SPECIFIC CLAIMS and *DELGAMUUKW*

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In its reasons for judgment in *Delgamuukw v. British Columbia*,[1] the Supreme Court of Canada has declared a dramatic shift in the law concerning aboriginal nations and other governments in Canada. As a result, there are profound changes in the federal government's fiduciary obligations to aboriginal peoples. Although *Delgamuukw* concerns aboriginal title the principles articulated by the Court are also, in part, relevant to specific claims.

This paper discusses the current claims policy, including some of the positions taken by the government at the negotiation table and describes the implications of *Delgamuukw* for specific claims.

Existing Claims Policy: Lawful Obligations

Different Types of Specific Claims

Over the years the specific claims program of the UBCIC has undertaken research on behalf of Indian bands on a wide variety of grievances which include the following:

- reserve lands set aside by colonial governments and cut off before confederation without surrender or consent
- village sites not reserved and not protected
- reserve lands set aside by the Indian Reserve Commission and opened up to non-Indian settlement without surrender or consent

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1 [1997] S.C.J. No. 108 (December 11, 1997)

- reserve lands set aside by the McKenna-McBride Commission and cut off by Ditchburn Clark (or otherwise) without surrender or consent
- applications for lands made to the McKenna-McBride Commission but lands not reserved by the Commission
- commonage land opened up to non-Indian settlement without surrender or consent
- reserve lands surrendered but not in accordance with the requirements of the *Indian Act*
- permitting non-Indians to use reserve lands but permits not in accordance with the requirements of the *Indian Act*
- reserve lands or resources (eg. timber) not protected for use of band
- graveyards reserved but not protected for use of band
- graveyards not reserved and not protected
- waters reserved but not protected for use of band
- waters not reserved and not protected
- fisheries reserved but not protected for use of band
- fisheries not reserved and not protected
- taking reserve lands for use by non-Indians [by the federal government for, for example, airport purposes; by the Province for, for example, road purposes; by a company for, for example, railway purposes] without consent
- taking reserve lands for use by non-Indians without compensation
- taking reserve lands for specific purpose but lands not used for that purpose

Although well documented, many of these claims have been rejected based on the government's ideas of what is a right and what is a lawful obligation.

Canada's specific claims policy is contained in a 1982 booklet published by DIAND entitled *Outstanding Business: A Native Claims Policy - Specific Claims* ("*Outstanding Business*"). Through its policy, specific claims are a means for the federal government to compensate Indian people for breaches of past treaties or the loss of reserve land through federal mismanagement.[2] The policy is premised on determining on the facts of individual cases whether or not Canada has fulfilled its 'lawful obligations' to a band. As a result of *Delgamuukw* what constitutes a lawful obligation is much broader than what is described in the existing policy.

The term 'lawful obligation' is set out in *Outstanding Business*:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding 'lawful obligation,' i.e., an obligation derived from law on the part of the federal government.
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> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
>
> ii) A breach of lawful obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.
>
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
>
> iv) An illegal disposition of land.

Furthermore, Canada is prepared to consider claims based on the following circumstances:

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.

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[2] The government distinguishes 'specific claims' from 'comprehensive claims'. Comprehensive claims are a process of treaty negotiation focused on previously unsurrendered aboriginal title to lands and resources.

ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where fraud can be clearly demonstrated.

The lawful obligations of the federal government must now be reassessed in light of *Delgamuukw*. The different fact patterns (or grievances) should more often be resolved in favour of aboriginal principles. This is for three main reasons:

(1) **The Supreme Court in *Delgamuukw* and in other decisions has established higher fiduciary standards than the specific claims policy applies**

(2) **The Court in *Delgamuukw* clarified that under section 35 there are rights which exist independently of aboriginal title and corresponding fiduciary obligations to these rights.**

(3) **The Court in *Delgamuukw* clarified the scope of the federal government's jurisdiction under section 91(24) and the corresponding obligation to safeguard the Indian interest in all Indian lands, on and off reserve.**

We deal with each of these points below.

(1) New Fiduciary Obligations

Since the policy was published in 1982 there have been significant developments in the law defining what is meant by 'lawful obligation' and the kinds of circumstances in which the federal government will be held to account for their actions (or lack of actions) in dealing with reserve land. The most significant court cases in this context have been: *Guerin v. R.*, [1985] 1 C.N.L.R. 120; *Blueberry River Indian Band v. Canada* [1996] 2 C.N.L.R. 25; *Semiahmoo Indian Band v. Canada*, [1998] 1 C.N.L.R. 250. These cases establish important principles of

fiduciary law which are relevant to many specific claims. In its dealings with native people and their lands the Crown must meet the fiduciary standard of acting in utmost good faith. This includes a fiduciary duty to act with honesty, integrity and in the band's best interests. The federal government must act in the best interests of the band in all of its dealings with reserve lands, whether before or after a surrender, (*Guerin*; *Blueberry River*) or in the taking of reserve lands for public purposes (*Semiahmoo*). As a result of this case law, a 'lawful obligation' under the specific claims policy can arise in any circumstances where the Crown failed to meet the fiduciary standard or failed to exercise its discretion to correct a situation of which it had knowledge.

The law of lawful obligations has now been expanded significantly by the *Delgamuukw* judgment. In *Delgamuukw* the Court described the fiduciary duty which must be met in relation to any particular infringement of aboriginal title, which includes the aboriginal interest in reserve land. This duty is bounded by the twin pillars of consultation and compensation:

(i) consultation Since aboriginal title includes the right to choose what are appropriate land uses, aboriginal people should be involved in decisions made with respect to their lands. The government must consult with aboriginal people with respect to land use decisions. Failure to consult is a breach of the Crown's fiduciary duty.

> [Consultation] must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation,... (para 168)

(ii) compensation Since aboriginal title includes an economic component, there must be compensation for an infringement of title.

> In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. (para 169)

The Crown's fiduciary obligations enunciated in *Delgamuukw* would also apply to interference with reserve lands, and new lawful obligations may arise in this context. Although *Delgamuukw* established these particular obligations in relation to s.35 and thus arising from 1982, the fiduciary standards are reasonable measures of Crown conduct in alienating interests in reserve land before 1982. In other words, a specific claim may include those circumstances in which the federal government permitted harm to the aboriginal interest in reserve lands without fulfilling the fiduciary duties of consultation and compensation. An example of this might be where a railway was permitted to place its tracks on riparian reserve land in such a way as to leave the people unable to properly access and utilize their fishery. On the basis of *Delgamuukw* the location of the railway line would require prior consultation and proper compensation and thus a claim based on the government's failure to either consult or compensate could be developed.

The *Blueberry River* case articulated a different kind of fiduciary obligation which is enforced in situations where Canada has the power to prevent harm and does nothing. Examples here might cover circumstances as diverse as the failure to correct a survey error which is brought to the government's attention or the failure to restore pre-confederation reserves which were cut off without a surrender or the consent of the band.

Mineral title is another issue which can now give rise to a specific claim. In *Delgamuukw* the Court specifically stated that aboriginal title includes mineral rights. However in legislation which compromises the Indian interest the federal government has acted so as to give sub-surface rights (except protected substances like uranium) lying under Indian reserve lands to the Province of British

Columbia. Where minerals underlying reserve lands have been dealt with under this legislation, the government's actions in this respect may form the basis of a specific claim.

In summary, *Delgamuukw*, combined with *Blueberry River*, provide some clear guidelines regarding new areas to scrutinize Crown conduct to address lawful obligations.

(2) Section 35: New Rights Articulated

The Court recognized that there is a spectrum of aboriginal rights which are constitutionally protected under s. 35(1) of the *Constitution Act, 1982*. Across the spectrum, there is a difference in the degree of connection with the land. This spectrum can include:

a) aboriginal rights practices which were integral to the aboriginal society before contact, but no title is proved;

b) a site specific right to engage in certain activities at particular places, but where title is not claimed;

c) aboriginal title which is a right to the land itself.

As can be seen, at the middle of this spectrum are rights dealing with the occupation of specific sites for specific purposes. These rights, embraced within s. 35, but short of title, should give rise to new specific claims. In particular, there is now an obligation on Canada to protect from interference those lands or places which ought to have been reserved or protected by Canada, but were not. For example, claims in respect of (i) pre-confederation village sites, (ii) graveyards, and (iii) specific harvesting resource areas, should now be recognized as specific claims whether or not these places were formally reserved.

(3) Scope of Federal Jurisdiction under Section 91(24)

Under s. 91(24) of the *Constitution Act, 1867*, the federal government has constitutional jurisdiction for 'Indians, and Lands reserved for the Indians'. Prior to *Delgamuukw*, the federal government believed that Canada's responsibility extended only to Indians on present day Indian reserve lands. The Court rejected this narrow interpretation of the federal power and ruled that the s.91(24) jurisdiction embraces off reserve interests, most notably encompassing the jurisdiction to protect aboriginal title.

The Court ruled that under s.91(24), the federal government has a fiduciary responsibility to "safeguard one of the most central of native interests - their interest in their lands, both on and off reserve." Specific claims in respect of reserve alienations should now be reviewed to determine whether the federal government acted in a manner which did in fact safeguard the aboriginal interests. As this same fiduciary obligation applies off-reserve, claims policy should be expanded to address the government's failure to safeguard the native interests in their lands off reserve.

Failure by Canada to safeguard aboriginal title in particular circumstances may result in a breach of fiduciary obligation which forms the basis of a specific claim. In *Blueberry River*, the Supreme Court of Canada found a breach by the Department of Indian Affairs when officials failed to correct an error (allowing the alienation of mineral rights from the reserve) on becoming aware of it. Thus Canada may be held responsible if the Crown could have prevented harm to aboriginal title, and failed to do so.

The disallowance of provincial land legislation in the early years after confederation is one example[3] of the federal government exercising its broad protective mandate. In this example the government did advocate in a manner consistent with its fiduciary role on behalf of the Indians and their lands, whether on or off reserve.

The government's disallowance of B.C.'s *Land Act, 1874* was based on a legal opinion prepared by the then Minister of Justice, Telesphore Fournier, that the provincial law enabled the Province to alienate land, without having regard to aboriginal title. That was illegal. The provincial Land Act was objectionable because it affected the interests of the Dominion, that is the federal domain of aboriginal title and rights. The care of Indians had been entrusted to the federal government by s. 91(24) and their rights to lands in the Province had been preserved by s. 109 of the *Constitution Act, 1867*[4].

As in 1875, Canada, holding the constitutional obligations under section 91(24), must act to prevent interference with Indian lands, whether or not those lands are reserved under the *Indian Act*. That is a clear consequence of *Delgamuukw*. With the guidance of *Delgamuukw*, specific claims provide an opportunity for the government to remedy, in creative and meaningful ways, the Crown's failure in the past to live up to these constitutional responsibilities.

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[3] The example discussed is based on research documents obtained by the UBCIC's specific claims research program. More details are set out in Appendix A.

[4] Section 109 provides that all lands belong to the Province subject to any trusts or other interest in respect of the lands. This constitutional provision was part of the argument made by the Hon. Telesphore Fournier when he recommended that the *Land Act, 1874* be disallowed. Fournier argued that under s.109 all lands belong to the Province subject to aboriginal title.

Aboriginal Title, on and off Reserve

The same legal principles govern the aboriginal interest in reserve lands and lands held pursuant to aboriginal title. The *Guerin* case involved a surrender of reserve land under the *Indian Act*. In that case Mr. Justice Dickson said the following:

> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the lands is the same in both cases. (This passage is cited with approval in *Delgamuukw* at para 120)

Thus another way to consider specific claims, both new (after *Delgamuukw*) and old (under the existing policy), is to consider the Court's characterization of aboriginal title. Of particular relevance for the purposes of this discussion is the fact that aboriginal title is a legal interest in land, a right to the land itself. Aboriginal title is not limited to the right to carry on traditional practices or activities. Rather, aboriginal title is a broad right to the exclusive use and occupation of land for a variety of purposes. Those purposes include using the land for contemporary economic activities. Like reserve land, aboriginal title includes the resources on the land, such as oil and gas, timber, etc.

Aboriginal title protects the aboriginal people's relationship to their land. Aboriginal title lands cannot be used in a way which destroys the aboriginal people's relationship to their land, now or in the future. Since the aboriginal people themselves cannot destroy their relationship to the land then it can be argued that neither can the Crown authorize uses of the land which has this effect, unless of course the people consent.

In circumstances where the federal government has either taken steps or failed to take steps with the result that there has been harm to the aboriginal interest in a

band's lands, the government's conduct may now form the subject of a specific claim. This certainly applies on reserve and may well apply off reserve.

Principles for Negotiation

There are a number of positions which the federal government typically takes in negotiating settlements of specific claims. The positions which cannot stand in the face of *Delgamuukw* include the following:

1. Special Value

The federal government says that there cannot be compensation for 'special value'. *Outstanding Business* describes this point as follows:

> Compensation shall not include any additional amount based on "special value to owner" unless it can be established that the land in question had a special economic value to the claimant band, over and above its market value.

In *Delgamuukw*, the Court recognized that aboriginal title lands have an important non-economic component. The lands have an inherent and unique value.

> The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-economic component. The land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. (para 129)

The policy stated in *Outstanding Business* (no special value or only special economic value) is contrary to this pronouncement of the Court.

2. Oral History

The federal government has accepted oral evidence, usually in the form of a statutory declaration, in support of a claim. The question has always been what weight the government has given to this evidence. Most often the government has

required additional evidence in the form of historical or archival documents which would corroborate the oral evidence of the people.

In *Delgamuukw*, the Court recognized that the laws of evidence work against aboriginal people and that it is necessary to adapt those laws in order to give value to oral histories. The aboriginal perspective on the people's relationship to their land must be given proper weight by the courts, and also by the government.

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the type of historical evidence that Courts are familiar with, which largely consists of historical documents. (para 87)

The use of oral history in proving a specific claim is now affirmed. Some claims should be reevaluated by the federal government based on the weight that should properly be given to oral testimony. Other claims which rely solely on oral history and the evidence of the Elders may now be advanced by Indian bands.

3. Compensation

Outstanding Business sets out the following criteria governing compensation:

> As a general rule, the claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. This compensation will be based on legal principles.
>
> Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority the band shall be compensated either by the return of these lands or by payment of the current, unimproved value of the lands.
>
> Compensation may include an amount based on the loss of use of the lands in question. where it can be established that the claimants did in fact suffer such a loss. In every case, the loss shall be the net loss.

Where a specific claim is about reserve lands which are also aboriginal title lands, these criteria as presently drafted cannot stand. Since aboriginal title includes an economic component, there must be compensation for an infringement of title.

> In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. (para 169)

The Court has now indicated that, as a necessary element of the discharge of fiduciary obligation, compensation is required when aboriginal title is infringed. The Court did not say how fair compensation is to be arrived at; the form and amount of compensation will need to be negotiated. However these comments may be of assistance:

> ...the treatment of aboriginal title as a compensable right can be traced back to the *Royal Proclamation, 1763* ...It must be emphasized, nonetheless, that fair compensation...is not equated with the price of a fee simple. Rather, compensation must be viewed in terms of the right and in keeping with the honour of the Crown. (per La Forest J., para 203)

The current policy on compensation is narrow, technical and legally strict and for these reasons it can be argued that the policy is not in keeping with the honour of the Crown. Moreover the policy does not take into account the aboriginal perspective on the relationship of the people to their land or what the loss of use or dispossession of the lands means to the community. Changes in keeping with Court's direction in *Delgamuukw* should be made.

4. Surrender Clauses

A review of one specific claim illustrates the kinds of problems which have arisen under the current policy. This claim concerns the sale of Lax Kw'alaams reserve land and the difficulty in settling the claim concerns the surrender clause required by the government.[5] In 1906, the federal government sold a portion of Lax Kw'alaams reserve land without obtaining a proper surrender under the *Indian Act*. The band had divided into two communities and occupied distinct parts of the reserve. It was only electors of one part of the band who were asked to give their consent to the sale. In 1979, the Band filed a specific claim seeking compensation. In 1985, the claim was accepted for negotiation and in 1991, a tentative agreement was reached on the amount of compensation. The federal government insisted that the settlement include a clause stating that with this agreement the Band has surrendered all its rights, title or interests in and to the reserve land sold in 1906. In other words, the federal government wanted a surrender of any and all of the Band's aboriginal rights, title and interest in the reserve. The Band refused to sign an agreement containing such a clause. The Indian Claims Commission (the "ICC")[6] held an inquiry into the government's requirement for the type of surrender clause it was demanding. The ICC recommended that the surrender required by the government should be limited to the Band's interest in the land under the *Indian Act* and should not include any of the Band's aboriginal rights in the land. To date the government has not acted upon the ICC's recommendations.[7]

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5 Report of Indian Claims Commission, June, 1994

6 The ICC was established in 1991 as an independent body with the authority to inquire into and advise on the government's application of the specific claims policy in situations where there are disagreements between the band and the Minister. The ICC only has the power to issue recommendations and no power to resolve any claim.

7 The Hon. A.C. Hamilton, Fact Finder, briefly reviewed and strongly endorsed the recommendations of the ICC in his report on the extinguishment issue related to comprehensive claims. (*A New Partnership*, June, 1995)

> It is difficult to understand why the Government is demanding such a broad form of surrender....

Regarding the claims process itself, it is worth noting that it has been nearly 20 years since the Band filed the claim and 13 years since the claim was accepted for negotiations; yet no settlement has been achieved under the current policy. A settlement should be possible in light of the clear statements made about aboriginal title in *Delgamuukw*, and in particular the ruling that there is no extinguishment in British Columbia, and that Crown title and aboriginal title can co-exist. The Court addressed how that co-existence operates in its discussion of s.35. The government should not require the Indians to terminate or extinguish their title since the purpose of s.35 is to reconcile the aboriginal title with the assertion of Crown sovereignty - extinguishment is not reconciliation. Following on *Delgamuukw*, it would now be contrary to legal principle for the government to continue to require the surrender of all of the Band's aboriginal title and rights in their former reserve lands.

Duty to Negotiate in Good Faith

In addressing both the issues of consultation, and negotiations to resolve the land question through treaties, the Court in *Delgamuukw* made a number of comments regarding both the necessity of negotiation and the standard for Crown conduct when conducting these negotiations. While the comments of the Court are not addressed to the specific claims process, the comments are nevertheless helpful in assessing whether or not the specific claims process is currently conducted in accordance with these judicial pronouncements. In our opinion, the claims process falls short of the standard, and should be changed. In *Delgamuukw* the Court repeated the point urged in many previous court decisions:

> On a final note, I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that

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The Lax Kw'alaams situation raises a question about the latitude government negotiators appear to have in spite of published policy upon which people rely. (at p.30)

> properly considers the complex and competing interests at stake. This point was made by Lambert J.A. in the Court of Appeal [citation omitted]:
>
> So, in the end, the legal rights of the Indian people will have to be accommodated within our total society by political compromises and accommodations based in the first instance on negotiation and agreement and ultimately in accordance with the sovereign will of the community as a whole. (para. 207, per LaForest J.)

There is a new development in the Court's admonition to resolve land claims by negotiation. The Court has now directed that the Crown must negotiate with aboriginal nations and those negotiations must be conducted **in good faith.**

> Moreover, the Crown is under a moral, if not a legal, duty to enter into and to conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*...to be a basic purpose of s. 35(1) - 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown'. Let us face it, we are all here to stay. (para. 186)

What is new in this statement is:

a) there is a legal duty on the Crown to enter into and conduct negotiations

b) negotiations must be conducted in good faith

c) the purpose of the negotiations is to reach settlements

d) there must be give and take

e) the courts will superintend these negotiations when the issue comes before them.

Based on an analysis of labour law cases where the good faith bargaining provision has been in existence for years, the content of the duty to negotiate has

been well delineated. We set out below the content of the duty, as prepared by Stuart A. Rush, Q.C. and presented at a conference entitled "Supreme Court of Canada Decision in *Delgamuukw*" sponsored by the Pacific Business and Law Institute held in Vancouver, January 12th and 13th, 1998. In his article entitled "The Duty to Bargain in Good Faith Arising Out of *Delgamuukw*.", Mr. Rush says the following: [at pages 1.8 to 1.12; footnotes and case citations omitted]

> "The content of the duty depends on the circumstances but it generally prohibits the following:
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> 1. Outright refusal to negotiate or meet.
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>   - Cursory attendance will be insufficient to meet the duty.
>
>   - The Federal Government must establish a treaty process which is in keeping with the principles of justification articulated by the Court in *Delgamuukw*.
>
>   - Neither Government cannot unilaterally withdraw from negotiations.
>
> 2. Refusal to meet unless procedural preconditions are met.
>
>   - The Governments cannot require that the negotiations will only go on under the auspices of the B.C. Treaty Commission.
>
> 3. "Surface" bargaining with no true intent of concluding an agreement.
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>   - Surface bargaining is going through the motions or preserving the surface indications of bargaining without any real intent to conclude a collective agreement.
>
> 4. Refusal to discuss a term which is basic and standard in similar agreements.
>
> 5. Seeking a provision which is illegal or contrary to public policy.
>
>   - The Government could not require a condition that it would extinguish the Federal fiduciary duty.

6. Deliberately inflammatory proposals.

7. Unexplained and sudden changes in position.

8. Refusing to meet unless specific concessions are agreed to.

    - It would be a breach of the duty to demand that specific progress must be met or there is no deal.

9. Failure to commit time and preparation required.

10. Failure to explain positions taken.

    - The most basic duty on parties is to state their position on the matters at issue and explain that position.

    - Bargaining must be informed; there must be rational discussion.

11. Failure to disclose relevant information.

    - There must be sufficient information to support the party's position and there must be full disclosure of that information to allow Aboriginal Nations to make informed decisions.

12. Misrepresentations.

13. Offering less than would exist without the agreement.

14. Refusing to follow through on matters already agreed to.

15. Changing conditions throughout the negotiation process.

    - The parties cannot move the goal posts in negotiations.

16. Threats during the negotiation process.

17. Contradictory offers and gross misstatements, especially when given publicly.

18. Failure to participate in bargaining sessions and failure to submit written or oral proposals.

19. Refusal to bargain with particular people or objecting to the composition of a bargaining committee.

20. Pressing certain matters fundamental to a settlement to an impasse.

    - The parties cannot take a "take it or leave it" position and walk away on fundamental issues to the negotiations.

21. Using the negotiation process to resolve or address a distinct dispute.

22. The duty to bargain is a continuous one until agreement is reached.

    - Even though there is litigation, the parties must still bargain.
    - The Federal Government must scrap its "where litigation, no negotiation" strategy."

The failure to bargain in good faith is capable of being supervised by a court or other independent tribunal. In the case of labour disputes, legislation has been created to establish an independent supervisory body.

The present specific claims process falls far short of meeting the good faith bargaining standard. Before a claim has even been accepted for negotiation, there is an inherent conflict of interest in the review by Canada as to its own breach of lawful obligations. After the claim has been accepted for negotiation, the negotiations are plagued by unilateral positions taken by Canada which are not negotiable and often stand in the way of settlement. Delay is systemic. The approach of the Court in *Delgamuukw* supports establishing an independent body which can supervise the specific claims process, to ensure that the review and negotiation of claims are in accordance with the high standards suggested in *Delgamuukw.* The recommendations of the Royal Commission for an independent body to handle specific claims is in keeping with the direction of the Court in *Delgamuukw.*

Conclusion

It is apparent that the existing federal claims policy will have to be revised in a manner which embraces the principles articulated in *Delgamuukw*. The requirement for a revised claims policy arises by virtue of the extent of the federal jurisdiction grounded in section 91(24) of the *Constitution Act, 1867*; the articulation of a spectrum of rights embraced by section 35 of the *Constitution Act 1982;* and the fiduciary obligation to safeguard the native interests in their lands, bounded by the twin fiduciary pillars of consultation and compensation.

The Supreme Court of Canada's description of aboriginal title and the discussion of the constitutional mandate and fiduciary role of Canada in relation to Indian lands provide new ground on which to develop specific claims, reevaluate claims which have been rejected, and conclude specific claims settlements which are consistent with the honour of the Crown. In order to walk this ground together, the federal government should rewrite the specific claims policy in light of *Delgamuukw*. Good faith negotiations can then commence.

Appendix A: Disallowance of *Land Act, 1874*

On March 2, 1874, the British Columbia legislature passed a Land Act ("*Land Act, 1874*"[8]). By federal Order-in-Council dated March 16, 1875, the federal government disallowed the *Land Act, 1874*. The government's disallowance followed a recommendation stated in a legal opinion prepared by the then Minister of Justice, Telesphore Fournier. In his report dated January 19, 1875 Fournier stated that the reason for the disallowance was that the provincial law enabled the Province to alienate land, without having regard to aboriginal title. That was illegal.

> ...the Act in question is objectionable, as tending to deal with the lands which are assumed to be the absolute property of the province, an assumption which completely ignores, as applicable to the Indians of British Columbia, the honour and good faith with which the Crown has, in all other cases,....dealt with the various Indian Tribes.

The provincial legislature went back to the drafting table and made some revisions to the *Land Act, 1874*. On April 22, 1875, the legislature passed a revised Land Act ("*Land Act, 1875*"). When this version reached Ottawa, at first no action was taken. This was because of a report of the Minister of Justice, Edward Blake, dated October 30, 1875, which stated that although certain changes were made to the disallowed Act the legislation "still retains objectionable features." A federal Order-in-Council dated November 10, 1875 approved this report.

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[8] B.C., Statutes, 1874, 37 Vict., no. 2 '*An Act to amend and consolidate the laws affecting Crown Lands in British Columbia*'.

Subsequently the Province took the position that the federal government's objections to the Land Act were entirely answered by the agreement of both levels of government to settle the Indian Land Question through the establishment of a Joint Indian Reserve Commission (the "IRC")[9]. In a report dated April 28, 1876, the Minister of Justice, Edward Blake, responded and advised the federal government in the following terms:

> Although [Blake] cannot concur that the objections taken are entirely removed [by the establishment of the IRC], and though [Blake] is of opinion that...there remains serious question as to whether the Act now under consideration is within the competence of the Provincial Legislature, yet since...great inconvenience and confusion might result from its disallowance...it would be the better course to leave the act to its operation.
>
> It is to be observed that this procedure neither expressly nor impliedly waives any right of the government of Canada to insist that any of the provisions of the Act are beyond the competence of the local legislature, and are consequently inoperative.

On May 6, 1876, the federal cabinet approved of this report and its recommendation. In short, because of political considerations, the disallowance was subsequently removed, with Canada reserving the right to maintain that the land law continued to be illegal.

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[9] The IRC was proposed by the federal government in an Order-in-Council dated November 10, 1875 and accepted by provincial Order-in-Council dated January 6, 1876. Subsequently two commissioners, A.C. Anderson representing Canada and Archibald McKinley representing British Columbia, were appointed. Gilbert Sproat was selected as the third, joint commissioner.