Defining Aboriginal Title in the 90's:

HAS THE SUPREME COURT

FINALLY GOT IT RIGHT?

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of Canadian Studies

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In memory of Chéliah

Professor Kent McNeil has been a faculty member at York University's Osgoode Hall Law School since 1987. He is author of numerous publications on the rights of indigenous peoples in Canada, Australia, and the United States. These works have been influential in the development of the law in relation to these rights. In particular, his book, *Common Law Aboriginal Title*, has been used by the Supreme Court of Canada and the High Court of Australia in landmark decisions on indigenous land rights.

During his tenure as Robarts Professor, Dr. McNeil wrote several articles on indigenous rights, among them "Co-Existence of Indigenous Rights and Other Interests in Land in Australia and Canada," "Aboriginal Title and Aboriginal Rights: What's the Connection?," and "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction." He also

prepared a collection of his articles for a book on indigenous rights in Canada and Australia, to be published by the University of Saskatchewan Native Law Centre.

In his Robarts Lecture, Professor McNeil examines the Supreme Court of Canada's recent decision on indigenous land rights in *Delgamuukw* v. *the Queen*. He gives the Court credit for boldly resolving the issue of content, but also criticizes the way the Court dealt with the issue of infringement. While not presuming to foresee all the effects of this momentous decision, Professor McNeil does attempt to assess its potential impact on federal/provincial relations and land claim negotiations.

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Introduction

The arrival of Europeans in North America had a profound impact on the Aboriginal peoples who had been living here for thousands of years. Virtually everything changed: unfamiliar diseases like smallpox ravished the population; the fur trade and European settlement and resource use decimated the wildlife; new technology such as firearms altered Aboriginal economies and tribal relations; Christian evangelism affected spiritual beliefs and values; European imposition of

sovereignty and governmental structures weakened and, in some cases, replaced Aboriginal forms of government; and so on.[1] But more than anything else, the taking of Aboriginal lands by Europeans has probably had the greatest long-term impact on the Aboriginal peoples.

In some areas of Canada, a degree of consent to this taking was obtained in the form of treaties.[2] Elsewhere--especially east of Ontario and in British Columbia--Aboriginal lands were simply seized for incoming settlers.[3] These discrepancies reveal both doubt (transparently self-serving) among Europeans about whether the Aboriginal peoples had legal rights to their traditional lands, and unevenness in the way Aboriginal land claims were actually dealt with. But from the beginning of European colonization, there was always some recognition of Aboriginal use and occupation of land. While French acknowledgment of this undeniable reality tended to be revealed more in day-to-day relations with the Aboriginal peoples,[4] Britain formally recognized Aboriginal land rights in the Royal Proclamation of 1763.[5] That document specifically reserved unceded Aboriginal lands for Aboriginal occupation and use, and stipulated that those lands could only be acquired by the Crown at an assembly of the Aboriginal people concerned.

While the Royal Proclamation provided a legal basis for the land surrender treaties that followed, the issue of the nature of Aboriginal land rights remained unsettled. Amazingly, that issue was not judicially resolved until December 1997, when the Supreme Court of Canada finally produced a legal definition of Aboriginal title in its landmark decision in *Delgamuukw* v. *British Columbia*.[6] That case involved claims by the Gitxsan (also spelled Gitksan) and Wet'suwet'en Nations to ownership and jurisdiction over their traditional territories, encompassing 58,000 square kilometres--an area almost the size of New Brunswick--in northern British Columbia (see the map of the claim area at page 8).[7] The case resulted in one of the longest and most complex

trials in Canadian history, taking 318 days for presentation of the evidence and a further 56 days for legal argument. The trial was conducted in the British Columbia Supreme Court before Chief Justice McEachern, who produced a book-length judgment dismissing the claims.[8] The British Columbia Court of Appeal modified some aspects of that decision and affirmed others.[9] On further appeal, the Supreme Court of Canada set aside the Court of Appeal's decision and ordered a new trial.

Antonio Lamer, the Chief Justice of Canada, delivered the leading judgment.[10] While avoiding any decision on the merits of the case, he did outline some important principles to be applied in Aboriginal title litigation. First of all, he specified the title's content and explained how it can be proved. He then looked at the test for determining when a legislative infringement of Aboriginal title can be justified. Finally, he examined the issue of whether the provinces have authority under the Constitution to extinguish Aboriginal title. But even though self-government was a vital part of the Gitxsan and Wet'suwet'en claims, he refused to address that issue directly. However, there is some indication in his judgment that the Court might look favourably on a claim of self-government in an appropriate future case.

In this lecture, I will examine the principles the Chief Justice laid down in relation to Aboriginal title, and assess the possible impact of his decision on Aboriginal land claims and resource development in Canada. We will see that the decision has far-reaching implications that could lead to the economic and political empowerment of Aboriginal peoples and to a radical restructuring of Canadian federalism.

The Content of Aboriginal Title

Prior to the *Delgamuukw* decision, judicial descriptions of Aboriginal title to land were vague. In 1888, the Judicial Committee of the Privy Council referred to it as "a personal and usufructuary right,"[11] but was unwilling to give a more precise definition. In the Supreme Court of Canada in 1973, Justice Judson said it meant that, at the time of colonization, the Aboriginal peoples were here, "organized in societies and occupying the land as their forefathers had done for centuries."[12] In 1984, Justice Dickson (later Chief Justice of Canada) said that it is "best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered [to the Crown]."[13] But the courts were reluctant to say what Aboriginal title actually amounts to. The question of whether Aboriginal peoples are entitled to the forests, minerals, oil, and other resources on and under their lands was left unresolved.

There were two sides to this debate over the content of Aboriginal title. Non-Aboriginal governments usually argued that it is limited to whatever uses Aboriginal peoples made of the land prior to being influenced by Europeans. In contrast to this, Aboriginal peoples generally contended that they are entitled to make any use of their lands, including extraction of resources like oil and minerals that were not utilized by them in the past.

Until the *Delgamuukw* decision, it was uncertain which way the Supreme Court of Canada was going to come down on this issue. At trial, the Gitxsan and Wet'suwet'en presented evidence that they have occupied and used lands within the claimed territories for at least 3,500 years. The governments of British Columbia and Canada contended that the evidence presented was not sufficient to establish Aboriginal title. Moreover, even if it did establish title, the government lawyers argued that the interest of the Gitxsan and Wet'suwet'en in their lands is limited to uses

that were integral to their distinctive cultures prior to contact with Europeans.[14]

The Supreme Court did not actually decide whether the Gitxsan and Wet'suwet'en have Aboriginal title. Chief Justice Lamer avoided a final determination of this issue because there were discrepancies between the way the case had been pleaded and the way it was argued on appeal.[15] More importantly, he decided that McEachern C.J. had made errors at trial in his treatment of the oral histories of the Gitxsan and Wet'suwet'en. Despite the fact that these histories were vitally important to their case, McEachern C.J. refused to admit some of them and did not attribute independent weight to those he was willing to admit. Chief Justice Lamer said that the courts have to be more appreciative of "the evidentiary difficulties inherent in adjudicating Aboriginal claims."[16] Quoting from his own judgment in the *Van der Peet* case, decided in 1996, he said that

> a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of Aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records....[17]

As the trial judge failed to do that, his factual findings were unreliable and could not stand. That was the main reason why the Supreme Court ordered a new trial.

In my opinion, the most important aspect of the *Delgamuukw* decision for Aboriginal peoples is the part dealing with the content of Aboriginal title. For the first time, the Supreme Court stopped avoiding this issue and provided a clear picture of the title's nature. In so doing, the Court rejected the position of British Columbia and Canada that Aboriginal title is limited to historical uses of the land, but it also rejected the contention of the Gitxsan and Wet'suwet'en that it is equivalent to an inalienable fee simple estate.[18] The Supreme Court affirmed earlier

characterizations of Aboriginal title as sui generis; that is, as an interest in land that is in a class of its own.[19] The fact that Aboriginal title cannot be sold or transferred is one aspect of this uniqueness. Another is the title's collective nature--it can only be held by a community of Aboriginal people, not by individuals. The source of Aboriginal title also distinguishes it from other land titles, which usually originate in Crown grants. Because the Aboriginal peoples were here before the Crown asserted sovereignty, their title is derived from the dual source of their prior occupation and their pre-existing systems of law.

These sui generis aspects of Aboriginal title do not restrict the uses that Aboriginal peoples can make of their lands. Chief Justice Lamer proclaimed emphatically that Aboriginal title is "a right to the land itself."[20] It is not a mere collection of rights to pursue activities on the land that were integral to the distinctive cultures of the Aboriginal peoples before Europeans appeared on the scene, as British Columbia and Canada argued. Instead, Aboriginal title encompasses a full range of uses that need not be linked to past practices. So Aboriginal nations can engage in mining, lumbering, oil and gas extraction, and so on, even if they did not use their lands in those ways in the past.[21]

But the Chief Justice did not stop there--he declared as well that the right Aboriginal peoples have to use and occupy their lands is an exclusive right. This means that Aboriginal peoples are not just free to determine for themselves what uses they will make of their lands; they also have as much right as any landholder to prevent others--and this includes governments--from intruding on and using their lands without their consent. Indeed, they should have even greater protection against government intrusion than other landholders because their Aboriginal rights have been recognized and affirmed by the Constitution,[22] whereas the property rights of other

landholders have not. In my opinion the Supreme Court, while acknowledging the proprietary nature and constitutional status of Aboriginal title, did not assign adequate significance to these factors. We will come back to this matter later, as it relates to another issue--namely, infringement.

While describing Aboriginal title as a right of exclusive use and occupation of land, the Supreme Court did place an inherent limitation on the purposes for which Aboriginal title lands can be used. The limitation is this:

> Lands held pursuant to Aboriginal title cannot be used in a manner that is irreconcilable with the nature of the attachment to the land which forms the basis of the group's claim to Aboriginal title.[23]

Chief Justice Lamer linked this limitation to the dual source of Aboriginal title in prior occupation of land and pre-existing systems of Aboriginal law. He emphasized the importance of maintaining the continuity between the historic patterns of occupation which are the basis of Aboriginal title and present-day uses. Thus Aboriginal peoples cannot use their lands in ways that would prevent their special relationship with the land from continuing into the future. The Chief Justice gave two examples to illustrate this point. First, if the occupation necessary for establishing Aboriginal title is proven by showing that the land was used as a hunting ground, it cannot be used today in ways that would destroy its value for hunting--so strip mining, for instance, would be precluded. Secondly,

> if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).[24]

These examples have added significance because they suggest that proof of a ceremonial or

cultural connection with land, or of use of it as a hunting ground, can be sufficient to establish Aboriginal title. This relates to the matter of proof, to be discussed below.

To the extent that the inherent limitation on Aboriginal title precludes uses that would destroy the value of the land for future generations, it probably accords with the understanding Aboriginal people generally have of their own responsibilities.[25] But the connection the Chief Justice made between their historic relationship to the land and uses they can make of it today concerns me because it suggests that Aboriginal peoples may be prisoners of the past. Lamer C.J. tried to dispel this kind of concern by emphasizing that the limitation does not restrict use to activities traditionally carried out on the land. "That," he said, "would amount to a legal straitjacket on Aboriginal peoples who have a legitimate legal claim to the land."[26] He added that his approach "allows for a full range of uses of the land, subject only to an overarching limit, defined by the special nature of the Aboriginal title in that land."[27]

But to what extent is the "special nature" of Aboriginal title tied to the past? The Chief Justice did not answer this question directly. But if I understand him correctly, what he seems to have had in mind is this: On the one hand, present uses are not limited to historic uses, but on the other, present uses that would preclude historic uses, or destroy an Aboriginal people's special relationship with the land, are not permitted. In other words, present uses are not restricted to, but they are restricted by, past practices and traditions.

So what if an Aboriginal society has changed so that its members no longer use their lands as they once did--they now have a different relationship with the land, which is still special to them, but is not historically based? Are they still restricted by past practices and traditions that no one is interested in following any more? In that hypothetical situation, which Chief Justice Lamer

does not seem to have considered, I would say no. From a logical perspective, maintenance of the restrictions would make little sense, though I suppose it would preserve the option of returning to the abandoned practices and traditions in the future. More disturbingly, isn't it paternalistic for the Supreme Court to impose restrictions on Aboriginal title in the interests of cultural preservation--which seems to be what this is all about--if the Aboriginal community in question does not want them? This brings me to the issue of self-government, which in my opinion provides a way out of this dilemma.

Aboriginal Self-Government

As already mentioned, Chief Justice Lamer expressly avoided the issue of self-government, even though it was a vital part of the Gitxsan and Wet'suwet'en claims. His reason for doing so was that

> the errors of fact made by the trial judge, and the resultant need for a new trial, make it impossible for this Court to determine whether the claim to self-government has been made out.[28]

The Chief Justice was not even willing to outline any general principles on self-government to guide future litigation. However, a careful reading of his decision reveals that, for theoretical and practical reasons, self-government is essential for his conception of Aboriginal title to work.

We have seen that the Chief Justice said that pre-existing systems of Aboriginal law are a source of Aboriginal title to land. He therefore acknowledged that the Aboriginal peoples had legal systems, which presupposes forms of government, prior to the arrival of Europeans in North America. Those legal systems and forms of government did not simply disappear when the French and British Crowns proclaimed sovereignty over what is now Canada. They continued to

function in varying degrees,[29] and regulated the internal affairs and external relations of the Aboriginal nations.[30] In *Delgamuukw*, Lamer C.J. acknowledged the existence of decision-making authority in present-day Aboriginal communities, insofar as their land rights are concerned. After affirming that Aboriginal land is held communally by all the members of an Aboriginal nation, he added that "[d]ecisions with respect to that land are also made by that community."[31] When one thinks about it, this decision-making authority has to accompany communal land use rights, as how would resources be managed and distributed within the community without it? In the absence of community controls, there might be a free-for-all scramble for resources--an Aboriginal version of the "tragedy of the commons."[32] And decision-making authority must entail a community structure for making decisions--in short, some form of self-government.[33]

As suggested above, self-government provides a solution to the dilemma created by the inherent limitation Chief Justice Lamer placed on Aboriginal title. We have seen that this limitation prevents Aboriginal lands from being used in ways that are inconsistent with an Aboriginal nation's connection with the land. But the nature of that connection must be allowed to change over time so that Aboriginal peoples are not made prisoners of their own pasts. Canadian courts should not sit in judgment over social change in Aboriginal communities, deciding what is and what is not necessary for their cultural preservation.[34] That kind of paternalism is self-defeating because it destroys the autonomy that is necessary for Aboriginal communities to thrive as dynamic cultural and political entities. Any internal limitations on Aboriginal title in the interests of cultural preservation should be determined by Aboriginal nations themselves through the exercise of self-government within their communities--they should not be

imposed by Canadian courts.[35]

Proof of Aboriginal Title

In order to establish Aboriginal title, Chief Justice Lamer said that Aboriginal people must prove that they occupied the claimed land at the time the Crown asserted sovereignty, and that the occupation was exclusive. The date of Crown assertion of sovereignty is the relevant time because, in his words, "Aboriginal title is a burden on the Crown's underlying title," and "it does not make sense to speak of a burden on the underlying title before that title existed."[36] Also, the date of sovereignty is generally more certain than the date of first contact with Europeans, which was the time the Court designated in *Van der Peet* for proof of other Aboriginal rights.[37] The Chief Justice distinguished Aboriginal title from other Aboriginal rights, such as a right to hunt or fish, because Aboriginal title arises from occupation of land, whereas other Aboriginal rights do not. At common law, occupation of land, in and of itself, is sufficient to establish title.[38]

What then is required to prove occupation of land? In the context of Aboriginal title, Chief Justice Lamer said that both the common law and the Aboriginal perspective have to be taken into account. At common law, any acts in relation to land that indicate an intention to hold it for one's own purposes are evidence of occupation.[39] In assessing these acts, "the conditions of life and the habits and ideas of the people" in question are relevant.[40] Quoting from Professor Brian Slattery, the Chief Justice said that, "[i]n considering whether occupation sufficient to ground title is established, `one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed.'"[41] Regarding the Aboriginal perspective, Lamer C.J. added that Aboriginal laws, including but not limited to land

tenure systems or land use laws, are also relevant to establishing occupation at the time the Crown asserted sovereignty. So while the issue to be determined is whether the lands were occupied at that time, both physical presence and Aboriginal law can be used to prove it.

The Chief Justice acknowledged that "[c]onclusive evidence of pre-sovereignty occupation may be difficult to come by."[42] He said that evidence of present occupation could be presented as proof of pre-sovereignty occupation.[43] In that case there would have to be continuity between the two, but this does not require "an unbroken chain of continuity," as long as there has been "`substantial maintenance of the connection' between the people and the land."[44] Occupation, he said, "may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize Aboriginal title."[45] Hence disruptions in continuity, especially when due to European violation of Aboriginal rights, do not preclude present-day Aboriginal title.

As we have seen, for Aboriginal title to be established, the occupation at the time of assertion of sovereignty must have been exclusive. Chief Justice Lamer explained that, because the right of use and occupation entailed by Aboriginal title is exclusive, the occupation necessary to prove it must have been exclusive as well. However, he observed that "[e]xclusivity is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of Aboriginal title with caution."[46] In this regard, the Aboriginal perspective once again needs to be accorded as much weight as the common law perspective. Also, joint Aboriginal title can be shared by two or more Aboriginal nations by application of the concept of shared exclusivity. This would occur, for example, where "two Aboriginal nations lived on a particular piece of land and recognized each other's entitlement to that land but nobody else's."[47]

Infringement of Aboriginal Title

Although earlier decisions had intimated as much,[48] *Delgamuukw* made clear that Aboriginal title is a real property right--in Chief Justice Lamer's words, it is "the right to the land itself."[49] We have seen that it is also an exclusive right, which means that Aboriginal titleholders can keep others from intruding on their lands.[50] As a result, any such intrusion, unless authorized by law, would be an actionable trespass. Stated more broadly, as a property right Aboriginal title is entitled to as much legal protection as any other property right in Canada.

But Aboriginal title is not just a property right--it is also a constitutionally protected right. Because it is recognized and affirmed as an Aboriginal right by section 35(1) of the Constitution Act, 1982,[51] it is accorded protection against government interference that no other property rights in Canada enjoy. However, this protection, like the protection accorded to fundamental rights by the Charter of Rights and Freedoms, is not absolute. In *R.* v. *Sparrow*,[52] decided in 1990, the Supreme Court held that Aboriginal rights can be infringed by federal legislation that meets a strict test of justification. This test requires the government to prove that there is a valid legislative objective behind the infringement, and that the fiduciary duty the Crown owes to the Aboriginal peoples has been respected. In *Sparrow*, the Court said that the legislative objective must be "compelling and substantial," and that respect for the fiduciary duty means that Aboriginal rights must be given priority over non-Aboriginal interests.[53] This priority is in keeping with the constitutional status of Aboriginal rights, which, to borrow a metaphor from Ronald Dworkin, allows them to "trump" other rights that are not constitutionally protected.[54] The Court also stated that, in some circumstances, consultation with the Aboriginal people whose

rights are involved will have to take place before measures infringing the rights are adopted.[55]

However, in decisions since *Sparrow* the Supreme Court has watered down the protection accorded to Aboriginal rights to such an extent that, in my opinion, their constitutional status has been seriously undermined. It seemed clear from Sparrow that Aboriginal rights can only be overridden in exceptional circumstances, as one would expect where constitutional rights are concerned, and then only by means of or pursuant to legislation.[56] In that case, the Aboriginal right in question was a right to fish for food, societal and ceremonial purposes. The Court decided that federal regulations could limit this right if necessary for the valid legislative purpose of conserving fish stocks. In other words, infringement would be justified if the government had no other viable options for conserving this vital resource. The government could not, however, justify an infringement of the right just because that would be in the "public interest." Chief Justice Dickson and Justice La Forest, delivering the unanimous judgment, put it this way:

> We find the “public interest” justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.[57]

However, when the Court revisited this issue six years later in the *Gladstone* case, it did endorse public interest justifications, though not quite in the broad terms rejected in *Sparrow.* Delivering the majority judgment, Chief Justice Lamer said that, because

> Aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that Aboriginal societies are a part of that community), some limitation of those rights will be justifiable.[58]

Taken by itself, this passage does not suggest that public interest alone is a sufficient justification for overriding Aboriginal rights, but when one looks at the kinds of objectives that Lamer C.J.

was willing to characterize as compelling and substantial, that seems to be the result.

To give this some context, we need to be aware that *Gladstone* involved a commercial Aboriginal fishing right, specifically a right to sell herring spawn on kelp in large quantities. This distinguished it from *Sparrow*, which involved an Aboriginal right to fish mainly for food. In *Gladstone*, Lamer C.J. decided that a commercial Aboriginal fishing right does not have complete priority over other fishing.[59] So after necessary conservation has been provided for, how is the fish resource to be allocated among the various users? The Chief Justice said that, while commercial fishing pursuant to an Aboriginal right still has to be given some priority, government allocation of the resource can take into account

> objectives such as the pursuit of economic and regional fairness, and the recognition of the historic reliance upon, and participation in, the fishery by non-Aboriginal groups.[60]

What he seems to be suggesting here is that, in the interests of "economic and regional fairness," the constitutional rights of the Aboriginal peoples can be infringed by legislation for the purpose of distributing some of the resource to others. Since when, I would like to know, can constitutional rights be overridden for the economic benefit of private persons who do not have equivalent rights? Isn't this turning the Constitution on its head by allowing interests that are not constitutional to trump rights that are?[61]

Justice McLachlin recognized these problems in her forceful dissent in *Van der Peet*, where she discussed Chief Justice Lamer's judgment in *Gladstone*. For one thing, she found his approach to be inconsistent with *Sparrow* because it extended the meaning of "compelling and substantial," in her words, "to any goal which can be justified for the good of the community as a whole, Aboriginal and non-Aboriginal."[62] She continued:

> The extension of the concept of compelling objective to matters like economic and regional fairness and the interests of non-Aboriginal fishers ... would negate the very Aboriginal right to fish itself, on the ground that this is required for the reconciliation of Aboriginal rights and other interests and the consequent good of the community as a whole.[63]

For her, this would permit the Crown to "convey a portion of an Aboriginal fishing right to others, not by treaty or with the consent of the Aboriginal people, but by its own unilateral act."[64] She found this to be not only unacceptable, but also unconstitutional.[65] I agree.

Chief Justice Lamer appears to have been oblivious to these objections, as he relied heavily on *Gladstone* in his discussion of infringement in *Delgamuukw.* From *Sparrow* and *Gladstone* he extracted general principles governing justification for infringement of Aboriginal rights, which he then applied to Aboriginal title. In particular, he pointed out that most of the legislative objectives that may justify infringement "can be traced to the reconciliation of the prior occupation of North America by Aboriginal peoples with the assertion of Crown sovereignty."[66] He added that reconciliation "entails the recognition that 'distinctive Aboriginal societies exist within, and are a part of, a broader social, political and economic community.'"[67] He then made a remarkable statement that reveals how little the constitutional protection of Aboriginal title really means:

> In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of Aboriginal title.[68]

Let us be clear about what the Chief Justice had in mind here. If the government thinks the development of agriculture is sufficiently important, it can settle "foreign populations" (by

which he must have meant non-Aboriginal Canadians) on Aboriginal lands, even though that would be a clear infringement of Aboriginal title. In other words, replacement of Aboriginal peoples who do not farm with Canadians who do can be justifiable, even though this is an infringement of the Aboriginal peoples' constitutional rights. This sounds very much like a familiar justification for dispossessing Aboriginal peoples in the heyday of European colonialism in eastern North America-- agriculturalists are superior to hunters and gatherers, and so can take their lands.[69] But Lamer C.J. was not referring to the seventeenth and eighteenth centuries--he was talking about the present day, as justification for infringement only became relevant after Aboriginal rights were constitutionalized in 1982!

Development of forestry and mining are two more examples Lamer C.J. gave of objectives that would justify infringing Aboriginal title. Now we all know who, for the most part, engages in these kinds of resource development today--large, usually multinational, corporations. So what the Chief Justice appears to have envisaged here is government-authorized intrusion onto Aboriginal lands to serve the economic interests of large corporations. If this is justifiable for the good of the community as a whole, then Lamer C.J. seems to subscribe to the view that what is good for large corporations is good for Canada, and if it is good for Canada, then Aboriginal rights can be brushed aside.

To put this in context, we need to think about how private, non-Aboriginal lands are treated by governments in Canada. Has anyone ever heard of someone's ranch or resort land being taken by the government and transferred to someone else because it would be economically beneficial to the community for the land to be farmed? If a private landowner decides not to develop his or her land, is it justifiable for the government to take it away and grant it to a

corporation because it contains valuable timber or minerals? Of course not. Governments can only expropriate land for public purposes, such as highways and airports, and then only if they have clear statutory authority to do so.[70] They have no power to take someone's land and grant it to someone else, even if that might be good for the community.[71] Protection of private property from this kind of interference happens to be a fundamental tenet of our English law system, and has been ever since Magna Carta.[72]

But from what Lamer C.J. said about infringement and justification in *Delgamuukw,* it sounds like Aboriginal title lands are more vulnerable to government interference than private lands. How can this be? We have seen that Aboriginal title is constitutionally protected in Canada, whereas private property rights are not. The whole purpose of constitutionalizing rights is to place them beyond government infringement, except in exceptional circumstances. In 1982, a conscious choice was made to provide that protection to Aboriginal rights but not to private property rights. So how is it that Aboriginal rights have now become more vulnerable? With respect, for me this aspect of Lamer C.J.'s judgment is simply perverse.

There are, however, a couple of qualifiers in the part of Lamer C.J.'s judgment on infringement that may serve as checks on the broad governmental power over Aboriginal title that he apparently endorsed. First, following *Sparrow,*[73] he held that one consequence of the Crown's fiduciary duty is that Aboriginal peoples must be consulted before infringements of their Aboriginal title will be justifiable.[74] This requirement of consultation would result in "the involvement of Aboriginal peoples in decisions taken with respect to their lands."[75] The extent of the requisite involvement apparently depends on the severity of the infringement. Lamer C.J. put it this way:

> The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this 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, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.[76]

His suggestion that mere consultation would not fulfil the Crown's fiduciary duty in most cases, and that full Aboriginal consent would be necessary in some situations, does allow for significant Aboriginal participation in decision-making regarding their lands, and for a veto power where the infringement of their Aboriginal title is sufficiently serious.

The other qualifier that could act as a practical deterrent to infringement is what Lamer C.J. called the "economic aspect" of Aboriginal title.[77] As we have seen, he held that Aboriginal title entails a right to exclusive use and occupation, encompassing resources both on and under the land, including timber and minerals.[78] After saying that the economic aspect is particularly relevant "when one takes into account the modern uses to which lands held pursuant to Aboriginal title can be put," he continued:

> The economic aspect of Aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in *Sparrow* and which I repeated in *Gladstone*. Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of Aboriginal rights: *Guerin*. In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when Aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular Aboriginal title affected and with the nature and severity of the infringement and the extent to which Aboriginal interests were accommodated.[79]

Infringement of Aboriginal title is not without cost. Aboriginal peoples have a right to

compensation for any loss they incur as a result of infringement. Moreover, as Lamer C.J. linked this right to the fiduciary duty which is integral to the constitutional status of Aboriginal title, it would seem that the obligation to pay compensation is constitutional.[80] This means that it cannot be avoided by legislation.[81] Given that Aboriginal title includes natural resources, any infringement of it for the purpose of developing those resources could result in expensive compensation payments. When one combines this right to compensation with the duty to consult, what emerges from the part of Lamer C.J.'s judgment on infringement is an emphasis on Aboriginal participation in resource development.[82]

Throughout his discussion of infringement, Lamer C.J. seems to have taken for granted that provincial legislatures as well as the federal Parliament can infringe Aboriginal title, provided they are able to meet the justification test.[83] But as we are about to see, this appears to be in direct conflict with another part of his judgment, dealing with Aboriginal title and federalism.

Federal and Provincial Jurisdiction over Aboriginal Title

Sections 91 and 92 of the Constitution Act, 1867,[84] divided governmental powers between the Parliament of Canada and the provincial legislatures. Section 91(24) assigned exclusive jurisdiction over "Indians, and Lands reserved for the Indians," to Parliament. The *Delgamuukw* decision resolved a long-standing debate over whether the words "Lands reserved for the Indians" include lands held by Aboriginal title.[85] Chief Justice Lamer decided, on the basis of his interpretation of earlier authority and for public policy reasons,[86] that Aboriginal title lands are included under that constitutional head of power.

Then what are the implications of this? The Chief Justice said explicitly that this means

that the provinces, since Confederation, have been unable to extinguish Aboriginal title. But as mentioned previously, he nonetheless suggested that the provinces can infringe Aboriginal title, provided they justify the infringement by meeting the *Sparrow* and *Gladstone* test.[87] This is also apparent from his examples of infringement for the purposes of agriculture, forestry, and mining, all of which come primarily under provincial jurisdiction. But how, one might ask, can the provinces infringe Aboriginal title for any of these purposes if it is under exclusive federal jurisdiction?

Surprisingly, Chief Justice Lamer did not even mention, let alone answer, this question. I nonetheless think that the correct response is that they cannot. This response is based on the constitutional principle of interjurisdictional immunity, which prevents the provinces from enacting legislation in relation to matters that are under exclusive federal jurisdiction.[88] In *Delgamuukw*, Lamer C.J. accepted the application of this principle to Aboriginal title, given that it is a federal matter.[89] So to the extent that provincial laws are in relation to land, they cannot apply to "Lands reserved for the Indians," including Aboriginal title lands.

There is an extensive, well-settled body of case law excluding the application of provincial laws to one category of these section 91(24) lands, namely, Indian reserves. Every case I am aware of on this issue--and this includes Supreme Court of Canada decisions--has held that, to the extent that provincial laws relate to use and possession of lands, they cannot apply to reserve lands.[90] This case law clearly applies to Aboriginal title lands, as Lamer C.J., in *Delgamuukw*, specifically adopted an earlier judicial statement that the interest in reserve and Aboriginal title lands is the same.[91] In both instances, the Aboriginal interest entails a right to exclusive use and occupation. The reason why provincial laws relating to use and occupation cannot apply on

reserves is precisely because those laws would interfere with that Aboriginal interest. If this is the case for reserve lands, it must be the case for Aboriginal title lands as well.[92]

How then was Chief Justice Lamer able to conclude that provincial laws can infringe Aboriginal title, particularly if the infringement involved something as intrusive as engaging in agriculture, forestry, or mining on Aboriginal lands? It is perfectly obvious that activities like these would interfere with the Aboriginal titleholders' right of exclusive use and occupation. Frankly, I do not have an answer to this. It appears to be an oversight, a case of the left hand having forgotten what the right hand has done. The Supreme Court will have to return to this issue in the future, and resolve this glaring contradiction.

So how might the Court resolve this?[93] In my opinion, it will be virtually impossible for the Court to backtrack on its conclusion that Aboriginal title comes under exclusive federal jurisdiction. As its motivation for doing so would obviously be to rescue provincial power to infringe Aboriginal title, it would leave itself wide open to attack for changing its mind for political and economic reasons, at the expense of legal principle and to the detriment of Aboriginal rights. That would not engender respect for the Court by Aboriginal peoples, nor, I would expect, by other fair-minded Canadians. Instead, I think the Court will be obliged to accept the consequences of its decision that Parliament has exclusive jurisdiction over Aboriginal title. This means that, to the extent that infringements of Aboriginal title can be justified--and we have seen that there are major problems with the Court's approach to that as well--the power to do so is exclusively federal.

Conclusion

Has the Supreme Court finally got the definition of Aboriginal title right? My answer, as is probably obvious by now, is an equivocal lawyer's response--yes and no. On the yes side, with some reservations I think the Court's approach to the issues of proof and content of Aboriginal title is basically correct.[94] What Aboriginal people have to show is exclusive occupation of land at the time the Crown asserted sovereignty. Occupation here is evaluated by reference to their own societies and their own ways of using the land, not by European standards. Joint occupation by more than one Aboriginal nation is also recognized. On content of Aboriginal title, the Court has acknowledged that it is a right to exclusive use and occupation, for a full range of purposes that are not limited to historic uses. This is in keeping with common law principles, which have never limited the uses an occupant can make of land to the uses relied upon to establish the occupation.[95] The inherent limitation excluding uses that are irreconcilable with the nature of the particular Aboriginal people's attachment to the land may be problematic, but as we have seen this will depend on whether the Court allows for modifications to the nature of that attachment over time, through cultural change and the exercise of powers of self-government.

However, in its treatment of the issue of infringement of Aboriginal title, I think the Supreme Court made serious errors. The suggestion that Aboriginal title can be infringed in the interests of economic development, benefiting private persons and corporations, disregards the special protection accorded to property rights by English law for close to eight hundred years. Moreover, Aboriginal title, unlike other property rights, is also protected against government interference by the Canadian Constitution, a fact that was acknowledged but not given sufficient importance by the Court.

Finally, there are the matters of provincial infringement of Aboriginal title and the

constitutional division of powers. As we have seen, Chief Justice Lamer's inference that provincial legislatures can infringe Aboriginal title is in stark contradiction to his ruling that Aboriginal title is under the exclusive jurisdiction of Parliament. I have no doubt that the Court will have to take a second look at this issue, and I hope this contradiction will be resolved in a way that respects both constitutional principles and Aboriginal rights.

Overall, there can be no doubt that *Delgamuukw* is a landmark decision. As the full impact of it sinks in, it will have a dramatic effect, especially in areas of Canada where land cession treaties or land claims agreements have not yet been signed. By specifying that "Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes,"[96] it helps to level the playing field between Aboriginal peoples and non-Aboriginal governments in the negotiation of land claims.[97] It could also alter the nature of those negotiations very significantly. In the land claims agreements that have been signed since the federal government instituted a land claims policy in 1973,[98] the Aboriginal parties have generally been obliged to surrender their Aboriginal title to the entire land claim area, in return for security of tenure in the form of recognized title to a portion of it, and other benefits.[99] At the time they were signed, these agreements may have been reasonable compromises, given the uncertainty over the meaning of Aboriginal title. That uncertainty no longer exists. Given that the Supreme Court has finally accepted that Aboriginal title is the right to exclusive use and occupation, and includes natural resources, why should Aboriginal people be willing to surrender Aboriginal title to any of their Aboriginal lands? As a result of *Delgamuukw,* they already have the security of tenure and entitlement to natural resources that they sought in earlier agreements.

Then why negotiate land claims agreements at all? In my opinion, there are two reasons for doing so. First of all, after *Delgamuukw* Aboriginal people still have to prove that they have Aboriginal title.[100] While the decision did remove the uncertainty over the meaning of Aboriginal title, it did not resolve the issue of which Aboriginal peoples have title to what lands. The decision did not even resolve that matter for the Git<u>x</u>san and Wet'suwet'en--that is why the case was sent back to trial. To avoid the protracted, expensive litigation that would be required to establish Aboriginal title in court, it is advisable for Aboriginal peoples to try to resolve the issues of the existence and geographical extent of their Aboriginal title through negotiations with the federal and provincial governments.[101] If those governments refuse to take sufficient account of the *Delgamuukw* decision in the negotiations, or display other instances of bad faith, then the Aboriginal peoples always have the option of going to court.

A second reason for negotiating is that, although Aboriginal peoples are entitled to the resources on and under their lands, the inalienability of Aboriginal title[102] may prevent them from developing those resources without the cooperation of the federal government. This feature of Aboriginal title may, for example, prevent Aboriginal titleholders from entering into leaseholds or resource extraction agreements with corporations that have the expertise and capital to develop the resources. While there would appear to be no legal impediment preventing Aboriginal peoples from developing these resources on their own (as long as they do not violate the inherent limitation on their title,[103]) this may not be a realistic option, at least in the short term, for Aboriginal peoples who do not have the necessary human and financial resources. So for Aboriginal peoples who are interested in developing the resources on their lands, negotiation of agreements with the federal and provincial governments may be unavoidable.

In the meantime we have seen that, given exclusive federal jurisdiction over Aboriginal rights, the provinces should not be able to infringe Aboriginal title. Without Aboriginal consent, provincially authorized resource development on lands subject to Aboriginal claims therefore poses substantial risks. If Aboriginal title to those lands is subsequently established, the province and the developer could be liable for damages for trespass.[104] In circumstances where the province and the developer had prior notice of those claims, punitive damages as well as damages for actual loss might be appropriate, especially where disruption to Aboriginal ways of life has occurred that cannot be repaired and cannot be assessed in monetary terms. As those damages might far outweigh the benefits of the trespass, provincial governments and developers should think twice before engaging in resource development or other use of lands that are subject to Aboriginal claims.

Acting under the authority conferred on it by section 91(24) of the Constitution Act, 1867, we have seen that the Parliament of Canada can infringe Aboriginal title as long as the infringement can be justified. On the basis of the *Delgamuukw* decision, it would therefore seem that Parliament could authorize resource development on Aboriginal title lands.[105] But for that to be justified, at the very least there would have to be consultation with the Aboriginal titleholders, and in some instances their consent would have to be obtained. Moreover, compensation would have to be paid to them for any violation of their Aboriginal title. If the benefit of the infringement went to a province or to a resource developer, what incentive would there be for the federal government to incur the cost of paying compensation?[106] From a practical perspective, the more viable alternative would be for agreements to be negotiated with the Aboriginal peoples for resource development on their lands. For these agreements to be valid, the federal government

would have to be a party. But where the lands are located within provincial boundaries, the province would need to be involved as well.[107]

Negotiated agreements are the means by which Aboriginal land claims have been dealt with in Canada historically, originally by treaties and more recently by land claims agreements. This approach respects the Aboriginal peoples and their authority to make decisions regarding their lands, whereas non-consensual infringement of their Aboriginal title by federal legislation does not. Legislative infringement is a coercive act that should only be used in emergencies or as a last resort where a compelling and substantial objective is at stake, and the Aboriginal titleholders refuse good-faith negotiations. Moreover, there is no valid reason why negotiations need result in an absolute surrender of Aboriginal title.[108] Aboriginal people should be able to participate in negotiations for the development of their lands without being compelled to give up their title.[109]

Despite its shortcomings, the *Delgamuukw* decision could usher in a new era for Aboriginal rights in Canada. For the first time, the right of Aboriginal peoples to participate as equal partners in resource development on Aboriginal lands has been acknowledged. But for this new partnership to work, the federal and provincial governments will have to shed out-dated attitudes and accept the new legal landscape.[110] This will take political courage, leadership, and imagination. The Canadian public as well needs to be aware of the unique position of the Aboriginal peoples in Canadian society, and accept the fact that they have special rights as the original inhabitants of this country. Over and over in his recent decisions on Aboriginal rights, Chief Justice Lamer has emphasized the need for reconciliation. Public support for governments that have the vision to negotiate just agreements with Aboriginal peoples for a sharing of this

country’s resources will help to achieve the kind of reconciliation he seems to have in mind.

NOTES

1. See generally J. R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, rev'd ed. (Toronto: University of Toronto Press, 1989); Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Years* (Toronto: McClelland and Stewart, 1992); Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890*, 2nd ed. (Vancouver: University of British Columbia Press, 1992).

2. See Darlene Johnston, *The Taking of Indian Lands in Canada: Consent or Coercion?* (Saskatoon: University of Saskatchewan Native Law Centre, 1989); *Report of the Royal Commission on Aboriginal Peoples* (hereinafter *RCAP Report*), vol. I, *Looking Forward, Looking Back* (Ottawa: Supply and Services Canada, 1996), 119-79.

3. E.g., see Leslie F. S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (Vancouver: University of British Columbia Press, 1979); Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990).

4. See Brian Slattery, "French Claims in North America 1500-59" (1978) 59 *Canadian Historical Review* 139; W. J. Eccles, "Sovereignty-Association, 1500-1783" (1984) 65 *Canadian Historical Review* 475; Cornelius J. Jaenen, "French Sovereignty and Native Nationhood During the French Régime," in J. R. Miller, ed. *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 19.

5. R.S.C. 1985, app. II, no. 1. See Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories* (Saskatoon: University of Saskatchewan Native Law Centre, 1979); Jack Stagg, *Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763* (Ottawa: Research Branch, Indian and Northern Affairs Canada, 1981); John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 *University of British Columbia Law Review* 1.

6. [1998] 1 C.N.L.R. 14 (hereinafter *Delgamuukw*).

7. On appeal, the claimants modified their claim from ownership and jurisdiction to Aboriginal title and self-government: see ibid., at 44-45 (para. 73).

8. *Delgamuukw* v. *British Columbia* (1991), 79 D.L.R. (4th) 185.

9. *Delgamuukw* v. *British Columbia* (1993), 104 D.L.R. (4th) 470.

10. Cory and Major JJ. concurred with Lamer C.J. La Forest J., L'Heureux-Dubé J. concurring, wrote a separate judgment arriving at the same result, but differing somewhat on content and proof of Aboriginal title. McLachlin J. concurred with the Chief Justice, and added that she was "also in substantial agreement with the comments of Justice La Forest": *Delgamuukw*, *supra* note 6, at 94 (para. 209). Given that Lamer C.J.'s judgment was concurred in by a majority of the Court, I am going to confine my discussion to his decision.

11. *St. Catherine's Milling and Lumber Company* v. *The Queen* (1888), 14 App. Cas. 46 (hereinafter *St. Catherine's Milling*), at 54.

12. *Calder* v. *Attorney-General of British Columbia*, [1973] S.C.R. 313, at 328.

13. *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335 (hereinafter *Guerin*), at 382.

14. The government lawyers relied upon *R.* v. *Van der Peet*, [1996] 4 C.N.L.R. 177 (hereinafter *Van der Peet*), where the Supreme Court of Canada created this "integral to the distinctive culture" test to determine the existence of other Aboriginal rights, in that case a right to fish.

15. In the pleadings, the land claims had been brought by 51 Chiefs on behalf of themselves and their Houses (social and political units within Gitxsan and Wet'suwet'en societies), whereas on appeal these claims were "amalgamated into two communal claims, one advanced on behalf of each nation": *Delgamuukw*, *supra* note 6, at 45 (para. 73).

16. Ibid., at 47 (para. 80).

17. Ibid., quoting from *Van der Peet*, *supra* note 14, at 207 (para. 68) (Lamer C.J.'s emphasis).

18. A fee simple estate is the greatest interest in land available under the common law, and is virtually the same as ownership.

19. See *Guerin*, *supra* note 13, *per* Dickson J. at 382; *Canadian Pacific Limited* v. *Paul*, [1988] 2 S.C.R. 654 (hereinafter *Canadian Pacific*), at 678. For discussion, see John Borrows and Leonard I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?" (1997) 36 *Alberta Law Review* 9.

20. *Delgamuukw*, *supra* note 6, at 68 (para. 140) (Lamer C.J.'s emphasis). Lamer C.J. said this not just once, but twice: see also 67 (para. 138).

21. Some commentators have suggested that the *Delgamuukw* decision, especially on this issue of the content of Aboriginal title, is a radical departure from established law: see Gordon Gibson, "The land-claims ruling is a breath taking mistake," *Globe and Mail*, 16 December 1997, A21; Owen Lippert, "Are B.C.'s treasury, economy in peril of going for a song?" *Vancouver Sun*, 19 December 1997, A23. Scholarly research, however, reveals that this is simply not so. On the contrary, the decision conforms with long-standing common law principles and precedents of the highest authority: see Kent McNeil, "The Meaning of Aboriginal Title" (hereinafter "Meaning of Aboriginal Title"), in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997), 135; Kent McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) 36 *Alberta Law Review* 117; Hamar Foster, "Aboriginal Title and the Provincial Obligation to Respect It: Is *Delgamuukw* v. *British Columbia* 'Invented Law'?" (1998) 56 *The Advocate* 221-31.

22. Section 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.) 1982, c.11, provides: "The existing aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed."

23. *Delgamuukw*, *supra* note 6, at 62 (para. 124).

24. Ibid., at 63-64 (para. 128).

25. E.g., see *RCAP Report*, *supra* note 2, vol. 2, *Restructuring the Relationship*, 434-64.

26. *Delgamuukw*, *supra* note 6, at 65 (para. 132).

27. Ibid.

28. Ibid., at 80 (para. 170).

29. However, suppression of Aboriginal governments by the *Indian Act* (first enacted in 1876, now R.S.C. 1985, c.I-5) and its predecessors did lead to the replacement of Aboriginal forms of government with the band council system in many cases: see generally Richard H. Bartlett, *Indian Act of Canada*, 2nd ed. (Saskatoon: University of Saskatchewan Native Law Centre, 1988); John S. Molloy, "The Early Indian Acts: Developmental Strategy and Constitutional Change," in Miller, *supra* note 4, 145; *RCAP Report*, *supra* note 2, vol. 1, *Looking Forward, Looking Back*, 255-332. In other cases, traditional forms of government have continued to function alongside this imposed system: see Darlene M. Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44 *University of Toronto Faculty of Law Review* 1.

30. External relations would include dealings with the British Crown and the Canadian government, as occurred when treaties were signed: see Delia Opekokew, *The First Nations: Indian Government and the Canadian Federation* (Saskatoon: Federation of Saskatchewan Indians, 1980), 9-21; James [sákéj] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 *Saskatchewan Law Review* 241; *RCAP Report*, *supra* note 2, vol. 1, *Looking Forward, Looking Back*, 155-76.

31. *Delgamuukw*, *supra* note 6, at 59 (para. 115).

32. See Garrett Hardin, "The Tragedy of the Commons" (1968) 162 *Science* 1243. I recognize that Aboriginal values and customs may operate to keep individual exploitation of resources in check in some communities without the necessity of formal mechanisms of enforcement: e.g., see Fikret Berkes, "Fishery Resource Use in a Subarctic Indian Community" (1977) 5 *Human Ecology* 289; and, more generally, David Feeny, Fikret Berkes, Bonnie J. McCay, and James M. Acheson, "The Tragedy of the Commons: Twenty-Two Years Later" (1990) 18 *Human Ecology* 1; David Feeny, Susan Hanna, and Arthur F. McEvoy, "Questioning the Assumptions of the 'Tragedy of the Commons' Model of Fisheries" (1996) 72 *Land Economics* 187 (I am grateful to Professor Kenneth Avio for bringing this possibility to my attention). However, in today's world where Aboriginal people are subjected to the influences and pressures of the acquisitive culture around them, these internalized social controls may not be sufficient.

33. See also *infra* note 97. For further discussion, see Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (hereinafter "Aboriginal Rights in Canada"), forthcoming, *Tulsa Journal of Comparative and International Law.* This is not to say that the forms of government in Aboriginal communities need to replicate the authority structures in Euro-Canadian

society: see generally Menno Boldt and J. Anthony Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians," in Menno Boldt and J. Anthony Long, eds., *Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985), 333; Russel Barsh, "The Nature and Spirit of North American Political Systems" (1986) 10 *American Indian Quarterly* 181; Menno Boldt, *Surviving as Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993), esp. 117-66; and, more generally, Bruce L. Benson, *The Enterprise of Law: Justice Without the State* (San Francisco: Pacific Research Institute for Public Policy, 1990), esp. 11-36.

34. Lamer C.J.'s approach to cultural preservation seems to be rooted in the false notion that tradition is necessarily historical in nature. Patricia Monture-Angus dispels this notion by providing a Mohawk perspective on the meaning of "traditional" in her book, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995), at 244 note 4:

> A word of caution is necessary regarding my use of the word traditional. This word is frequently misinterpreted in the mainstream discourse. It does *not* mean a desire to return through the years to some historic way of life. Aboriginal traditions and cultures are neither static nor frozen in time. It is not a backward-looking desire.... Traditional perspectives include the view that the past and all its experiences inform the present reality.

See also Russel Lawrence Barsh and James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 *McGill Law Journal* 993; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 *American Indian Law Review* 37.

35. It might be argued that the inalienability of Aboriginal title (see text accompanying note 13, *supra*) is also an imposed limitation that is paternalistic (I am grateful to Professor Kenneth Avio for bringing this argument to my attention). There are, however, other explanations for this restriction.

First, inalienability may be an incorrect characterization of this aspect of Aboriginal title, as it appears to be more a prohibition against acquisition of Aboriginal title by private persons than a limitation on Aboriginal title itself: see Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) (hereinafter *Common Law Aboriginal Title*), 221-35. This is in keeping with the communal nature of Aboriginal title: see text accompanying note 31, *supra*.

Secondly, Aboriginal title may be encompassed within an overarching title to territory that includes sovereign powers of self-government: see "Aboriginal Rights in Canada," *supra* note 33. If it were possible to alienate lands so that they ceased to be part of an Aboriginal nation's territory, that would involve surrender of jurisdiction over those lands. Jurisdiction is surrenderable only to another sovereign entity, such as another Aboriginal nation or the Crown, not to private persons. So the restriction on alienation other than by surrender to the Crown (or another Aboriginal nation) is in keeping with the sovereign status of the Aboriginal nations: see *Johnson* v. *M'Intosh*, 8 Wheat. 543 (1823) (U.S.S.C.); *Cherokee Nation* v. *Georgia*, 5 Pet. 1 (1831) (U.S.S.C.); *Worcester* v. *Georgia*, 6 Pet. 515 (1832) (U.S.S.C.) (note, however, that in

Johnson v. *M'Intosh*, at 593, Marshall C.J. suggested that alienation of Indian land to a private person would bring that person under the jurisdiction of the Indian nation insofar as that land was concerned). The first explanation given above is consistent with this jurisdictional explanation because both depend on the incapacity of private persons to acquire Aboriginal title rather than on a limitation on Aboriginal title or on the capacity of Aboriginal nations.

As Kenneth Avio has suggested in the context of fishing rights, a third non-paternalistic explanation for inalienability is that this aspect of Aboriginal rights, rather than being imposed on the Aboriginal peoples, was tacitly agreed to by them in order to preserve their cultures: see K. L. Avio, "Aboriginal Property Rights in Canada: A Contractarian Interpretation of *R.* v. *Sparrow*" (1994) 20:4 *Canadian Public Policy* 415. This explanation is also consistent with Aboriginal sovereignty: see *Worcester* v. *Georgia*, *supra*, at 561, where Marshall C.J. said that "a weaker power does not surrender its independence--its right to self-government, by associating with a stronger, and taking its protection." Moreover, it is supported by recent research revealing that a large number of Aboriginal nations agreed to the Royal Proclamation of 1763 (providing, among other things, that only the Crown could acquire Aboriginal lands: see text following note 5, *supra*) at Niagara in 1764: see Borrows, *supra* note 5.

36. *Delgamuukw*, *supra* note 6, at 69 (para. 145). Note that while Lamer C.J. referred to *assertion* of sovereignty, I think he really meant *acquisition* of sovereignty, as that is when the Crown's underlying title would have vested. Also, as he did not mention the French Crown in this context, it is arguable that, even in French Canada, the relevant time for proof of Aboriginal occupation is assertion of British, not French, sovereignty. For further discussion, see "Aboriginal Rights in Canada", *supra* note 33.

37. *Van der Peet*, *supra* note 14. For further discussion, see "Aboriginal Rights in Canada," *supra* note 33. However, the date of Crown sovereignty can be debated as well: see Kent McNeil, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have," in Daniel Drache and Roberto Perin, eds., *Negotiating with a Sovereign Quebec* (Toronto: Lorimer, 1992), 107; Mei Lin Ng, "Convenient Illusions: A Consideration of Sovereignty and the Aboriginal Right of Self-Government," LL.M. Thesis, Osgoode Hall Law School, York University, 1994, 2-69.

38. See *Common Law Aboriginal Title*, *supra* note 35, esp. ch. 2. It is therefore unnecessary for claimants to Aboriginal title to meet the integral to the distinctive culture test laid down in *Van der Peet* (see *supra* note 14), because "the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy": *Delgamuukw*, *supra* note 6, *per* Lamer C.J. at 68-69 (para. 142); see also 71-72 (para. 150-51).

39. See *Common Law Aboriginal Title*, *supra* note 35, at 197-204.

40. *Cadija Umma* v. *S. Don Manis Appu*, [1939] A.C. 136 (P.C.), *per* Sir George Rankin at 141-42.

41. *Delgamuukw*, *supra* note 6, at 71 (para. 149), quoting Brian Slattery, "Understanding Aboriginal Rights" (1987) 64 *Canadian Bar Review* 727, at 758.

42. *Delgamuukw*, *supra* note 6, at 72 (para. 152).

43. This is in keeping with common law principles, whereby proof of present occupation raises a rebuttable presumption of title: see Edward Coke, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton*, 19th ed., edited by Charles Butler (London: J. & W.T. Clarke *et al.*, 1832), 239a, Butler's n.1; William Blackstone, *Commentaries on the Laws of England*, 21st ed. (London: Sweet, Maxwell and Stevens & Norton, 1844), vol. 2, 196, vol. 3, 177, 180; Kent McNeil, "A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals?" (1990) 16 *Monash University Law Review* 91, esp. 104, 107-110; *Common Law Aboriginal Title*, *supra* note 35, esp. 42-49, 218-20, 277-79, 298; *Calder*, *supra* note 12, *per* Hall J. (dissenting on other grounds) at 375. However, the authorities go further than Lamer C.J., as adverse claimants generally have to show a better title *in themselves* to rebut the presumption arising from present occupation: e.g., see *Roe d. Haldane and Urry* v. *Harvey* (1769), 4 Burr. 2484 (K.B.), at 2487-88; *Goodtitle d. Parker* v. *Baldwin* (1809), 11 East 488 (K.B.), at 495; *Danford* v. *McAnulty* (1883), 8 App. Cas. 456 (H.L.), at 460-62, 464-65. Put another way, as against those who cannot show a better right themselves, occupation is a sufficient title: see *Asher* v. *Whitlock* (1865), L.R. 1 Q.B. 1 (Q.B.); *Mussammat Sundar* v. *Mussammat Parbati* (1889), L.R. 16 I.A. 186 (P.C.), at 193. Moreover, these principles apply against the Crown as well as against other adverse claimants: see *Bristow* v. *Cormican* (1878), 3 App. Cas. 641 (H.L.); *Nireaha Tamaki* v. *Baker*, [1901] A.C. 561 (P.C.), at 576; *Perry* v. *Clissold*, [1907] A.C. 73 (P.C.). So if an Aboriginal people is in present occupation of land, the burden should be on the Crown to rebut the presumption of title by showing that the lands were vacant at the time the Crown acquired sovereignty. See also *infra* note 100.

44. *Delgamuukw*, *supra* note 6, at 72-73 (para. 153), citing *Van der Peet*, *supra* note 14, at 206 (para. 65), and *Mabo* v. *Queensland [No. 2]* (1992), 175 C.L.R. 1 (Aust. H.C.).

45. *Delgamuukw*, *supra* note 6, at 72 (para. 153). On this unwillingness in British Columbia, see generally Fisher, *supra* note 1; Tennant, *supra* note 3; Hamar Foster, "Letting Go the Bone: The Idea of Indian Title in British Columbia," in Hamar Foster and John McLaren, eds., *Essays in the History of Canadian Law*, vol. VI, *British Columbia and the Yukon* (Toronto: University of Toronto Press and the Osgoode Society, 1995), 28. Where Aboriginal peoples were wrongfully dispossessed, they should be able to rely on their occupation at the time to establish their title: see generally *Common Law Aboriginal Title*, 15-78.

46. *Delgamuukw*, *supra* note 6, at 73 (para. 156).

47. *Ibid.*, at 74 (para. 158).

48. See esp. *Canadian Pacific*, *supra* note 19, at 677. For discussion, see "Meaning of Aboriginal Title," *supra* note 21, at 142-43.

49. *Delgamuukw*, *supra* note 6, at 67 (para. 138).

50. Ibid., at 73 (para. 155).

51. See *supra* note 22.

52. [1990] 1 S.C.R. 1075 (hereinafter *Sparrow*).

53. Ibid., at 1113, 1114-16. See also *R.* v. *Gladstone*, [1996] 4 C.N.L.R. 65 (S.C.C.) (hereinafter *Gladstone*), at 88-101 (para. 54-84); *R.* v. *Adams*, [1996] 4 C.N.L.R. 1 (S.C.C.), at 22-23 (para. 56-59); *R.* v. *Côté*, [1996] 4 C.N.L.R. 26 (S.C.C.) (hereinafter *Côté*), at 58-59 (para. 81-83).

54. See Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977). Interestingly, in *Sparrow*, *supra* note 52, at 1119, the Court echoed the title of Dworkin's book, without mentioning it, in a passage stating that the objective of the requirement of priority is to guarantee that government conservation and management of resources (in that case salmon stocks) "treat [A]boriginal peoples in a way ensuring that their rights are taken seriously."

55. *Sparrow*, *supra* note 52, at 187.

56. Legislation would be necessary because a fundamental principle of the rule of law prevents legal rights, and especially rights of property, from being infringed by executive action in the absence of unequivocal statutory authority: see *Entick* v. *Carrington* (1765), 19 St. Tr. 1029 (C.P.); *Attorney-General for Canada* v. *Hallet & Carey Ld*, [1952] A.C. 427 (P.C.); *Roncarelli v. Duplessis*, [1959] S.C.R. 121. For further discussion, see Kent McNeil, "Racial Discrimination and Unilateral Extinguishment of Native Title" (1996) 1 *Australian Indigenous Law Reporter* 181 (hereinafter "Racial Discrimination"), esp. 182-90. The constitutionalization of Aboriginal title means that, in addition, the legislative authorization must meet the *Sparrow* test of justification.

57. *Sparrow*, *supra* note 52, at 1113.

58. *Gladstone*, *supra* note 53, at 97 (para. 73) (my emphasis).

59. He distinguished *Sparrow*, which did give complete priority to Aboriginal food fishing, because fishing for that purpose contains an internal limitation (an Aboriginal nation can only consume so much fish), whereas commercial fishing is limited only by "the market and the availability of the resource": ibid., at 90 (para. 57).

60. Ibid., at 98 (para. 75).

61. For more detailed discussion, see Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?" (1997) 8:2 *Constitutional Forum* 33.

62. *Van der Peet*, *supra* note 14, at 278 (para. 304).

63. Ibid., at 279 (para. 306).

64. Ibid., at 283 (para. 315).

65. Ibid., at 283 (para. 314). She also described the Chief Justice's approach to justification as "indeterminate and ultimately more political than legal," and "contrary to the intention of the framers of the constitution": ibid., at 278 (para. 302), 281 (para. 308).

66. *Delgamuukw, supra* note 6, at 78 (para. 165) (Lamer C.J.'s emphasis).

67. Ibid., quoting from *Gladstone, supra* note 53, at 97 (para. 73).

68. *Delgamuukw, supra* note 6, at 78 (para. 165).

69. See Wilcomb E. Washburn, "The Moral and Legal Justifications for Dispossessing the Indians," in James Morton Smith, ed., *Seventeenth Century America: Essays in Colonial History* (Chapel Hill: University of North Carolina Press, 1959), 15; Geoffrey S. Lester, "Primitivism versus Civilization: A Basic Question in the Law of Aboriginal Rights to Land," in Carol Brice-Bennett, ed., *Our Footprints Are Everywhere: Inuit Land Use and Occupancy in Labrador* (Ottawa: Labrador Inuit Association, 1977), 351; Robert A. Williams, Jr., *The American Indian in Western Legal Thought: Discourses of Conquest* (New York: Oxford University Press, 1990), esp. 246-49.

70. This power of expropriation did not exist at common law, other than in exceptional circumstances where necessary for defence: see Blackstone, *supra* note 43, vol. 1, 139; Keith Davies, *Law of Compulsory Purchase and Compensation*, 3rd ed. (London: Butterworths, 1978), 9-10; *Attorney-General* v. *De Keyser's Royal Hotel*, [1920] A.C. 508 (H.L.) (hereinafter *De Keyser's Royal Hotel*); *Burmah Oil Co.* v. *Lord Advocate*, [1965] A.C. 75 (H.L.).

71. For detailed discussion, see "Racial Discrimination," *supra* note 56.

72. *Magna Carta*, 17 John (1215), c.29, provided that "[n]o Freeman shall ... be disseised of his Freehold ... but by the lawful Judgement of his Peers, or by the law of the Land." As Lord Parmoor stated in *De Keyser's Royal Hotel, supra* note 70, at 569, "[s]ince Magna Carta the estate of a subject in lands or buildings has been protected against the prerogative of the Crown." For affirmation of the fundamental nature of property rights in English law, see Blackstone, *supra* note 43, vol. 1, at 127-29, 138-40; Herbert Broom, *Constitutional Law Viewed in Relation to Common Law*, 2nd ed. by George L. Denman (London: W. Maxwell and Son, 1885), 225-45; *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1973-86), vol. 8 (1974), para. 833; James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 2nd ed. (New York: Oxford University Press, 1998), 13-14, 54-55.

73. See text accompanying note 55, *supra*. Lamer C.J. also referred to *Guerin, supra* note 13, in this context.

74. "There is always a duty of consultation": *Delgamuukw, supra* note 6, at 79 (para. 168). I am grateful to Professor Peter Russell for bringing this vital point to my attention.

75. Ibid. For a post-*Delgamuukw* decision requiring such involvement before lumbering operations are conducted on land claimed under Aboriginal title, see *Kitkatla Band v. British*

Columbia (Minister of Forests), [1998] B.C.J. no. 1460 (Quicklaw) (B.C.S.C.)

76. *Delgamuukw, supra* note 6, at 79 (para. 168).

77. Ibid., at 79 (para. 169).

78. See text accompanying notes 20-21, *supra*.

79. *Delgamuukw, supra* note 6, at 79-80 (para. 169).

80. In this respect, the protection accorded to Aboriginal title by s.35(1) of the *Constitution Act, 1982* (see *supra* note 22) resembles the protection accorded to private property by the taking provision of the Fifth Amendment to the American Constitution ("nor shall private property be taken for public use, without just compensation") and by s.51(xxxi) of the Australian Constitution (empowering the Commonwealth Parliament to make laws with respect to the "acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws").

81. In contrast to this, the obligation to pay compensation for the taking of property that is not constitutionally protected is subject to legislative override, as long as the denial of compensation is clearly expressed: see *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co., Ltd.*, [1919] A.C. 744 (H.L.), per Lord Atkinson at 752.

82. Lamer C.J. said the requirement, arising out of the fiduciary duty, that the prior interest of Aboriginal titleholders be reflected in the distribution of resources, "might entail [among other things] that governments accommodate the participation of Aboriginal peoples in the development of the resources of British Columbia": *Delgamuukw, supra* note 6, at 78-79 (para. 167).

83. E.g., see the last sentence of the quotation accompanying note 76, *supra*.

84. 30 & 31 Vict. (U.K.), c.3.

85. See Robert D. J. Pugh, "Are Northern Lands Reserved for the Indians?" (1982) 60 *Canadian Bar Review* 36; Hamar Foster, "Roadblocks and Legal History, Part II: Aboriginal Title and s.91(24)" (1996) 54 *The Advocate* 531.

86. The case relied on was *St. Catherine's Milling, supra* note 11. Lamer C.J. also said that if Parliament does not have exclusive jurisdiction over Aboriginal title, the result would be "most unfortunate," as "the government vested with primary constitutional responsibility for securing the welfare of Canada's Aboriginal peoples would find itself unable to safeguard one of the most central of Native interests--their interest in their lands": *Delgamuukw, supra* note 6, at 83 (para. 176).

87. *Delgamuukw, supra* note 6, at 75 (para. 160). Lamer C.J. relied on his own judgment in *Côté*, *supra* note 53, to reach this conclusion. However, it can be argued that *Côté* was wrong in this respect because it misapplied *R.* v. *Badger*, [1996] 2 C.N.L.R. 77 (S.C.C.): see Kent McNeil,

"Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (hereinafter "Rethinking Federal and Provincial Jurisdiction"), (1998), 61 *Saskatchewan Law Review 95* (hereinafter "Rethinking Federal and Provincial Jurisdiction." See also Albert C. Peeling, "Provincial Jurisdiction After *Delgamuukw*," paper delivered at Continuing Legal Education Society of British Columbia Conference, Vancouver, March 25, 1998), at 2.1.03, where it is pointed out that the provincial law in question in *Côté*, while it may have had an incidental effect on an Aboriginal right, did not infringe it.

88. While provincial laws of general application might have a valid incidental effect on Aboriginal title, to the extent that they actually infringe it they would cross the line into exclusive federal jurisdiction and so offend the principle of interjurisdictional immunity: see Peeling, *supra* note 87, at 2.1.02-03.

89. *Delgamuukw, supra* note 6, at 83 (para. 177-78).

90. E.g., see *Corporation of Surrey* v. *Peace Arch* (1970), 74 W.W.R. 380 (B.C.C.A.); *R.* v. *Isaac* (1975), 13 N.S.R. (2d) 460 (N.S.S.C., App. Div.) (hereinafter *Isaac*); *Derrickson* v. *Derrickson*, [1986] 1 S.C.R. 285 (hereinafter *Derrickson*); *Paul* v. *Paul*, [1986] 1 S.C.R. 306. Cases that have found provincial laws to be applicable on reserves have done so by characterizing those laws as laws in relation to something other than use and possession of land: e.g., see *Four B Manufacturing Ltd.* v. *United Garment Workers of America*, [1980] 1 S.C.R. 1031 (labour laws); *R.* v. *Francis*, [1988] 1 S.C.R. 1025 (traffic laws); *R.* v. *Fiddler*, [1994] 1 C.N.L.R. 121 (Sask. Q.B.) (hereinafter *Fiddler)* (fire safety); *Brantford (Township)* v. *Doctor*, [1996] 1 C.N.L.R. 49 (Ont. Gen. Div.) (health and safety). *Western Industrial Contractors Ltd.* v. *Sarcee Developments Ltd.* (1979), 98 D.L.R. (3d) 424 (Alta. S.C., App. Div.), might appear to be an exception, but really it is not because there the Court decided that a leasehold held by a non-Indian on a reserve is not land "reserved for the Indians." For further discussion of these and other relevant cases, see "Rethinking Federal and Provincial Jurisdiction," *supra* note 87.

91. *Guerin, supra* note 13, at 379, cited in *Delgamuukw, supra* note 6, at 60 (para. 120). For further discussion, see "Meaning of Aboriginal Title," *supra* note 21, at 148-51.

92. For further discussion, see "Rethinking Federal and Provincial Jurisdiction," *supra* note 87.

93. Referential incorporation of provincial laws in relation to land into federal law might provide a *legislative* solution, but according to the case law this has not been not done by s.88 of the *Indian Act*, *supra* note 29, because it only makes provincial laws of general application apply to "Indians," not to "Lands reserved for the Indians": see *R.* v. *Johns* (1962), 133 C.C.C. 43 (Sask. C.A.), at 47; *Isaac*, *supra* note 90, at 474; *Re Park Mobile Homes Sales Ltd. and Le Greely* (1978), 85 D.L.R. (3d) 618 (B.C.C.A.), at 619; *Millbrook Indian Band* v. *Northern Counties Residential Tenancies Board* (1978), 84 D.L.R. (3d) 174 (N.S.S.C.), at 181-83, affirmed without reference to s.88, *sub nom. Attorney-General of Nova Scotia* v. *Millbrook Indian Band* (1978), 93 D.L.R. (3d) 230 (N.S.S.C., App. Div.); *Palm Dairies Ltd.* v. *The Queen*, [1979] 2 C.N.L.R. 43 (F.C.T.D.), at 48; *The Queen* v. *Smith*, [1980] 4 C.N.L.R. 29 (F.C.A.), at 78, reversed on other grounds, without reference

to s.88, [1983] 1 S.C.R. 554; *Fiddler*, *supra* note 90, at 127-28. Although the Supreme Court explicitly avoided this question in *Derrickson*, *supra* note 90, at 297-99, it is unlikely that the Court would overrule the above decisions on this point, three of which were made by provincial courts of appeal, and most of which are long-standing. For further discussion, see "Rethinking Federal and Provincial Jurisdiction," *supra* note 87; Peeling, *supra* note 87.

94. E.g., see *supra* note 43, regarding proof of Aboriginal title.

95. See generally *Common Law Aboriginal Title*, *supra* note 35, esp. chap. 2 and 7.

96. *Delgamuukw*, *supra* note 6, at 59 (para. 117) (my emphasis).

97. As Dickson C.J. and La Forest J. remarked in *Sparrow*, *supra* note 52, at 1105, in relation to s.35(1) generally, "at the least, [it] provides a solid constitutional base upon which subsequent negotiations can take place." Note that this recognition of the need for negotiations, which is present in the *Delgamuukw* decision as well (I am grateful to Professor Peter Russell for bringing this to my attention), is another indication of tacit acceptance by the Court that the concept of self-government is inherent in the communal nature of Aboriginal rights: see text accompanying notes 31-33, *supra*. This is because the community possessing the rights needs to be able to choose representatives to participate in the negotiations, and needs to have a mechanism for ratifying any agreement that is reached. Stated more broadly, the community must have the political authority to engage with other governments where its communal rights are involved, and this entails self-government. On the exercise of this authority in relation to the signing of one of the numbered treaties, see Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective," in Asch, *supra* note 21, 173, esp. 189-92. More generally, see Opekokew, *supra* note 30, esp. 9-15; Henderson, *supra* note 30, esp. 256-60.

98. For an overview of these agreements, see *RCAP Report*, *supra* note 2, vol. 2, *Restructuring the Relationship*, at 720-32.

99. See Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa: Supply and Services Canada, 1995). An exception is the *Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon* (Ottawa: Supply and Services Canada, 1993), by which the Yukon Indian Nations retain their Aboriginal title to a portion of the land claim area: see *RCAP Report*, *supra* note 2, vol. 2, *Restructuring the Relationship*, at 537-38.

100. E.g., see *R.* v. *Peter Paul*, [1998] N.B.J. No. 126 (Quicklaw) (N.B.C.A.), a post-*Delgamuukw* decision where an alleged treaty or Aboriginal right to cut timber failed as a defence to a charge of unlawfully removing timber from Crown lands, in part because the accused failed to prove Aboriginal title to the lands where the timber was cut. For critical perspectives on this issue of onus of proof, see Kent McNeil, "Aboriginal Lands and Resources: An Assessment of the Royal Commission's Recommendations" (1997) 5:5 *Canada Watch* 77; Peggy J. Blair, "Prosecuting the Fishery: The Supreme Court of Canada and the Onus of Proof in Aboriginal Fishing Cases" (1997) 20 *Dalhousie Law Journal* 17. See also *supra* note 43.

101. Provincial governments do not have a constitutional right to be at the table, given that Lamer C.J. held in *Delgamuukw*, *supra* note 6, at 82 (para. 175), that "jurisdiction to accept surrenders [of Aboriginal title] lies with the federal government." Politically, however, there is no realistic possibility of viable agreements being reached regarding lands within provincial boundaries without provincial participation (Professor Peter Russell pointed this out to me in a personal communication dated 10 April 1998). Moreover, given that the geographic extent of Aboriginal title is a major issue to be settled and that provincial governments have a direct interest in that issue, they need to take part in the negotiations.

102. See *supra* notes 5, 13, and 35, and accompanying text.

103. See text accompanying notes 23-27, *supra*.

104. The province might be liable as well for breach of the fiduciary duty that the Crown owes to the Aboriginal peoples: see generally Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996), esp. 244-54.

105. Remember that this would require legislation, as executive action cannot infringe rights without unequivocal legislative authorization: see *supra* note 56. Also, legislation of this sort might violate the *Canadian Bill of Rights*, S.C. 1960, c.44, s.1(a), as it would interfere with the enjoyment of property in a way that would probably discriminate on the basis of race or national origin. There is authority in Australia that legislation directed at infringing the property rights of indigenous peoples is discriminatory, and offends the rights to own and inherit property that are recognized by Article 5 (v) and (vi) of the International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 U.N.T.S. 195 (in force 4 January 1969), which both Australia and Canada have ratified: see *Mabo* v. *Queensland [No. 1]* (1988), 166 C.L.R. 186 (Aust. H.C.), and discussion in "Racial Discrimination," *supra* note 56, at 36-38. While Parliament can get around the *Canadian Bill of Rights* by resorting to the notwithstanding clause in s.2, the International Convention might still be offended. In any case, Canada's reputation as a proponent of human rights would be seriously tarnished.

106. There is a parallel here with the situation the federal government found itself in as a result of the *St. Catherine's Milling* decision, *supra* note 11, whereby the provinces received the benefits of Indian land surrenders and Canada paid the costs: see *Dominion of Canada* v. *Province of Ontario*, [1910] A.C. 637 (P.C.). The federal government will no doubt want to avoid getting into a similar predicament in the context of infringement of Aboriginal title by insisting that the province concerned agrees to pay the costs of compensation. As Albert Peeling has written (*supra* note 87, at 2.1.08), in this context "the fiduciary duties and financial interests of Canada coincide. The two governments will have to negotiate against one another with respect to money, rather than them both negotiating against the aboriginal people."

107. See *supra* note 101.

108. Even where Aboriginal lands are required for public purposes such as highways and airports, the Aboriginal titleholders could retain an interest so that the lands would revert to them if they cease to be used for those purposes.

109. See Michael Asch and Norman Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations", in Asch, *supra* note 21, at 208. In this respect, there is no reason why Aboriginal title lands should be treated any differently than reserve lands: for an example (unfortunately tainted by breach of the Crown's fiduciary obligation) of development of reserve land without an absolute surrender, see *Guerin*, *supra* note 13.

110. Unfortunately, preliminary indications do not reveal that this is occurring. The deal announced by Newfoundland and Quebec in March 1998, on hydroelectric development of the Churchill River, in face of Innu protests, is just one example: see Shawn McCarthy, "Innu short-circuit Labrador ceremony," *Globe and Mail*, March 10, 1998, A1; Jeffrey Simpson, "Raining on the Churchill Falls megaproject parade," *Globe and Mail*, 10 March 1998, A14. See also Robert Matas, "B.C. favours industry over native land claims," *Globe and Mail*, 14 March 1998, A12.

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