before about Indigenous rights, the Court set down a test for Indigenous title:

1) **The Indigenous nation must have occupied the land at the time the Crown asserted sovereignty.** This is different from the test for Indigenous rights generally (found in *Van der Peet*), which require the courts to look at a society's practices before they had contact with European settlers. Courts must take into account both whether the land was physically occupied at that time, as well as the Indigenous nation's recognition of land ownership at that time.
2) **If the Indigenous nation claims that their present occupation of the land is proof of past occupation, there must be continuity.** There does not need to be an "unbroken chain" of occupation, but there must be substantial maintenance of the connection between the people and the land.
3) **The Indigenous nation must have occupied the land exclusively at the time of sovereignty**. Indigenous title is an exclusive use and occupation of the land. If other Indigenous nations also occupied the same land and considered it under their control, title cannot be established. However, this does not mean that an Indigenous nation claiming title needs to prove that no other people were on the land (for example, if they had been granted permission to be there or were trespassing). In some cases, there may also be joint title, if multiple Indigenous nations recognized each other's rights to occupy the land alongside them, and to exclude others.

Although the Court sent the matter back down for a new trial, it has not yet been reheard by the courts.

Relevant Law:

The Constitution Act, 1982

35 (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.