

Land claims settlements – an alternative Commonwealth model?

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Introduction

One of the great strengths of the Commonwealth is its highly developed jurisprudence and its shared commitment to promoting the rule of law. The influence of the law in one country, particularly developments in the common law, may be felt thousands of miles away in another jurisdiction. While this influence does not mean there should be uniformity across the Commonwealth, it does strengthen legal reasoning and enable Commonwealth States to learn from one another's experiences.

In early 2006 Guyana brought into force the Amerindian Act (Act no.6 of 2006) which creates a regime of special rights for native Indians (Amerindians.) This new Amerindian Act (the Act) is a part of the Commonwealth's shared legal culture. The Act shows influences from Australia and Canada, yet takes a different approach in order to address the unique situation of Amerindians in Guyana. A key aspect of the Act is the settlement of Amerindian land claims.

The land issue

The Amerindian population is currently about 68,819 persons - an increase of 47% in the 11 years between the 1991 census¹ and the most recent census in 2002. Such a large increase in population has resulted in growing pressure on the land and natural resources which Amerindians depend on for their physical, cultural and spiritual lives. Amerindians now need more land than before if they are to survive as peoples with their cultural base intact.

The Amerindian Act seeks to do this in three ways :

- first by recognising and protecting *collective* ownership
- second by giving Amerindians *absolute title* to land so that collectively they control what happens to their land; and
- third by expressly recognising their *spiritual* relationship with the land.

Collective rights

Although many countries have refused to recognise collective ownership of land for aboriginal and tribal peoples, since Independence, Guyana has granted communal titles to Amerindian communities as a matter of policy. That policy is now entrenched in law. Under the Act successful land claims will result in the land being held

¹ This census counted 46,722 Amerindians

collectively by the community.² Furthermore under Part IV of the Act, all decisions relating to the use of the land will be made collectively by the community.

Absolute title

Guyana's land law is based on Roman-Dutch law with the English law of personalty imposed on it. All land which is not owned privately is vested in the State and there is no court decision on whether common law aboriginal title exists. There are no treaties which recognise Amerindian land ownership or sovereignty.

Before the Act was passed, the administrative mechanism for dealing with Amerindian land claims was for the President to make a grant under the State Lands Act conferring title on the Amerindian community³. Each title is expressed to be absolute and forever. It also states that it is unconditional but does not transfer ownership of minerals. This mechanism under the State Lands Act was purely discretionary. The State has been under no legal obligation to grant a title or to make it unconditional and forever. In theory the State could refuse a title irrespective of the strength of a land claim.

Under the Act the Government no longer has a discretion whether to grant a title. If a claim is successful title, the Act imposes a duty to issue a title under the State Lands Act.

The absolute nature of the title granted to the community is reinforced in the Act which gives substantial powers to the Village Council⁴ with respect to entry and access to community lands and to the use of resources on those lands. Anybody who enters the community's land without first obtaining permission from the Village Council commits a criminal offence.⁵ The only exceptions are for official government business⁶ (e.g. inspecting or maintaining airstrips, schools, health centres which lie within the community's lands) or where entry into property is already authorised by law (e.g. police powers).

The Village Council makes all decisions regarding the use and occupation of land but their decision must be in accordance with traditional rights as recognised within the community. Anyone wishing to use forest resources, (e.g. to cut timber) must obtain permission from the Village Council and comply with the conditions set by the Village Council.⁷ Communities control how much logging goes on within their lands and what level of environmental protection to impose. The only condition is that such exploitation of the forests should meet the standards set by national law (but the community is free to set higher standards if it wishes.)

² Section 63

³ These titles can be extensive: the WaiWai community of 200 persons were granted title to 2300 square miles

⁴ The Village Council is elected by the community and must be composed of Amerindians resident in the community.

⁵ Section 5

⁶ Section 7

⁷ Sections 64 and 65

Communities also have effective control of mining on their lands through a veto. Irrespective of whether a miner has permission from the State to conduct mining on Amerindian lands he cannot do so unless he has obtained the consent of the community.⁸ The community are free to attach conditions to their consent e.g. payment of royalties, restrictions on access to sacred sites etc. If the community refuse their consent to the mining it is illegal for the miner to attempt to start any mining operations on the community's land.⁹

The State has a limited power to override the community's veto where it is in the public interest to do so. This applies only to mining which is classified as large scale mining. Since most miners in Guyana carry out small and medium scale mining this power to override the veto will rarely be exercisable. Should the State attempt to override the veto, the community is entitled to challenge the State in court and the State is required to put in place measures to protect the community.

The relationship with the land

Amerindian communities claim that land is something with which they have a spiritual relationship. They assert that their land must be passed down intact from one generation to the other. This way of looking at land is completely different to market based systems in which land is a commodity to be bought and sold for profit. Any settlement of Amerindian land claims should be consistent with the basis upon which Amerindians have made that claim. The Act therefore requires the State to take into account the community's spiritual attachment¹⁰ to and cultural association with the land when settling the land claim¹¹.

In order to protect the Amerindian relationship with land, the Act also prohibits the community from disposing of its land.¹² No more than ten percent of the land can be leased and the maximum term is fifty years. Any such lease must be consistent with the community's cultural attachment to the land although it is up to the community to decide what that is.¹³

The land claim mechanism

Another innovative feature of the land settlement process in the Act is the mechanism by which communities can claim land. Common law aboriginal title is based on rights which pre-date the State's acquisition of sovereignty. Courts in Australia and Canada have over the years produced extensive and cogent jurisprudence establishing the scope and content of native or aboriginal title and in setting out the conditions for recognition of such title. The main requirement for a claimant is to show exclusive occupation or use at the time the Crown acquired sovereignty.¹⁴

⁸ Section 48

⁹ Non-Amerindian Guyanese have no equivalent veto.

¹⁰ See the decision of the Inter-American Court of Human Rights in *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement of 31st August 2001, Inter-Am. Ct. H.R., (Ser.C) No.79 (2001)) which recognised the link between a community's land and their spiritual life.

¹¹ Section 62

¹² Section 44

¹³ Section 46

¹⁴ See for example from Australia: *Mabo and others V State of Queensland*; and from Canada *Delgamuuk, Marshall*,

This evidentiary requirement would be extremely onerous for Amerindian claimants and likely to prove fatal to an unknown number of claims. Accurate historical records are hard to find. The Act allows Amerindians to adduce oral evidence¹⁵, but it is very unlikely that oral evidence alone could establish what obtained some hundred years ago. Amerindian claimants would have to obtain archaeological and anthropological evidence which could be time consuming and prohibitively expensive. Furthermore there is historical evidence which would be prejudicial to some land claims. Records indicate that the Dutch issued land grants to certain Amerindians thereby suggesting that Amerindians in those areas did not consider that they owned the land. There is also evidence that Amerindians fled from the Spanish and the Portuguese in Venezuela and Brazil and sought the protection of the British Crown as late as the nineteenth century.

The Amerindian Act therefore departs from the strict requirements of common law aboriginal title as developed in other States. Any community which has been in existence for twenty-five years may claim land.¹⁶ The Act acknowledges that Amerindian lands claims have a historical basis. The claim is settled on the basis of information on the claimant's customs and traditions and takes into account the length of time they have occupied and used the land but there is no need to go back to the acquisition of sovereignty. Furthermore a claimant does not have to show exclusive occupation or use. As a result the Act makes the evidentiary burden much less onerous one than in other jurisdictions.

Amerindian or indigenous?

The rights contained in the Act apply only to Amerindians and there was some discussion on whether to replace "Amerindian" with "Indigenous Peoples". The term "indigenous peoples" is used in some Commonwealth countries but its introduction into Guyana threatened to be extremely divisive. Unlike countries such as New Zealand, Canada and Australia, Guyana does not have a settler population descended from the colonial powers. The bulk of the population comprises the descendants of African slaves and indentured Indians. After much consideration the change was rejected out of concern for the rights of other Guyanese, not least the outstanding Afro-Guyanese claims to ancestral lands.

Amerindians were also divided and some rejected the term "indigenous peoples" as another colonial imposition; others felt that they should not be forced to call themselves "indigenous" but should be free to define themselves according to their traditional names. The Act addresses all of these concerns by giving Amerindian communities the legal right to self-define and to describe themselves as indigenous, Amerindian, aboriginal, native, Arecuna, Akawaiyo, Arawak, Atorad, Carib, Lokono, Macushi, Patamona, WaiWai, Wapishiana, or Warau as they choose.¹⁷

¹⁵ Section 61

¹⁶ Section 60

¹⁷ Section 3

Conclusion

The Amerindian Act addresses the issue of Amerindian land claims by using legal mechanisms to ensure respect for the Amerindian way of life. The recognition of collective ownership and collective decision making in relation to Amerindian land allows Amerindians to protect their cultural and spiritual existence. The title is a form of private property and as such is protected under the Constitution against interference by the State. Amerindians have the power to decide what is the right balance between using their resources for economic development and ensuring that they hand the land on intact to the next generation.

The influence of Canadian and Australian jurisprudence is evident in the Amerindian Act and in its provisions to address the problems inherent in the concept of native title and the requirements for evidence. The Act addresses the very specific situation of Amerindians in Guyana but may provide insights for other States in their approach to land settlement issues.

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