

# Aboriginal Title Implementation

*Why are we waiting for the (Settler) Governments to say No to Delgamuukw? We should implement our Original Title.*

-- Chehalis Chief Alex Paul UBCIC Chiefs Council, April 1998

## Indigenous Reality of Original Title

Our Indigenous Peoples, as Nations, hold the jurisdiction and responsibility to protect, access and use the resources upon the Land for the benefit of our Peoples, this is our Original Title.

Nations are comprised of distinct Peoples who have a common history, language and culture. Nations have distinct territories, governed by their distinct social organizations and political, social and economic laws. Indigenous Nations embrace the complete population of a Peoples, bound together by common ties of Self-Determination. No individual community or communities have the power to treaty concerning the collective rights of the Nation. Treaties can be entered into by Nations of Peoples, not fragments of a Nation.

As the Original Peoples of this Land, we have never reached any agreement or treaty with Canada concerning the occupation, settlement, sovereignty and jurisdiction that Canada claims over Land to which we hold absolute Original Title. Despite federal and provincial assertions of jurisdiction and sovereignty, our absolute Original Title to the Lands and Resources and our Right of Self-Determination remains strong and unbroken.

Self-Determination is our responsibility and right to practice our traditional forms of government to protect our Peoples' social, political, economic, and cultural well being.

Our Original Title demands that we practice our jurisdiction to ensure that our Lands and Resources are protected and maintained and used to the full benefit of our Peoples.

Genocide is the destruction and alteration of the very existence of a Peoples. Genocide is what the Indigenous Nations of this Land have been subjected to by the Canadian State (and the colonial powers which gave birth to Canada) and its institutions: the forced removal of our Peoples from their land, the blocking of our Peoples from the use, access and benefit from our Resources; the theft of our children through residential schools and child welfare systems; and a multitude of assimilationist policies aimed at destroying our cultures, histories, languages, laws and systems of governance.

Despite that we have been ravaged by genocide through the years, our Original Title remains firmly rooted and we survive as Peoples and as Nations.

## Canadian Legal Reality of "Aboriginal Title"

Canada has refused to acknowledge that Indigenous Nations have any title to or interest in the Land and its Resources. The Supreme Court of Canada's decision in *Delgamuukw* makes it illegal for Canada to maintain its policy of non-recognition. For the first time in Canada's history, the unanimous bench of the Supreme Court affirmed the existence of aboriginal title as a "right to the land itself."

*Delgamuukw* affirms the existence of Aboriginal Title and demands that the governments of Canada recognize a meaningful role for Indigenous Nations in all decisions relating to our Lands and Resources as well as a right to benefit economically from the use of our Lands and Resources. affirms the existence of Aboriginal Title and demands that the governments of Canada recognize a meaningful role for Indigenous Nations in all decisions relating to our Lands and Resources as well as a right to benefit economically from the use of our Lands and Resources.

There remains a significant difference between what Indigenous Peoples see as being our "Original Title" to the land and its resources, and the Canadian legal notion of "Aboriginal Title."

Our goal is to move from a formal legal recognition of Aboriginal Title into a meaningful assertion "on the ground" of our Original Title. Our "Original Title" to the Lands and its resources is more often referred to as "Aboriginal Title" as this is the term that Canadian courts use. "Aboriginal Title", as it has been recognized in the Canadian legal system to date, still must develop further in order to encompass the full reality of our "Original Title."

This Discussion Paper suggests some of the ways which Indigenous Nations can begin a process of re-discovering and re-invigorating our own Laws and fully re-asserting our Aboriginal Title and Right of Self-Determination.

We recognize that Indigenous Nations are at different stages in their struggle to decolonize. Some may already have taken the first steps, while still others have not seen the power of our own reality.

The *Delgamuukw* case is only a legal decision which does not acknowledge the fullness of our relationship with the Land or the complete measure of our inherent jurisdiction over the Lands and Resources. The power of the *Delgamuukw* decision will be in the political will of our Peoples.

### **Lock, Stock and Barrel**

We can expect that Canada and B.C. will argue that Aboriginal Title is limited to specific tracts of Land and does not include all of our traditional territories.

The Supreme Court confirmed our right to assert our authority over the totality of our traditional territories by incorporating Aboriginal Law, and Aboriginal Peoples' relationship to the Land, in its definition of Aboriginal Title. Reserve lands were originally intended to "reserve" lands upon which to confine us to those areas which we used and occupied most extensively. We must avoid a similar situation from developing with respect to the recognition of Aboriginal Title Lands.

We maintain our position that Aboriginal Title and our relationship to the Land encompasses all of our traditional territories, and that Self-Determination encompasses all aspects of the social, political, cultural and economic well being of our Peoples.

### **Recommendations:**

1. Indigenous Nations must aggressively advance the position that we hold Aboriginal Title to the totality of our territories, and refuse to negotiate or discuss Aboriginal Title with governments on any other basis.
2. Canada must fully accept the reality of our status as Nations. Indigenous Nations must refuse to negotiate or discuss Aboriginal Title on any other basis.
3. Despite Canada's historic policies to cut us off from our Lands, our connection to our Lands has remained strong. Indigenous Nations must "re-claim" the Aboriginal Title Lands which Canada has prevented each Nation from fully using. Our reclamation of our Aboriginal Title lands must include a broad range of activities through which People re-invigorate their relationships to the Land. Some examples would be the building of homes, museums, administration offices, day care centres, and schools on your traditional territories, as well as reviving past uses of the land which have been interrupted by Canadian law. Reclamation would require the support and participation of the entire Nation.
4. Each Indigenous Nation can issue a declaration of its Aboriginal Title to the entirety of its traditional territory.
5. Indigenous Nations must vigorously challenge the federal and provincial government's claim of title or jurisdiction over our Lands, Resources and Peoples. Declarations and policy statements will be served upon both the federal and provincial governments, as well as third party interests, to clarify to all governments, companies or individuals who seek to use our Lands and Resources, that Indigenous Peoples will not allow business to proceed as usual.
6. Indigenous Nations must serve notice to the public that the provincial government does not have jurisdiction to alienate or grant interests to our Lands and Resources. This could include advertisements in local newspapers outlining a map of your Nation's traditional territory, as well as road signs or other public means of education about the extent of your traditional territories.

### **Indigenous De-Colonization Forums**

Indigenous Nations must de-colonize our own minds and actions. Indigenous Nations must stop asking Canada and others for recognition and begin reasserting our own Nationhood. This process of decolonization will involve a fierce struggle to reinvigorate our own traditional laws and systems of governance, as well as to plant within the minds of our own Peoples the seeds of our tomorrows in the

knowledge of our true place among the Nations of the world.

**Recommendations:**

7. Indigenous Government must organize De-Colonization forums to educate their citizens about the political and legal reality which our Nations are facing.

8. De-colonization forums, ultimately, must embrace the Peoples' vision of how Indigenous Governments should proceed to a full recognition of our Aboriginal Title and Responsibility of Self Determination.

**Negotiation**

Each Indigenous Nation must acknowledge and respect the responsibility they have of ensuring that they guard and protect their Aboriginal Title for future generations. Therefore any discussions with any other government must include the full involvement of their citizens, the Peoples who collectively hold the Aboriginal Title, and will pass this on.

No one government, band council, or provincially empowered entity has the power to determine or define the current future collective rights of their Peoples. Aboriginal Title vests with each member of an Indigenous Nation and no negotiation or other discussions can proceed on any other basis.

Our Aboriginal Title is an inherent and inalienable relationship between the Peoples and the Land.

**Recommendations::**

9. Indigenous Nations must set out the principles and standards by which they will agree to meet with Canada to fully accept and implement the reality of our Aboriginal Title.

**B.C. Treaty Process**

There are several key findings of the *Delgamuukw* decision which challenge the current federal and provincial policies within the British Columbia Treaty Process.

Aboriginal Title is a collective interest, which means that no individual band or "First Nation" can treaty for a right held by the collective Nation. Our Aboriginal Title is held by all of our Peoples' and not by the individual "band councils" created under the *Indian Act*.

The Court's recognition that Aboriginal Title has an economic component has thrown the current B.C. Treaty Process loans systems into question. Canada and the Province have become wealthy from their use of Indigenous Nations' Lands and Resources, and their policies aimed at cutting off Indigenous Nations' access to our Lands and Resources. It is morally reprehensible to suggest that our Nations' should have to borrow from the wealth created from our Aboriginal Title Lands in order to "negotiate" for Canada to recognize Aboriginal Title.

The province is a key player in the current B.C. Treaty Process. The basis of this participation was the federal and provincial governments' position that the province had "jurisdiction" over many of the areas being negotiated (lands, resources, social programs, etc.). The *Delgamuukw* case has made it very clear that any title or interest the federal or provincial governments have in lands and resources is subject to Aboriginal Title. Only the federal government has the power or authority to treaty with Indigenous Nations with respect to our Aboriginal Title.

Canada has an obligation to negotiate fairly and in good faith with Indigenous Nations. For those Indigenous Nation who have remained outside of the current treaty process, Canada cannot continue to alienate our lands and resources while insisting that the B.C. Treaty Process is the only process in which they are willing to discuss questions of our Aboriginal Title.

**Recommendations:**

10. Any agreements made or negotiated with respect to our Aboriginal Title must be made by our Nations as a whole, because the title is held by the Nation as a whole. Indigenous Nations must accept the reality of the full consent of its citizens and being able to re-institute their own laws.

11. Any negotiating funds received can not be construed as a loan, but as an initial reparation payment

against the monies which Canada and the Province owe to our Nations as a result of their exploitation of our Lands and Resources.

12. The Province be removed as a full party to any negotiation regarding treaties for the settling of the Land Question; However, Nations may choose to enter into government to government discussion with the province.

13. Indigenous Nations insist that the federal government demonstrate its political will to honour the Supreme Court's direction in *Delgamuukw* to enter into Good Faith Negotiations on a Nation-to-Nation basis. The principles of Good Faith Negotiations must be determined by each individual Nation.

14. Each Indigenous Nation must develop its own consent requirements based upon and fully reflective of their Peoples' right of Self-Determination. These consent requirements must be based on each Nation's own traditional laws and ways of fully involving their Peoples' in decision making. The highest form of decision making for our Nations is consensus and a mutual agreement amongst all of the people within a Nation.

15. Indigenous Peoples must challenge the minimal "Consent" provisions which are currently used within the B.C. Treaty Process (for example, sparsely attended community meetings, or a simple majority voting procedure) by measuring this "minimum standard of consent" against their Nation's traditional laws.

16. Individual communities must accept the reality that Aboriginal Title is collectively held by Indigenous Nations. When individual communities participate in processes designed to extinguish our Aboriginal Title this will be deemed a breach of our traditional laws, for which individual communities will be held fully accountable.

17. Each individual community within a Nation holds their portion of the Nation's territory in protection and trust for the entire Nation. When individual communities enter into any extinguishment processes (such as the B.C. Treaty Process) they are violating their sacred duty to protect and maintain lands and resources for all of the Peoples of their Nation. Where an individual community or communities violate their sacred responsibility to protect the Lands and Resources for the collective benefit of their Peoples, the rest of the Nation must step in and recover this trust for the protection of their Peoples' future relationship with the Lands and Resources.

18. Where federal and provincial governments continue to deal with individual communities in an effort to extinguish our collective Aboriginal Title to the Lands and Resources, Indigenous Nations must hold these governments fully legally liable for the breach of their own laws.

19. As Indigenous Nations we have a responsibility to reconcile all of our communities in order to realize our full power as Nations.

20. Indigenous Nations have the moral obligation to stand with and support individuals within our own Nations, and in neighbouring Nations, to defend their Aboriginal Title and Responsibility of Self-Determination against the extinguishment policies of the Canadian and provincial governments.

21. Indigenous Nations cannot consent to negotiate, discuss or enter into any agreements until the federal government has rescinded its current extinguishment policies in all its forms.

### **Oral Histories and Cultural Heritage**

As Indigenous Peoples we have always recognized that our oral histories and cultural heritage form the basis of our laws and systems of governance. They are our constitutions, our history books, the umbilical cord which will sustain the future of our Peoples.

Historically, our stories have been disrespected and undervalued in Canadian courts. Rules of evidence which exclude oral histories create an impossible situation for aboriginal litigants who seek to establish their rights in Canadian courts. In *Delgamuukw* the court recognized the power and validity of oral histories and stated that they must be given the same weight as other evidence.

### **Recommendations:**

22. Indigenous Nations develop principles on the use and protection of their oral histories and cultural heritage as precious resources which sustain our Peoples' and must be safe-guarded.

23. Both as a means of re-implementing our traditional forms of government, as well as establishing an evidentiary basis where we choose to bring court cases to force the Canadian government to recognize our Aboriginal Title and Rights, Indigenous Nations must preserve the oral histories and stories of our Peoples.

24. Indigenous Nations can compile, for the use and benefit of their own Peoples', maps of their traditional territories which reflect the real Indigenous place names.

### **Jurisdiction**

Our Aboriginal Title forms the basis of our Peoples' inherent jurisdiction over the air, waters, forests, marine resources, wildlife, and all other natural resources.

The full reassertion of our Jurisdiction must include the development and strengthening of our relationships with neighbouring Indigenous Peoples and Nations.

Section 91(24) of the *Constitution Act, 1867* reserves jurisdiction to the federal government over the Indians and lands reserved for Indians. The *Delgamuukw* decision has clarified that the federal jurisdiction over Indian lands is not limited to "reserve" lands but encompasses all Aboriginal Title Lands.

Despite the incorporation of provincial laws under Section 88 of the *Indian Act*, the province cannot intrude upon the federal jurisdiction over "Indian lands" in a manner which would fundamentally alter their nature. Aboriginal Laws and systems of governance have priority over provincial laws.

Currently, the Province erroneously assumes full jurisdiction for such diverse resources as timber, water, range lands, hunting, fishing, wildlife, social services, child welfare, etc. The Supreme Court has clearly stated that any interest that the Province acquired in our Lands and Resources, is subject to our own Aboriginal Title. The province's jurisdiction to regulate or manage our Peoples', resources, or our use of and access to those resources, has been invalidated.

Current policy requires merely that the province "consult" with Indigenous Nations prior to taking action which will impact upon Aboriginal Title or Rights. To date this has meant that the province will inform us of their proposed action, and Indigenous Nations will be given an opportunity - within a limited time frame and with no financial resources - to tell them how we believe this may impact our Aboriginal Title and Rights. The ultimate determination of what impact the proposed action will have on our Title and Rights is left solely with the province, there is no real or meaningful involvement of Indigenous Nations in the actual decision making.

We are told that they are going to build a house, where they will build the house, and the plans that they will use to build the house, and then offered an opportunity to "consult" on the colour of the house. Consultation has meant only superficial and meaningless involvement in any provincial decision making processes. *Delgamuukw's* recognition of Aboriginal Title and the jurisdiction of Indigenous Nations has turned current consultation processes on their head.

The legal duty of the province to consult has been greatly expanded to require the full consent of Indigenous Nations where the Self Determination of our Peoples', or our relationship with the land and its resources will be greatly impacted.

### **Recommendations:**

25. Indigenous Nations must begin the process of re-invigorating our traditional laws and systems of governance with respect to Land management and the access to and use of resources, by reassuming jurisdiction based on our traditional laws and systems of governance. This could mean proceeding with a logging or marine harvesting operation which was approved according to each Nation's own laws.

26. Any plan involving the reassertion of our jurisdiction will put individual Indigenous People in conflict with federal and provincial laws. For example, it will be the individual logger, clam harvester, or hunter who is arrested. As the reassertion of our jurisdiction is done on a Nation-wide basis, a political action designed to challenge federal and provincial jurisdiction must have strong support and participation by members and communities of each Nation.

27. Emphasis must be placed on the harvesting of a particular resource to provide an economic basis for advancing other areas of jurisdiction. Each community within your Nation could commit to logging 10 trees. The profits from the sale of these trees could form the basis of a legal defence fund for individuals who are arrested and charged under Canadian or provincial laws, while acting under authority of your

own law.

28. Indigenous Nations can enter into joint protocol agreements with their neighbouring Nations. These agreements would set out Indigenous Nations' joint commitment and promise to stand together for the protection of their Aboriginal Title. These relationships between Indigenous Nations must be in place before any discussions with the federal and provincial governments occur.

29. Each Nation advise the Canadian and provincial government that all development, regulation, land sales, and resource extraction on so-called "Crown Lands" held under Aboriginal Title must immediately cease.

30. Indigenous Nations notify Canada that our Aboriginal Title Lands include all lands presently designated "Crown Lands" within British Columbia. These Crown Lands are held in Trust for Indigenous Peoples, and must be immediately returned to the Indigenous Nations who are vested with the Aboriginal Title.

31. Where Canada, or third party interests, fully accept the reality of our Aboriginal Title, Indigenous Nations may enter into Interim Agreements to allow some resource extraction or land uses to proceed, where such proposals fully incorporate the involvement and consent of the Indigenous Nations for the benefit of our Peoples.

32. Each Indigenous Nation must take control of the process of consultation by setting up their own "Settler Claims Policy" which sets out the process that federal or provincial governments, and third party interests, must follow if they wish to use or access our lands or resources.

### **Reparations**

Canada has been built upon the wealth extracted from our Nations' traditional territories, and by the imposition of their own laws to prevent our access to our Lands and Resources.

"Aboriginal Title" includes an economic interest. Part of the test for governments to meet when justifying an infringement of Aboriginal Title and Rights is to show that they have provided compensation to the Indigenous Nation who holds the Aboriginal Title to the Lands or resources in question.

*Delgamuukw* imposes a strong duty on the part of the federal government to protect Aboriginal Title Lands. This means that where governments fail to fully protect our interests they are legally liable to provide financial compensation for both the breach of their fiduciary duty as well as for the economic loss suffered through the damage to our relationship with our lands. imposes a strong duty on the part of the federal government to protect Aboriginal Title Lands. This means that where governments fail to fully protect our interests they are legally liable to provide financial compensation for both the breach of their fiduciary duty as well as for the economic loss suffered through the damage to our relationship with our lands.

Governments may attempt to focus on the compensation requirements for infringements, while entirely underplaying the importance of our sacred relationship with the land, and our position that this relationship is not one which can ever be sold or severed without destroying us as a Peoples.

### **Recommendations:**

33. Canada and British Columbia must be held fully legally, financially and morally liable for any further or continued alienation, infringement, or expropriation of our Lands and Resources without our full consent, and for the damage brought upon our Peoples' by their continued implementation of their social policies.

34. Indigenous Nations must demand an independent forensic audit for the last 150 years which gives a full accounting of the profits made by Canadian governments, individuals and corporations from their use of our lands and resources. Canada and the province must be billed for these amounts.

The *Delgamuukw* case is only a legal decision which does not acknowledge the fullness of our relationship with the Land or the complete measure of our inherent jurisdiction over the Lands and Resources.

The power of the *Delgamuukw* decision will be in the political will of our Peoples'.

*Aboriginal Title & Rights...*

*Know Your Rights*

*Exercise Your Rights*

*Protect Your Rights!*