Defining Aboriginal Title in the 90's:
HAS THE SUPREME COURT
FINALLY GOT IT RIGHT?

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TWELFTH ANNUAL ROBARTS LECTURE
25 March 1998
York University, Toronto, Ontario

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.

**Acknowledgments**

Many people assisted in the preparation of this lecture, sometimes without being aware of it. I discussed ideas with Michael Asch, John Borrows, Frank Cassidy, Hamar Foster, Dawn Kooistra, Patrick Macklem, Chantel Morton, Michael Posluns, Lori Ann Roness, and Brian Slattery, and profited immensely from their knowledge and insights. Members of the audience at the delivery of the lecture asked probing questions that forced me to rethink and rework certain aspects for this published version. Kenneth Avio and Peter Russell provided very valuable feedback by pointing out important omissions. Their comments prompted me to make substantial additions, particularly to the conclusion. Daniel Drache, the Director of the Robarts Centre, added stimulating suggestions that helped refine and hopefully strengthen my arguments. To all these people, I owe a debt of gratitude.

I am grateful as well to Osgoode Hall Law School for the financial support and release from teaching that permitted me to pursue my research as the Robarts Professor during the 1997-
98 academic year. This lecture is just one product of that generous support. I have also
depended heavily on Chantel Morton for research assistance and on Cheryl Dobinson, Diana
Posavac, Joanne Rappaport, and Krystyna Tarkowski for technical and other support. Their help
has been greatly appreciated.

I would also like to thank Michael Asch, John Borrows, Shin Imai, Patrick Macklem,
Michael Posluns, Peter Russell, Brian Slattery, and Maureen Tehan for their enthusiastic
participation in the Robarts Chair Seminar Series, and for the exceptional quality of their
presentations. The seminars were consistently well attended and always resulted in stimulating
questions and discussion, amply demonstrating the interest generated by the participants and the
relevance of their topics to contemporary Aboriginal issues.

Finally, I would like to thank the Robarts Centre for Canadian Studies itself for selecting
me to be the 1997-98 Chair, and for providing congenial space for interdisciplinary academic
inquiry. I feel privileged to have been given the opportunity to work and learn in such an
environment.

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. 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. Elsewhere--especially east of Ontario and in British Columbia--Aboriginal lands were simply seized for incoming settlers. 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, Britain formally recognized Aboriginal land rights in the Royal Proclamation of 1763. 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. 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). 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. The British Columbia Court of Appeal modified some aspects of that decision and affirmed others. 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. 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," 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." 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]." 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.  

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. 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." 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....

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. 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. 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." 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."

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 Gitx̱san 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, and regulated the internal affairs and external relations of the Aboriginal nations. 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." 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." And decision-making authority must entail a community structure for making decisions--in short, some form of self-government.

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. 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." He said that evidence of present occupation could be presented as proof of pre-sovereignty occupation. 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." Occupation, he said, "may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize Aboriginal title." 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." 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."
Infringement of Aboriginal Title

Although earlier decisions had intimated as much, \textit{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.” We have seen that it is also an exclusive right, which means that Aboriginal titleholders can keep others from intruding on their lands. 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, 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 \textit{R. v. Sparrow}, 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 \textit{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. 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. 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. 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.

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? 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." 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. 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. They have no power to take someone's land and grant it to someone else, even if that might be good for the community. 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.

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, 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. This requirement of consultation would result in "the involvement of Aboriginal peoples in decisions taken with respect to their lands." 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 Delgamuuukw 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. 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. In *Delgamuukw*, Lamer C.J. accepted the application of this principle to Aboriginal title, given that it is a federal matter. 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. 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. 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.\textsuperscript{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?\textsuperscript{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. 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. 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," it helps to level the playing field between Aboriginal peoples and non-Aboriginal governments in the negotiation of land claims. 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, 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. 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. 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 Gitxsan 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. 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 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), 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.\textsuperscript{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 \textit{Delgamuukw} decision, it would therefore seem that Parliament could authorize resource development on Aboriginal title lands.\textsuperscript{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?\textsuperscript{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.\textsuperscript{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.\textsuperscript{108} Aboriginal people should be able to participate in negotiations for the development of their lands without being compelled to give up their title.\textsuperscript{109}

Despite its shortcomings, the \textit{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.\textsuperscript{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


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).


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.


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.


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).


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."

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.


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

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.


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.


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).


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 v. Haldane and Urry* v. *Harvey* (1769), 4 Burr. 2484 (K.B.), at 2487-88; *Goodtitle v. 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.


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).


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.


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 Ltd, [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).


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).


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


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.


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).


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.

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 RACAP Report, supra note 2, vol. 2, Restructuring the Relationship, at 720-32.


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.


WORKS CITED

Books and Articles


---------. 1996. "Roadblocks and Legal History, Part II: Aboriginal Title and s.91(24)." 54 *The Advocate* 531.


--------. Forthcoming. "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty." Tulsa Journal of Comparative and International Law.


Miller, J. R., 1989. Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada,


---------. 1979. The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown’s Acquisition of Their Territories. Saskatoon: University of Saskatchewan Native Law Centre.


Cases

Asher v. Whitlock (1865), L.R. 1 Q.B. 1 (Q.B.)


Bristow v. Cormican (1878), 3 App. Cas. 641 (H.L.)

Burmah Oil Co. v. Lord Advocate, [1965] A.C. 75 (H.L.)


Cherokee Nation v. Georgia, 5 Pet. 1 (1831) (U.S.S.C.)


Danford v. McAnulty (1883), 8 App. Cas. 456 (H.L.)


Entick v. Carrington (1765), 19 St. Tr. 1029 (C.P.)

Four B Manufacturing Ltd. v. United Garment Workers of America, [1980] 1 S.C.R. 1031

Goodtitle d. Parker v. Baldwin (1809), 11 East 488 (K.B.)

Guerin v. The Queen, [1984] 2 S.C.R. 335

Johnson v. M’Intosh, 8 Wheat. 543 (1823) (U.S.S.C.)


Mussammat Sundar v. Mussammat Parbati (1889), L.R. 16 I.A. 186 (P.C.)


Palm Dairies Ltd. v. The Queen, [1979] 2 C.N.L.R. 43 (F.C.T.D.)


Perry v. Clissold, [1907] A.C. 73 (P.C.)


R. v. Johns (1962), 133 C.C.C. 43 (Sask. C.A.)


Re Park Mobile Homes Sales Ltd. and Le Greely (1978), 85 D.L.R. (3d) 618 (B.C.C.A.)

Roe d. Haldane and Urry v. Harvey (1769), 4 Burr. 2484 (K.B.)


St. Catherine's Milling and Lumber Company v. The Queen (1888), 14 App. Cas. 46 (P.C.)
