

**THE POST-*DELGAMUUKW* NATURE AND CONTENT OF ABORIGINAL TITLE**

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## Introduction

In *Delgamuukw v. British Columbia*,<sup>1</sup> the Supreme Court of Canada finally addressed the issue of the nature and content of Aboriginal title head on, after dancing around the matter for many years.<sup>2</sup> While not deciding whether the Gitksan (also spelled Gitx̄san) and Wet'suwet'en Nations who brought the case to court actually have title to the lands they claim,<sup>3</sup> the Court did provide a definition of Aboriginal title to guide trial courts and negotiators as they grapple with the issue.<sup>4</sup>

This definition contains a number of elements:

1. the *source* of Aboriginal title;
2. the *proprietary status* of Aboriginal title;
3. the *content* of Aboriginal title;
4. the *inherent limit* on Aboriginal title;

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<sup>1</sup> [1997] 3 S.C.R. 1010.

<sup>2</sup> The Court did address this issue to some extent in earlier decisions, notably *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 (hereinafter *Calder*), and *Guerin v. The Queen*, [1984] 2 S.C.R. 335 (hereinafter *Guerin*). See also *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46 (P.C.) (hereinafter *St. Catherine's*); *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Côté*, [1996] 3 S.C.R. 139. For discussion, see Kent McNeil, "The 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 (hereinafter "Meaning of Aboriginal Title"), and Kent McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) 36 *Alta. L. Rev.* 117 (hereinafter "Aboriginal Title and Aboriginal Rights").

<sup>3</sup> The Court decided that the case would have to go back to trial to determine this, as defects in the pleadings and in the trial judge's treatment of the oral histories of the Gitksan and Wet'suwet'en prevented the Court from deciding the case on its merits.

<sup>4</sup> Both Lamer C.J. (for himself, Cory and Major JJ.) and La Forest J. (for himself and L'Heureux-Dubé J.) emphasized the need to resolve Aboriginal land claims by negotiated settlements: *Delgamuukw*, *supra* n.1, at 1123-24 (para. 186), 1134-35 (para. 207), respectively. McLachlin J. concurred with Lamer, adding that she was "also in substantial agreement with the comments of Justice La Forest": *ibid.*, at 1135 (para. 209). In this paper, I will refer mainly to Lamer's judgment, as it was concurred in by the majority of the Court.

5. the *communal nature* of Aboriginal title; and
6. the *inalienability* of Aboriginal title.

I will discuss each of these elements of Aboriginal title in turn. However, as this paper is intended to be an overview, the analysis does not purport to be exhaustive. In particular, certain *sui generis* aspects of Aboriginal title, especially the inherent limit, the title's communal nature, and its inalienability, raise complex issues that require further examination. Moreover, as the focus of this paper is on the *Delgamuukw* decision, the discussion will be primarily concerned with the common law; Aboriginal law, while of fundamental importance, will only be considered to the extent that the Supreme Court found it to be relevant to Aboriginal title. Also, it will be seen that the definition of Aboriginal title relates closely to the inherent right of self-government, the existence of which, while not considered directly by the Court,<sup>5</sup> is nonetheless entailed by the *sui generis* nature of Aboriginal title.<sup>6</sup> Finally, other issues that were dealt with in *Delgamuukw*, including proof of Aboriginal title,<sup>7</sup> use of oral histories as evidence,<sup>8</sup> constitutional jurisdiction over Aboriginal title,<sup>9</sup>

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<sup>5</sup> Lamer C.J. offered the following explanation for avoiding this issue in *Delgamuukw*, *supra* n.1, at 1114 (para. 170):

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. Moreover, this is not the right case for the Court to lay down the legal principles to guide further litigation.

See also per La Forest J. at 1134 (para. 205).

<sup>6</sup> For more general discussion of the inherent right of self-government, see Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998) 5 *Tulsa J. of Comp. & Int'l Law* 253 (hereinafter "Aboriginal Rights in Canada"), at 278-98.

<sup>7</sup> For discussion, see *ibid.*, at 271-77, and Kent McNeil, "The Onus of Proof of Aboriginal Title", forthcoming (2000) 34 *Osgoode Hall L.J.* (hereinafter "Onus of Proof").

<sup>8</sup> For discussion, see Lori Ann Roness and Kent McNeil, "Legalizing Oral History: Proving Aboriginal Title in Canadian Courts", forthcoming, *Journal of the West*; John Borrows, "Listening for a Change: The Courts and Oral Traditions", unpublished research paper.

<sup>9</sup> For discussion, see Kent McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal

and the protection accorded to it by s.35(1) of the *Constitution Act, 1982*,<sup>10</sup> have been considered elsewhere and so will not be discussed in this paper.

## 1. The Source of Aboriginal Title

From earlier jurisprudence, it was not entirely clear whether the source of Aboriginal title was use and occupation of land by the Aboriginal peoples at the time the Crown acquired sovereignty, pre-existing systems of Aboriginal law, or a combination thereof.<sup>11</sup> In *Calder v. Attorney-General of British Columbia* and *Guerin v. The Queen*,<sup>12</sup> the *Royal Proclamation of 1763*,<sup>13</sup> which had been regarded as the source in *St. Catherine's Milling and Lumber Company v. The Queen*,<sup>14</sup> was accepted as an affirmation of *pre-existing* Aboriginal title based on occupation of land, but the relevance of Aboriginal law remained uncertain.<sup>15</sup> In *Delgamuukw*, Chief Justice Lamer took pains to clarify this matter. He began by pointing out that

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and Provincial Jurisdiction" (1998) 61 *Sask. L. Rev.* 431 (hereinafter "Aboriginal Title and the Division of Powers"); Nigel Bankes, "*Delgamuukw*, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 *U.B.C.L. Rev.* 317; Kerry Wilkins, "Of Provinces and Section 35 Rights", (1999) 22 *Dalhousie L.J.* 185.

<sup>10</sup> For discussion, see Kent McNeil, *Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got It Right?* (Toronto: Robarts Centre for Canadian Studies, York University, 1998) (hereinafter *Defining Aboriginal Title*), 16-23, and Kent McNeil, "Aboriginal Title as a Constitutionally Protected Property Right" (hereinafter "Constitutionally Protected Property Right"), paper presented at "The Delgamuukw Case: Aboriginal Land Claims and Canada's Regions", a Fraser Institute Conference, Ottawa, May 26-27, 1999.

<sup>11</sup> For discussion, see "Meaning of Aboriginal Title", *supra* n.2, at 135-41; Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) (hereinafter *Common Law Aboriginal Title*), 267-90.

<sup>12</sup> *Supra* n.2.

<sup>13</sup> R.S.C. 1985, App. II, No. 1.

<sup>14</sup> *Supra* n.2.

<sup>15</sup> For a decision that blended pre-sovereignty occupation and Aboriginal systems of law in a perplexing way, see *Hamlet of Baker Lake v. Minister of Indian Affairs*, [1980] 1 F.C. 518 (T.D.) (hereinafter *Baker Lake*),

... it is now clear that although aboriginal title was recognized by the *Proclamation*, it arises from the prior occupation of Canada by aboriginal peoples. That prior occupation, however, is relevant in two different ways, both of which illustrate the *sui generis* nature of aboriginal title. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law.... What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward.... This idea has been further developed in *Roberts v. Canada*, [1989] 1 S.C.R. 322, where this Court unanimously held at p. 340 that "aboriginal title pre-dated colonization by the British and survived British claims to sovereignty" (also see *Guerin*, *supra* [n.2], at p. 378). What this suggests is *a second source* for aboriginal title - the relationship between common law and pre-existing systems of aboriginal law.<sup>16</sup>

However, when Lamer returned to this issue of source in his discussion of proof of Aboriginal title, he does not appear to have regarded the relationship between the common law and Aboriginal law as "a second source" of Aboriginal title, but rather as something to be taken into account in determining whether the lands were occupied at the relevant time. He said this:

In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the *time at which the Crown asserted sovereignty over the land subject to the title*.<sup>17</sup>

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esp. 557-59. See also *infra* n.18.

<sup>16</sup> *Supra* n.1, at 1082 (para. 114) (emphasis added).

<sup>17</sup> *Delgamuukw*, *supra* n.1, at 1097 (para. 144) (emphasis in original). Note that, although Lamer referred to "assertion" of sovereignty throughout his judgment, in my opinion he must have meant "acquisition", as it would only be upon acquisition of sovereignty that the Crown's underlying title would vest and Aboriginal title would crystalize: see *Delgamuukw*, *supra* n.1, at 1098 (para. 145). For discussion, see "Aboriginal Rights in Canada", *supra* n.6, at 273-77. On when Crown sovereignty might have been acquired in various parts of Canada, see Kent McNeil, "Aboriginal Nations and Québec's Boundaries: Canada Couldn't Give What It Didn't Have", in Daniel Drache and Roberto Perin, eds. *Negotiating with a Sovereign Québec* (Toronto: James Lorimer and Company, 1992), 107 (hereinafter "Aboriginal Nations and Québec's Boundaries"); Kent McNeil, "Sovereignty and the Aboriginal Nations of Rupert's Land" (Spring/Summer 1999) 37 *Manitoba History* 2 (hereinafter "Aboriginal Nations of Rupert's Land"); Kent McNeil, "Sovereignty on the Northern Plains: Indian, European, American and Canadian Claims", forthcoming, *Journal of the West* (hereinafter "Sovereignty on the Northern Plains"). For criticism of the Supreme Court's acceptance of the validity of Crown assertions of sovereignty without Aboriginal consent, see John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 *Osgoode Hall L.J.* 537.

And then, in a vital passage that deserves to be quoted at length, he elaborated on the connection between occupation and pre-existing systems of Aboriginal law:

There was a consensus among the parties on appeal that proof of historic occupation was required to make out a claim to aboriginal title. However, *the parties disagreed on how that occupancy could be proved*. The respondents [British Columbia and Canada] assert that in order to establish aboriginal title, the occupation must be the physical occupation of the land in question. The appellant Gitksan nation argue, by contrast, that aboriginal title may be established, at least in part, by reference to aboriginal law.

This debate over the proof of occupancy reflects two divergent views of the source of aboriginal title. The respondents argue, in essence, that aboriginal title arises from the physical reality at the time of sovereignty, whereas the Gitksan effectively take the position that aboriginal title arises from and should reflect the pattern of land holdings under aboriginal law. However, as I have explained above, the source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. *It follows that both should be taken into account in establishing the proof of occupancy.*<sup>18</sup>

So Lamer's position seems to be that pre-sovereignty occupation is the source of Aboriginal title, but that Aboriginal law can be relied on to establish the necessary occupation.<sup>19</sup> Other

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<sup>18</sup> *Delgamuukw, supra* n.1, at 1099-1100 (para. 146-47) (emphasis added). Lamer found support for this dual approach to occupation in *Baker Lake, supra*, n.15, regarding which he said: "Mahoney J. held that to prove aboriginal title, the claimants needed both to demonstrate their 'physical presence on the land they occupied' (at p. 561) and the existence 'among [that group of] ... a recognition of the claimed rights ... by the regime that prevailed before' (at p. 559)." However, Lamer clearly did not think it necessary to prove *both* physical occupation and a pre-existing system of Aboriginal law (as this reference to *Baker Lake* might suggest), as that would be inconsistent with his own test for proof of Aboriginal title: see *supra*, text accompanying n.17. This is affirmed at 1106 (para. 159), where he referred to "the general principle that the common law should develop to recognize aboriginal rights (and title, when necessary) as they were recognized by *either de facto practice or by the aboriginal system of governance*" (emphasis added). He said as well that, as long as occupation at the time of Crown sovereignty is established, it is not necessary to prove in addition that the land was of central significance to the distinctive culture of the claimants, as that would follow from the fact that the lands were occupied by them: see *Delgamuukw, supra* n.1, at 1102 (para. 151). This also supports the conclusion that they do not have to prove "recognition of the claimed rights ... by the regime that prevailed before" (their own system of laws) if they are able to establish physical occupation. By holding that Aboriginal claimants can rely on their own systems of law in proving occupation, the Chief Justice obviously intended to give weight to their perspectives, rather than place an additional hurdle in front of them.

<sup>19</sup> This approach is in keeping with the common law as well because occupation at common law involves not just physical presence on and use of land, but also an intention to control it: see *Common Law Aboriginal Title, supra* n.11, at 197-204. The existence of Aboriginal laws in relation to land would generally indicate that

passages in his judgment support this interpretation. For example, in reference to his own decision in *R. v. Van der Peet*,<sup>20</sup> he said that he had held in that case

... that the aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples: at para. 41. As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, *those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title*. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.<sup>21</sup>

Further, in his discussion of the requirement of exclusivity of occupation, he said this about the relevance of Aboriginal law:

... the aboriginal group asserting the claim to aboriginal title may have *trespass laws which are proof of exclusive occupation*, such that the presence of trespassers does not count as evidence against exclusivity. As well, aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would *reinforce the finding of exclusive occupation*. Indeed, if that permission were the subject of treaties between the aboriginal nations in question, those treaties would also form part of the aboriginal perspective.<sup>22</sup>

There is, however, another way of explaining the relevance of Aboriginal law to the establishment of Aboriginal title. For Aboriginal law to exist it would necessarily be part of an Aboriginal legal system created by the Aboriginal society through the exercise of governmental authority. In other words, Aboriginal law would arise from what Lamer C.J. called an "aboriginal system of governance".<sup>23</sup> This system of governance would usually be territorial, in the sense that it

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the Aboriginal people in question intended to exercise control over it.

<sup>20</sup> [1996] 2 S.C.R. 507 (hereinafter *Van der Peet*).

<sup>21</sup> *Delgamuukw*, *supra* n.1, at 1100 (para. 148) (emphasis added).

<sup>22</sup> *Ibid.*, at 1105 (para. 157).

<sup>23</sup> *Ibid.*, at 1106 (para. 159).

would involve the exercise of jurisdiction over a specific geographical area. To the extent that an Aboriginal nation could prove that it exercised exclusive jurisdiction over a certain area at the time the Crown asserted sovereignty, it should have a communal Aboriginal title to all the lands within that area because those lands would have been under its *de jure* control.<sup>24</sup> This approach relies not on the specific content of Aboriginal law to establish title, but rather on proof of the existence of a system of law and of its application throughout a territory to establish Aboriginal title to the territory as a whole.<sup>25</sup>

Whether Aboriginal law is used as evidence of occupation of lands or of territorial jurisdiction resulting in Aboriginal title at common law, the additional value and relevance of Aboriginal law *within Aboriginal societies* is not diminished.<sup>26</sup> Using Aboriginal law in either or both of these ways to prove title involves acceptance that, in the context of the inter-societal relationship between an Aboriginal nation and the Crown, neither the common law nor Aboriginal

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<sup>24</sup> This approach also acknowledges the intimate connection between Aboriginal title and self-government: see "Aboriginal Rights in Canada", *supra* n.6, at 291-98.

<sup>25</sup> That the common law is not adverse to the legal pluralism inherent in such an approach is revealed by the importance of manors in the structure of English landholding. Maitland described the manor as a composite unit of real property, title to which was vested in the lord of the manor, but which consisted of both the lord's lands and a lordship over the lands of the tenants of the manor: see Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2nd ed. (Cambridge: Cambridge University Press, 1898), vol. 2, 127-28. Each manor also had its own law, known as the custom of the manor, and a manorial court to administer that law: see generally Sir Paul Vinogradoff, *The Growth of the Manor*, 2nd ed. (London: George Allen & Unwin Ltd., 1911). Moreover, as Maitland pointed out, the common law also regarded larger territorial units, like the county palatine of Chester, or even the kingdom of Scotland, as composite things that "can be demanded in a proprietary action, just as Blackacre can be demanded": Pollock and Maitland, *supra*, at 128.

<sup>26</sup> Communal Aboriginal title is not inconsistent with individual, family, or other landholding within an Aboriginal community, as the two can co-exist. This is demonstrated by reserve lands which, while held by a communal title, can be parcelled out to individuals by means of certificates of possession: see *Joe v. Findlay*, [1981] 3 W.W.R. 60 (B.C.C.A.), commented on *infra* n.109.

law is entirely appropriate for determining this matter.<sup>27</sup> In Canadian courts, Aboriginal law by itself may not be capable in some instances of protecting Aboriginal lands from intrusion because it may not contain a concept of property that is recognizable as such by non-Aboriginal judges.<sup>28</sup> Moreover, reliance on the *substance* of Aboriginal law to determine title would invite Canadian judges to interpret and apply that law, which could lead to unfortunate, culturally-destructive results.<sup>29</sup> In my opinion, it is therefore preferable to base Aboriginal title on the factual standard of occupation of land, or the jurisdictional standard of *de jure* control over a territory, or a combination of the two, rather than on Aboriginal law as such.<sup>30</sup> Regardless of which of these approaches is

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<sup>27</sup> See *Delgamuukw*, *supra* n.1, per Lamer C.J., esp. 1065-66 (para. 81-82), 1081 (para. 112). Aboriginal law may, however, be appropriately used in Canadian courts to determine other matters, such as the validity of marriages and adoptions: see *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (Que. S.C.), affirmed *sub nom. Johnstone v. Connolly* (1869), 17 R.J.R.Q. 266 (Que. Q.B.); *R. v. Nan-E-Quis-A-Ka* (1889), 1 Terr. L.R. 211 (N.W.T.S.C.); *R. v. Bear's Shin Bone* (1899), 4 Terr. L.R. 173 (N.W.T.S.C.); *R. v. Williams* (1921), 30 B.C.R. 303 (B.C.S.C.); *Re Noah Estate* (1961), 32 D.L.R. (2d) 185 (N.W.T.T.C.); *Re Adoption of Katie* (1961), 32 D.L.R. (2d) 686 (N.W.T.T.C.); *Re Beaulieu's Adoption Petition* (1969), 3 D.L.R. (3d) 479 (N.W.T.T.C.); *Re Deborah* (1972), 5 W.W.R. 203 (N.W.T.C.A.); *Re Wah-Shee* (1975), 57 D.L.R. (3d) 743 (N.W.T.S.C.); *Deer v. Okpik*, [1980] 4 C.N.L.R. 93 (Que. S.C.); *Re Tagornak Adoption Petition*, [1984] 1 C.N.L.R. 185 (N.W.T.S.C.); *Casimel v. Insurance Corporation of British Columbia*, [1994] 2 C.N.L.R. 22 (B.C.C.A.); *B.C. Birth Registration No. 1994-09-040399 (Re)*, [1998] 4 C.N.L.R. 7 (B.C.S.C.); and discussion in Norman K. Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases" [1984] 4 C.N.L.R. 1; compare *Ex parte Cote* (1971), 22 D.L.R. (3d) 353 (Sask. C.A.); *Michell v. Dennis and Dennis*, [1984] 2 C.N.L.R. 91 (B.C.S.C.); *C.K. and E.K. v. C.E.*, [1986] 2 C.N.L.R. 38 (N.W.T.S.C.); *Manychief v. Poffenroth*, [1995] 2 C.N.L.R. 67 (Alta. Q.B.). Nor is the relevance of Aboriginal law restricted to family matters: see John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 *McGill L.J.* 629; John Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47 *U. of T. L.J.* 417. Moreover, Aboriginal law can help define the *relationship* between the Crown and the Aboriginal peoples, e.g. where treaties were signed: see discussion of the Two-Row Wampum Treaty (1664) in Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Publishing, 1999), 36-38, and of the Niagara Treaty (1764) in John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government", in Asch, *supra* n.2, 155 (hereinafter "Wampum at Niagara").

<sup>28</sup> See *Common Law Aboriginal Title*, *supra* n.11, 192-95.

<sup>29</sup> See *infra* n.96.

<sup>30</sup> An additional advantage of this approach is that, subject to the inherent limit discussed below, it results in a generic title, the content of which does not vary from one Aboriginal nation to another: see Brian Slattery, "Varieties of Aboriginal Rights" (1998) 6:4-6 *Canada Watch* 71. Compare the approach taken by the High Court of Australia in *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1 (hereinafter *Mabo*), and *Wik*

taken (the choice would depend on the circumstances and the available evidence), Aboriginal law would nonetheless continue to apply internally to regulate landholding by the members of Aboriginal nations within their communities.<sup>31</sup> Moreover, as those communities would need to have the capacity to change their law for it to continue to be relevant to new circumstances, self-government is a necessary corollary of the concept of Aboriginal title outlined in *Delgamuukw*.<sup>32</sup> We will return to this issue in our discussions of the inherent limit, Aboriginal title's communal nature, and inalienability.

## 2. The Proprietary Status of Aboriginal Title

Any lingering doubts about the status of Aboriginal title as a property right were clearly put to rest by the *Delgamuukw* decision. Referring to Lord Watson's description of Aboriginal title in the *St. Catherine's* case<sup>33</sup> as "a personal and usufructuary right", Lamer C.J. said:

This Court has taken pains to clarify that aboriginal title is only "personal" in this sense [i.e., in the sense of being inalienable], and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests: see *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at p. 677.<sup>34</sup>

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*Peoples v. Queensland* (1996), 141 A.L.R. 129, commented on in "Aboriginal Title and Aboriginal Rights", *supra* n.2, at 138-44.

<sup>31</sup> See Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 *Can. Bar Rev.* 727, at 744-48; "Meaning of Aboriginal Title", *supra* n.2, at 153. See also *Mabo*, *supra* n.30, per Brennan J. at 51-52.

<sup>32</sup> See "Aboriginal Rights in Canada", *supra* n.6, at 278-91.

<sup>33</sup> *Supra* n.2, at 54.

<sup>34</sup> *Delgamuukw*, *supra* n.1, at 1081-82 (para. 113).

The proprietary nature of Aboriginal title was confirmed by Lamer in his rejection of the argument made by the governments of Canada and British Columbia that Aboriginal title has no independent content, being only the aggregate of other Aboriginal rights to engage in specific activities, such as hunting and fishing, on the claimed land. Instead, he said that Aboriginal title is "an interest in land" and a "*right to the land itself*".<sup>35</sup> Indeed, the very term "title" would be a misnomer if Aboriginal land rights were not proprietary.<sup>36</sup>

A significant consequence of classifying Aboriginal title as proprietary is to clothe it with all the protection the common law has traditionally accorded to property rights.<sup>37</sup> As prominent commentators on British constitutional principles have repeatedly emphasized, ever since *Magna Carta*<sup>38</sup> the common law has accorded the same kind of special protection to property rights as it has to other fundamental rights and freedoms, such as liberty and security of the person.<sup>39</sup> As a result, the executive branch of government can only infringe property rights when it has

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<sup>35</sup> *Ibid.*, at 1081 (para. 112), 1095 (para. 138), 1096 (para. 140) (emphasis in original at 1096). This should have been apparent from the *St. Catherine's* decision itself, as Lord Watson said that Aboriginal title to land "is an interest other than that of the Province in the same" within the meaning of s.109 of the *Constitution Act, 1867*, 30 & 31 Vict., c.3 (U.K.), and that the beneficial interest in Aboriginal title lands would only become available to the provinces "as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title": *supra* n.2, at 58-59. For discussion, see Hamar Foster, "Aboriginal Title and the Provincial Obligation to Respect It: Is *Delgamuukw v. British Columbia* 'Invented Law'?" (1998) 56 *The Advocate* 221.

<sup>36</sup> See generally Bernard Rudden, "The Terminology of Title" (1964) 80 *L.Q.R.* 63.

<sup>37</sup> For more detailed discussion, see "Constitutionally Protected Property Right", *supra* n.10.

<sup>38</sup> 17 John (1215).

<sup>39</sup> See William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-69), vol. 1, at 129-39; 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, para. 833. See also 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.

unequivocal statutory authority to do so.<sup>40</sup> Put another way, the Crown cannot seize property by act of state within its own dominions,<sup>41</sup> as that would be a violation of the rule of law.<sup>42</sup>

This means that, clear and plain statutory authority apart, after British acquisition of sovereignty and the reception of the common law the Crown has never had the power to infringe or unilaterally extinguish Aboriginal title in Canada.<sup>43</sup> So even prior to the constitutional entrenchment of Aboriginal title, along with other Aboriginal and treaty rights, by s.35(1) of the *Constitution Act, 1982*,<sup>44</sup> the Crown in its executive capacity had no more authority to interfere with

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<sup>40</sup> In *Attorney-General v. De Keyser's Royal Hotel*, [1920] A.C. 508 (H.L.) (hereinafter *De Keyser's Royal Hotel*), at 569, Lord Parmoor stated: "Since Magna Carta the estate of a subject in lands or buildings has been protected against the prerogative of the Crown." See also *Australian Communist Party v. The Commonwealth* (1951), 83 C.L.R. 1 (H.C. Aust.), per Williams J. at 230-31; *Clunies-Ross v. The Commonwealth* (1984), 155 C.L.R. 193, (H.C. Aust.), at 201. For a case involving a situation where the executive had such statutory authority, see *Attorney-General for Canada v. Hallet and Carey Ltd.*, [1952] A.C. 427 (P.C.). Note, however, that there is an exception to the general rule where the Crown seizes or destroys property in time of war, in which case it must pay compensation, except where the destruction occurred as a direct result of battle: see *De Keyser's Royal Hotel*, *supra*; *Commercial and Estates Co. of Egypt v. The Board of Trade*, [1925] 1 K.B. 271 (C.A.), esp. per Atkin L.J. at 294-97; *Burmah Oil Co. v. Lord Advocate*, [1965] A.C. 75 (H.L.); *Halsbury's Laws of England*, *supra* n.39, vol. 8, para. 920.

<sup>41</sup> See *Walker v. Baird*, [1892] A.C. 491 (P.C.); *Johnstone v. Pedlar*, [1921] 2 A.C. 262 (H.L.); *Eshugbayi Eleko v. Government of Nigeria*, [1931] A.C. 662 (P.C.), at 671; *Attorney-General v. Nissan*, [1970] A.C. 179 (H.L.); *Buttes Gas v. Hammer*, [1975] Q.B. 557 (C.A.), at 573.

<sup>42</sup> See *Entick v. Carrington* (1765), 19 How. S.T. 1029 (C.P.); T.R.S. Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 *Cambridge L.J.* 111, esp. 112-17.

<sup>43</sup> So when Lord Watson stated in the *St. Catherine's* case, *supra* n.2, at 54, that Aboriginal title is "dependent upon the good will of the Sovereign", he must have had in mind the legislative authority of the Crown in Parliament rather than the executive authority of the Crown: see *Mathias v. Findlay*, [1978] 4 W.W.R. 653 (B.C.S.C.), at 656. This is because, having held that Aboriginal title is an interest in land (see *supra* n.35), fundamental constitutional principles would have prevented him from concluding that the Crown in its executive capacity could infringe that proprietary interest without unequivocal statutory authority. For further discussion of this issue in relation to the *Royal Proclamation of 1763*, see Kent McNeil, "The Temagami Indian Land Claim: Loosening the Judicial Strait-jacket", in Matt Bray and Ashley Thomson, eds., *Temagami: A Debate on Wilderness* (Toronto: Dundurn Press, 1990), 185. On Crown acquisition of sovereignty, see *supra* n.17.

<sup>44</sup> Schedule B to the *Canada Act 1982*, c.11 (U.K.). Section 35(1) provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

Aboriginal title than it has to interfere with the land titles of other Canadians.<sup>45</sup> So if the Crown attempted to grant lands that were held by virtue of Aboriginal title, for example, the grant would either be void or subject to that title,<sup>46</sup> just as a Crown grant of lands held by virtue of a fee simple or lesser estate would either be void or subject to that estate.<sup>47</sup> And this is quite apart from the further restrictions placed on the authority of colonial governors in this regard by the *Royal Proclamation of 1763*, and on the Crown in right of the provinces at the time of Confederation by the conferral on the Parliament of Canada of exclusive jurisdiction over "Indians, and Lands reserved for the Indians" by s.91(24) of the *Constitution Act, 1867*.<sup>48</sup>

### 3. The Content of Aboriginal Title

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<sup>45</sup> See Broom, *supra* n.39, at 231: "no man's property can legally be taken from him or invaded by the direct act or command of the sovereign, without the consent of the subject, given expressly or impliedly through parliament". Authority to take private property for public purposes is commonly conferred on the executive by expropriation statutes: see generally Keith Davies, *Law of Compulsory Purchase and Compensation*, 3rd ed. (London: Butterworths, 1978); Graham L. Fricke, ed., *Compulsory Acquisition of Land in Australia*, 2nd ed. (Sydney: The Law Book Company Limited, 1982); Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed. (Toronto: Carswell, 1992). But as Lord Pearson said in *Rugby Water Board v. Shaw Fox*, [1973] A.C. 202 (H.L.), at 214, "compulsory acquisition and compensation for it are entirely creations of statute".

<sup>46</sup> In *Chippewas of Sarnia Band v. Attorney-General of Canada*, [1999] O.J. No. 1406 (Quicklaw) (hereinafter *Chippewas of Sarnia*), at para. 397-431, Campbell J. held that a 1853 Crown grant of lands held by unsurrendered Aboriginal title that had been confirmed by treaty was void (this decision is currently on appeal to the Ont. C.A.). In the United States, on the other hand, the Supreme Court has repeatedly held that grants of Indian title land are not void, but take effect subject to that title: see discussion of the case law in Kent McNeil, "Extinguishment of Native Title: The High Court and American Law" (1997) 2 *A.I.L.R.* 365.

<sup>47</sup> For detailed discussion of the common law in relation to the validity of Crown grants generally, see Kent McNeil, "Racial Discrimination and Unilateral Extinguishment of Native Title" (1996) 1 *A.I.L.R.* 181 (hereinafter "Racial Discrimination"). In relation to colonial charters, see *Common Law Aboriginal Title*, *supra* n.11, at 235-41.

<sup>48</sup> 30 & 31 Vict., c.3 (U.K.). See *Delgamuukw*, *supra* n.1, per Lamer C.J. at 1115-23 (para. 172-83), and discussion in articles cited *supra* n.9. The *Royal Proclamation*, *supra* n.13, forbid the governors of the Crown's North American colonies from issuing warrants of survey or patents for any unceded Indian lands: for discussion, see Brian Slattery, *The Land Rights of Indigenous Canadian Peoples* (Saskatoon: University of Saskatchewan Native Law Centre, 1979), esp. 261-67.

We have already seen that Chief Justice Lamer rejected the argument made in *Delgamuukw* that Aboriginal title is no more than the sum of other Aboriginal rights to engage in specific activities on the claimed land.<sup>49</sup> At the same time, he dismissed an alternative argument made by Canada and British Columbia that "aboriginal title, at most, encompasses the right to exclusive use and occupation of land in order to engage in those activities which are aboriginal rights themselves".<sup>50</sup> But he also rejected the argument of the Gitksan and Wet'suwet'en that "aboriginal title is tantamount to an inalienable fee simple, which confers on aboriginal peoples the rights to use those lands as they choose".<sup>51</sup> Instead, he said that the "content of aboriginal title, in fact, lies somewhere in between these positions."<sup>52</sup> He elaborated as follows:

Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This inherent limit, to be explained more fully below, flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a fee simple.<sup>53</sup>

Apart from the source of Aboriginal title, which we have already dealt with, the *sui generis* aspects of Aboriginal title identified by the Chief Justice - namely, its inherent limit, communal nature, and

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<sup>49</sup> See *supra*, text following n.34.

<sup>50</sup> *Delgamuukw*, *supra* n.1, at 1080 (para. 110).

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*, at 1080 (para. 111).

<sup>53</sup> *Ibid.*, at 1080-81 (para. 111).

inalienability - will be discussed in more detail below. For now, I want to focus on the content of Aboriginal title apart from those aspects.

The first thing to notice is that, subject to the inherent limit, the uses to which Aboriginal peoples can put their lands are not limited to the uses they made of them in the past. In the arguments they presented, the governments of Canada and British Columbia were trying to get the Court to rely on the *Van der Peet*<sup>54</sup> test for identifying and defining other Aboriginal rights, and apply it to Aboriginal title. That test requires Aboriginal peoples to establish their Aboriginal rights by proving that they are based on pre-European contact practices, customs and traditions that are integral to the distinctive culture of the Aboriginal group claiming the rights.<sup>55</sup> In *Delgamuukw*, Lamer C.J. clearly rejected the application of this test to Aboriginal title claims.<sup>56</sup> He said this:

... aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to the land itself.<sup>57</sup>

The Chief Justice's refusal to limit the content of Aboriginal title to traditional uses of the land is amply supported by common law principles. At common law, persons who are in physical occupation of land generally have possession, which gives them an interest in the land entitling

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<sup>54</sup> *Supra* n.20.

<sup>55</sup> For critiques of the *Van der Peet* test, see John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 *American Indian L. Rev.* 37; Russel Lawrence Barsh and James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 *McGill L.J.* 993; "Aboriginal Rights in Canada", *supra* n.6, at 261-65.

<sup>56</sup> See *Delgamuukw*, *supra* n.1, at 1095-97 (para. 140-42). As we have seen, Lamer also prescribed a different time frame for proof of Aboriginal title, namely the date of assertion of Crown sovereignty rather than contact with Europeans: see *supra* n.17 and accompanying text.

<sup>57</sup> *Ibid.*, at 1095 (para. 138).

them to put it to any use permitted by law.<sup>58</sup> Those uses are generally restricted by zoning and environmental laws, and the law of nuisance and riparian rights, but they are not limited to the activities on the land that gave rise to the possession.<sup>59</sup> Similarly, Aboriginal peoples who establish their Aboriginal title by proving occupation of land at the time of Crown sovereignty, as required by the *Delgamuukw* decision,<sup>60</sup> are not limited to the uses they made of the land prior to that time. To hold otherwise, the Court would have had to adopt a double standard, which would have discriminated against Aboriginal peoples.<sup>61</sup>

Lamer found additional support for his conclusion that Aboriginal title is not limited to traditional Aboriginal uses in the jurisprudence and statutory provisions respecting Indian reserve lands. Relying on Dickson J.'s statement in *Guerin v. The Queen* that the Indian interest in Aboriginal title lands and reserves is the same,<sup>62</sup> he found indications in s.18 of the *Indian Act*<sup>63</sup> that

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<sup>58</sup> For detailed discussion, see *Common Law Aboriginal Title*, *supra* n.11, esp. 6-17. Where, however, the possession is that of a leaseholder or life tenant, the uses that can be made of the land are limited to some extent by the law of waste.

<sup>59</sup> E.g., see *Kirby v. Cowderoy*, [1912] A.C. 599 (P.C) (possession maintained by payment of taxes on "wild" land in British Columbia); *Cadija Umma v. S. Don Manis Appu*, [1939] A.C. 136 (P.C.) (possession established by taking and selling of wild grass in Ceylon); *Red House Farms Ltd. v. Catchpole* (1976), 244 E.G. 295 (C.A.) (possession established in England by hunting on a regular basis, and giving others permission to hunt).

<sup>60</sup> *Delgamuukw*, *supra* n.1, at 1095-1107 (para. 140-59). For discussion of the onus of proof of Aboriginal title, see "Onus of Proof", *supra* n.7.

<sup>61</sup> See "Meaning of Aboriginal Title", *supra* n.2, at 143-44.

<sup>62</sup> *Supra* n.2, at 379.

<sup>63</sup> R.S.C. 1985, c. I-5. Section 18, quoted by Lamer in *Delgamuukw*, *supra* n.1, at 1085-86 (para. 121), provides:

18. (1) Subject to this Act, reserves are held by Her Majesty for the *use and benefit* of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

(2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or,

the Indian interest in reserves is "very broad", not being "restricted to practices, customs and traditions integral to distinctive aboriginal cultures."<sup>64</sup> Moreover, he noted that the *Indian Oil and Gas Act*<sup>65</sup>

... presumes that the aboriginal interest in reserve land includes mineral rights, a point which this Court unanimously accepted with respect to the *Indian Act* in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344. On the basis of *Guerin*, aboriginal title also encompass [sic] mineral rights, and lands held pursuant to aboriginal title should be capable of exploitation in the same way, which is certainly not a traditional use for those lands.<sup>66</sup>

Another important aspect of Aboriginal title is what Chief Justice Lamer referred to as "the right to *exclusive* use and occupation".<sup>67</sup> Exclusivity is an attribute of property,<sup>68</sup> and so this aspect of Aboriginal title affirms its proprietary nature. But as Lamer said, it also means that the aboriginal titleholders have "the ability to exclude others from the lands held pursuant to that title."<sup>69</sup> So anyone who intrudes on their lands without their permission or lawful authority - and this includes

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with the consent of the council of the band, *for any other purpose for the general welfare of the band*, and may take any lands in a reserve required for those purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian, in such amount as may be agreed between the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct. [Lamer's emphasis]

<sup>64</sup> *Delgamuukw*, *supra* n.1, at 1085-86 (para. 120-21).

<sup>65</sup> R.S.C. 1985, c. I-7.

<sup>66</sup> *Delgamuukw*, *supra* n.1, at 1086 (para. 122). Compare per La Forest J. at 1127 (para. 192): "[I]n defining the nature of 'aboriginal title', one should generally not be concerned with statutory provisions and regulations dealing with reserve land."

<sup>67</sup> *Ibid.*, at 1083 (para. 117) (emphasis added).

<sup>68</sup> See A.W.B. Simpson, "Real Property", in H.W.R. Wade, *Annual Survey of Commonwealth Law 1972* (London: Butterworths, 1973), 320, at 324 (quoted *infra* n.131).

<sup>69</sup> *Delgamuukw*, *supra* n.1, at 1104 (para. 155).

an officer of the Crown<sup>70</sup> - would be a trespasser, and therefore subject to an action of trespass that could result in damages, an injunction, or both.<sup>71</sup>

In sum, it is apparent from Chief Justice Lamer's decision in *Delgamuukw* that Aboriginal title is an all-inclusive real property interest. Subject to the inherent limit that we are about to discuss, Aboriginal peoples can put their lands to any use they collectively choose.<sup>72</sup> This includes extracting minerals and harvesting timber, whether for their own consumption or commercial purposes.<sup>73</sup> And since the subsurface is encompassed by Aboriginal title, the air space must be as

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<sup>70</sup> In *Delgamuukw*, *supra* n.1, at 1098 (para. 145), Lamer C.J. affirmed that "Aboriginal title is a burden on the Crown's underlying title." However, given that the Aboriginal right to use and occupation is exclusive, the Crown's title is not possessory. As Campbell J. noted in *Chippewas of Sarnia*, *supra* n.46, at para. 377, the accepted position that underlying title is in the Crown "is simply a basic proposition of English and Canadian property law that applies to all land." He elaborated at para. 419:

As demonstrated earlier it is axiomatic in our common law system that the underlying, allodial, or radical title in Indian land, like all land is indeed vested in the Crown. But that title is subject to the overlying burden of Indian title. That overlying burden of Indian title is not vested in the Crown but guaranteed by the Crown to the Indians until surrendered by the Indians to the Crown. Until so surrendered, the Crown has no power to grant it. The title, although vested in the Crown, remained subject to the Indian right of occupancy. Although part of Indian land title is vested in the Crown, *the exclusive communal right of the Indians to possession of their land is not vested in the Crown and therefore not in the gift of the Crown to dispose.* [emphasis added]

For detailed discussion, see *Common Law Aboriginal Title*, *supra* n.11, esp. 79-107, 216-21.

<sup>71</sup> For further discussion, see "Onus of Proof", *supra* n.7.

<sup>72</sup> See *Delgamuukw*, *supra* n.1, at 1082-83 (para. 115): "Decisions with respect to [Aboriginal title] land are also made by th[e] community" that holds that title as "a collective right to land".

<sup>73</sup> While Lamer C.J. did not explicitly say that Aboriginal peoples can sell natural resources extracted from or harvested on their lands, this is clearly implicit in his judgment. The *Indian Oil and Gas Act*, for example, envisages the commercial exploitation of oil and gas on reserve lands. By relying on that Act to find that the Aboriginal interest in Aboriginal title lands also includes oil and gas, Lamer must have accepted that those resources could be exploited commercially. Indeed, if the Aboriginal titleholders could not sell their oil, then in order to use it themselves they would have to either build their own refineries, or contract with oil companies to have the oil processed for them. Also, the resources on their lands might far exceed their needs, in which case valuable assets might be rendered unusable. This makes no sense, especially considering the poverty of so many Aboriginal communities and their need for economic development.

While the inalienability of Aboriginal title, other than by surrender to the Crown, might also be regarded as an impediment to commercial exploitation of natural resources, this is probably not so. Once trees are cut or minerals or other resources are removed from the ground, they cease to be part of the land, and become personal property. In principle, there is no reason why resources that are no longer part of Aboriginal

well.<sup>74</sup> Also included are water rights, be they riparian, surface, subterranean, or incidental to Aboriginal title to the beds of waterways.<sup>75</sup> However, Aboriginal title is still *sui generis*, making it distinct from what Chief Justice Lamer called "'normal' proprietary interests, such as fee simple."<sup>76</sup> We have already discussed one *sui generis* aspect of Aboriginal title, namely its source in occupation of land prior to Crown assertion of sovereignty. We now turn to the title's other distinctive features, starting with the inherent limit.

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title land would be subject to the inalienability rule. However, inalienability might prevent Aboriginal titleholders from alienating resources that are still part of the land, for example by entering into a lease with a mining company, unless this can be done under their own laws: see *infra*, para. following n.161.

<sup>74</sup> At common law, the owner of the surface of land also owns the subsurface and air space, unless they have been severed from the surface rights. In *Opetchesah Indian Band v. Canada*, [1997] 2 S.C.R. 119, involving a right-of-way held by B.C. Hydro for an electric power transmission line across an Indian reserve, Major J., for the majority, said at 133, 134 (para. 18, 23) that the right-of-way included "occupation of air space where the poles and wires were found", but he also held that Hydro's rights were not exclusive:

The respondent Hydro can only use the land for the power transmission line and related maintenance purposes and the appellant Band retains the right to use the right-of-way. The Band's ability to use the land is restricted only in that they cannot erect buildings on it or interfere with the respondent Hydro's easement. Both Hydro and the Band share use of the right-of-way.

From this, it appears that, absent the right-of-way, the Band would have been entitled to use the air space as it chose, and could erect buildings (which should be perfectly obvious, as otherwise they could not even build houses). Given that the Indian interest in reserve lands includes air space, the Aboriginal interest in Aboriginal title lands must as well, because the Aboriginal interest in reserve and Aboriginal title lands is the same: see *supra* nn. 62-66 and accompanying text. This could be especially significant for the Innu of Quebec and Labrador, who for many years have protested low-level military flights over their traditional lands.

<sup>75</sup> See generally Richard H. Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (Calgary: Canadian Institute of Resources Law, University of Calgary, 1988); Kenneth J. Tyler, "Indian Resource and Water Rights", [1982] 4 C.N.L.R. 1, and "The Division of Powers and Aboriginal Water Rights Issues", National Symposium on Water Law, Environmental Law CLE Programme, Canadian Bar Association, Toronto, April 9-10, 1999; Kent McNeil, "Riparian Rights and 'Lands Reserved for the Indians': Some Constitutional Issues", *ibid.* Note that, in *R. v. Lewis*, [1996] 1 S.C.R. 921, and *R. v. Nikal*, [1996] 1 S.C.R. 1013, the Supreme Court held that the *ad medium filum aquae* rule (the owner of land bordering on water owns the bed to the middle of the waterway) does not apply to navigable waters in British Columbia, and so does not apply to Indian reserves in the province that border on or are traversed by navigable waterways. The impact of these decisions on Aboriginal title claims to the beds of navigable waterways (and hence to ownership of fisheries in those waterways) involves complex issues that cannot be addressed here.

<sup>76</sup> *Delgamuukw*, *supra* n.1, at 1081 (para. 112). See also *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657, at 666-67 (para. 14). On the *sui generis* nature of Aboriginal rights generally, see John Borrows and Leonard I. Rotman, "The *Sui Generis* Nature of Aboriginal rights: Does It Make a Difference?" (1997) 36 *Alta. L. Rev.* 9.

#### 4. The Inherent Limit on Aboriginal Title

Aboriginal title is *sui generis* in part because, in the words of Chief Justice Lamer, "lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place."<sup>77</sup> The limit therefore relates to the uses of the land, and the special connection with it, that were relied upon by the Aboriginal claimants to establish their Aboriginal title at the time of Crown assertion of sovereignty. This is evident as well from the two examples the Chief Justice gave to illustrate the application of the limit:

... if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, 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.)<sup>78</sup>

To my knowledge, this inherent limit is a new development in the law. It was not present in the earlier jurisprudence on Aboriginal title, nor am I aware of any precedent for it in the common

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<sup>77</sup> *Delgamuukw*, *supra* n.1, at 1089 (para. 128).

<sup>78</sup> *Ibid.*, at 1089 (para. 128). These examples are significant for another reason as well, namely that they show that the occupation required for Aboriginal title can be established by proving that the lands were used for hunting, or that they have ceremonial or cultural significance (so evidently the lands do not need to have been used for economic or practical purposes). Where hunting is concerned, this is consistent with the *Royal Proclamation of 1763*, *supra* n.13, which stated that the unceded lands of the Indian nations are in their possession and are reserved to them "as their Hunting Grounds". It is also consistent with American law: see *Mitchel v. United States*, 9 Pet. 711 (1835), at 745, where Baldwin J. for the Court said that the Indians' "hunting-grounds were as much in their actual possession as the cleared fields of the whites". See also *Red House Farms Ltd. v. Catchpole*, *supra* n.59.

law generally.<sup>79</sup> Lamer nonetheless found support for this limit in the source of Aboriginal title in "the prior occupation of Canada by Aboriginal peoples."<sup>80</sup> He elaborated as follows:

That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law. However, the law of aboriginal title does not only seek to determine the historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day. Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.<sup>81</sup>

Lamer clearly wanted to ensure that the special relationship Aboriginal peoples have with their lands continues into the future. To make sure this happens, he said that "uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title."<sup>82</sup> He linked this to Aboriginal cultures by stating that, where lands were occupied by an Aboriginal group so as to establish their title, "there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture."<sup>83</sup>

While in some instances Lamer's inherent limit might be supported by the Aboriginal perspectives and laws that he said have to be taken into account along with the common law,<sup>84</sup> he

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<sup>79</sup> This is as one would expect, given that the limit is a *sui generis* aspect of Aboriginal title.

<sup>80</sup> *Delgamuukw*, *supra* n.1, at 1088 (para. 126).

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*, at 1089 (para. 127). See also 1103 (para. 154), where Lamer said that the inherent limit relates to "uses which are inconsistent with continued use by future generations of aboriginals."

<sup>83</sup> *Ibid.*, at 1089 (para. 128).

<sup>84</sup> *Ibid.*, at 1066 (para. 81-82), 1081 (para. 112), 1099-1100 (para. 147-48). On Aboriginal perspectives regarding their relationships with their lands, see *Report of the Royal Commission on Aboriginal Peoples* (hereinafter *RCAP Report*), Vol. 2, *Restructuring the Relationship* (Ottawa: Minister of Supply and Services Canada, 1996), Part 2. Moreover, the word "perspectives" is probably not the appropriate term to use in this

did not rely explicitly on those perspectives and laws in formulating the limit.<sup>85</sup> Moreover, as Aboriginal perspectives on this matter would no doubt vary to some extent from one Aboriginal nation to another, they probably could not provide the foundation for a generic limit that applies to Aboriginal title generally. But even if preservation of a culturally-based relationship with the land is a common goal for Aboriginal nations, it is doubtful that they would accept a legally-enforceable limit on their land use that is based in part on the particular uses they made of specific lands at the time of Crown sovereignty. Such an approach does not take sufficient account of the economic adaption and cultural change that have been necessary for Aboriginal nations to live in the modern world. It also fails to acknowledge that an Aboriginal nation might want to engage in land-based activities that, while in conflict with the uses they made of their lands at the time of Crown sovereignty, are culturally appropriate in the present-day.

Chief Justice Lamer's own example of Aboriginal title based on occupation of land as a hunting ground may serve to illustrate this point. He said that the inherent limit would prevent uses of the land, such as strip mining, that would destroy its value as a hunting ground. Now given the dependence of most Aboriginal nations on hunting prior to Crown sovereignty, the attachment to the land that would form the basis for their Aboriginal title to much of their land might be largely through hunting. If this is correct, then extensive areas of Aboriginal title land cannot be put to uses that would destroy their value for hunting. Strip mining would obviously have this effect, but so would residential and commercial development because, even if the destruction of habitat and the

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context, as what are involved here are not simply matters of opinion, but systems of knowledge and understanding that include law and governance: see Monture-Angus, *supra* n.27, at 22.

<sup>85</sup> It does not appear from his judgment that the evidence he considered contained any indication that the inherent limit arose from Aboriginal perspectives and laws, whether of the Gitksan and Wet'suwet'en or other Aboriginal nations.

presence of people and buildings did not cause the game to disappear, it would be unsafe to hunt in such populated areas. Alternative Aboriginal uses of these lands might, therefore, be limited to agriculture, forestry, and other less intrusive activities, and then only as long as sufficient habitat was preserved to maintain game populations. Moreover, because the limit is inherent to Aboriginal title, it would continue to restrict the use of the land even if the Aboriginal people in question were no longer interested in hunting, or the game disappeared. According to Lamer, if they "wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands [to the Crown] and convert them into non-title lands to do so."<sup>86</sup>

So an Aboriginal nation that wants to use certain lands in ways inconsistent with the kind of occupation relied on to establish its Aboriginal title is faced with a dilemma. It must either refrain from engaging in those inconsistent uses, or give up its Aboriginal title, and hence its special relationship with those lands, by surrendering them to the Crown and taking back some other interest, such as a fee simple. This would seem to be so even if the economic viability of the community depends on putting at least some of their Aboriginal title lands to inconsistent uses. If the main purpose of the inherent limit is cultural preservation,<sup>87</sup> restricting the choice of an Aboriginal nation to these two options in this kind of situation is unlikely to achieve that goal. Moreover, by limiting the decision-making authority of Aboriginal nations with respect to their

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<sup>86</sup> *Delgamuukw*, *supra* n.1, at 1091 (para. 131).

<sup>87</sup> See *supra* nn. 81-83 and accompanying text.

lands,<sup>88</sup> it seems to undermine their capacity to undertake the kind of economic development necessary for them to be sustainable, self-sufficient communities.<sup>89</sup>

The Chief Justice nonetheless took pains to caution against an over-restrictive interpretation of the inherent limit. He drew an analogy between it and the concept of equitable waste, which prevents a life tenant from committing "wanton or extravagant acts of destruction" or from "ruin[ing] the property".<sup>90</sup> He added that "[t]his description of the limits imposed by the doctrine of equitable waste capture the kind of limit I have in mind here."<sup>91</sup> However, employing Lamer's examples again, many uses of land that do not amount to equitable waste, such as erecting buildings and putting in parking lots, would be inconsistent with the use of it as a hunting ground, and could destroy its ceremonial significance. The connection he drew between the inherent limit and the attachment to the land relied upon to establish Aboriginal title suggests that what is prohibited is not just wantonly destructive acts, but any uses that seriously interfere with the continuance of the kind of attachment that existed at the time of Crown sovereignty.

Nor can much reassurance be drawn from Lamer's concluding remarks on this issue, where he emphasized that the inherent limit is not

... a limitation that restricts the use of the land to those activities that have traditionally been carried out on it. That would amount to a legal straitjacket on

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<sup>88</sup> Lamer C.J. affirmed this authority in *Delgamuukw*: see *infra*, quotation accompanying n.103.

<sup>89</sup> The importance of economic development for Aboriginal communities is emphasized in the *RCAP Report*, *supra* n.84, Vol. 2, *Restructuring the Relationship*, Part 2, where 240 pages (775-1014) are devoted to the topic.

<sup>90</sup> *Delgamuukw*, *supra* n.1, at 1090 (para. 130), quoting E.H. Burn, *Cheshire and Burn's Modern Law of Real Property*, 14th ed. (London: Butterworths, 1988), 264, and Robert E. Megarry and H.W.R. Wade, *The Law of Real Property* (London: Stevens, 1975), 105, respectively. See also Bankes, *supra* n.9, at 324-25 n.34, where it is pointed out that equitable waste "is by far the worst form" of the four categories of waste.

<sup>91</sup> *Delgamuukw*, *supra* n.1, at 1090-91 (para. 130).

aboriginal peoples who have a legitimate legal claim to the land. The approach I have outlined above 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.<sup>92</sup>

What this really appears to mean is that Aboriginal title, while not limited *to* Aboriginal uses of land at the time of Crown sovereignty, is still limited *by* those uses. It also has to be kept in mind that "aboriginal title encompasses the right to *exclusive* use and occupation".<sup>93</sup> This exclusivity generally prevents anyone else from coming onto the land and using it in any way, including ways prohibited by the inherent limit. Nor can Aboriginal nations permit others to come in and use their lands in prohibited ways, as that would also violate the inherent limit. A potentially absurd situation could therefore result, where valuable resources on Aboriginal lands would be rendered unusable *by anyone* without destruction of the special Aboriginal relationship with the land that the inherent limit is supposed to protect. As we have seen, the only way the Aboriginal peoples could take advantage of those resources themselves in this situation would be by surrendering their lands to the Crown, which would terminate their Aboriginal title. And the only other way the resources could be accessed would be through legislative infringement of their Aboriginal title,<sup>94</sup> a clearly coercive act that would be at least as destructive of the special relationship with the land on which the title is based.

There are other problems with the inherent limit as well. While Lamer C.J.'s desire to preserve Aboriginal title lands for future generations was no doubt well intentioned, one can question whether imposing an inherent limit on that title is an appropriate means for achieving this

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<sup>92</sup> *Ibid.*, at 1091 (para. 132).

<sup>93</sup> *Ibid.*, at 1083 (para. 117) (emphasis added).

<sup>94</sup> See *ibid.*, per Lamer C.J. at 1107-14 (para. 160-69). For critical analysis, see *Defining Aboriginal Title*, *supra* n.10, at 16-25, and "Aboriginal Title and the Division of Powers", *supra* n.9.

goal. It suggests that Aboriginal peoples are either not capable or not willing to take appropriate actions themselves to maintain their special relationship with their lands. If so, the inherent limit is paternalistic and disrespectful, particularly in light of the spiritual attachment and the strong ethic of responsibility and stewardship that Aboriginal peoples generally have towards their lands.<sup>95</sup> One can also question whether Canadian courts are the appropriate bodies to be imposing a limitation on the property rights of Aboriginal peoples that has cultural preservation as its objective.<sup>96</sup> Related to this issue of jurisdiction is the question of standing: Who has a sufficient interest in this matter to challenge an allegedly inconsistent use in a Canadian court? No doubt the members of an Aboriginal nation would have standing, but are they going to be willing to risk discord within their own community by going outside to bring such a court challenge?<sup>97</sup> Would provincial governments have standing, given their underlying title to Aboriginal title lands?<sup>98</sup> Would the federal

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<sup>95</sup> See *RCAP Report, supra* n.84, Vol. 2, *Restructuring the Relationship*, Part 2, esp. 434-64.

<sup>96</sup> See, for example, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), where the United States Supreme Court decided that, except where imprisonment is involved, enforcement of the *Indian Civil Rights Act*, 1968, 25 U.S.C. §§ 1301-03, is up to tribal courts, not the courts of the United States. Marshall J., in his majority decision, said this at 65: "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." He supported his conclusion by adding at 72 that "efforts by the federal judiciary to apply the statutory prohibitions of [the *Indian Civil Rights Act*] in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity."

<sup>97</sup> In most, if not all, Aboriginal cultures, social harmony is an essential value: see *RCAP Report, supra* n.84, Vol. 1, *Looking Forward, Looking Back*, esp. 651-54; *Report of the Aboriginal Justice Inquiry of Manitoba*, Vol. 1, *The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991), esp. 22-39; Rupert A. Ross, *Dancing with a Ghost: Exploring Indian Reality* (Markham, Ont.: Octopus Publishing Group, 1992), esp. 139-42.

<sup>98</sup> See *supra* n.70. Note, however, that the resources on Aboriginal lands only become available to the provinces after Aboriginal title is surrendered: see *supra* n.35. Until then it appears that Aboriginal titleholders own even those resources that the inherent limit prevents them from using, as they have "the right to exclusive use and occupation": *Delgamuukw, supra* n.1, per Lamer C.J. at 1083 (para. 117). This interpretation is supported by Lamer's statement in *Delgamuukw*, at 1091 (para. 131), that "[i]f aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so", for if Aboriginal peoples did not own the resources that the inherent limit prevents them from using, they would not be able to obtain a right to them by surrendering their lands and

government be able to rely on its constitutional authority over Aboriginal title lands and its fiduciary obligations to the Aboriginal peoples to justify bringing an action?<sup>99</sup> Would it be in breach of those obligations if it failed to do so? These are issues that will have to be resolved in future court cases.<sup>100</sup>

Given that the inherent limit is problematic in so many respects, is there another way of preserving the special relationship that Aboriginal peoples have with their lands? In my opinion, the solution to this is to acknowledge that the decision-making authority Aboriginal peoples have with

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converting them into "non-title lands". In this respect, a useful analogy can be drawn between the inherent limit and zoning laws that prevent landowners from putting their lands to certain uses, but do not diminish their ownership of their lands or of the resources on them (though in some circumstances government interference with access to those resources can amount to expropriation for which compensation has to be paid: see *British Columbia v. Tener*, [1985] 1 S.C.R. 533).

<sup>99</sup> On the federal government's constitutional authority, see *supra* n.48 and accompanying text. On its fiduciary obligations, see generally Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996); Kent McNeil, "Fiduciary Obligations and Aboriginal Peoples", forthcoming in Mark Gillen and Faye Woodman, eds., *The Law of Trusts: A Conceptual Approach*, and "Fiduciary Obligations and Federal Responsibility for Aboriginal Peoples", forthcoming in Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2000).

<sup>100</sup> To my knowledge, the only case decided so far that has applied the inherent limit is *R. v. Denault*, [1998] 2 C.N.L.R. 114 (B.C. Prov. Ct.). It did not involve a direct challenge to Aboriginal land use on the basis of the limit, but rather a prosecution of a member of the Shuswap Nation under s.35 of the *Fisheries Act*, R.S.C. 1985, c. F-14, for harmful alteration or destruction of fish habitat by placing landfill along the South Thompson River for the development of a mobile home park. The accused, who held a certificate of possession of reserve land bordering the river, stated that he had consulted with and obtained the approval of the governing body of the Shuswap Nation, i.e. the Elders, before undertaking the development. He also claimed that the Shuswap Nation had Aboriginal title to the lands in question. Sundhu P.C.J. did not decide the issue of Aboriginal title, in part because little or no evidence of historical occupation and use of the lands had been presented. But even if Aboriginal title had been established, he said at 129 that

[t]he decision of Chief Justice Lamer, in *Delgamuukw*, states that 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. If, as it is asserted, 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 to destroy that relationship, as was done in this case, with the destruction of fish habitat, by the dumping of landfill, removal of trees and vegetation for the creation of a mobile home park.

So it appears that, even if the accused had the permission of the governing body of the Shuswap Nation, he could not develop the land in a way that would destroy its ceremonial or cultural significance, as that would violate the inherent limit.

respect to their lands includes authority to put those lands to uses that are irreconcilable with the uses they made of them at the time of Crown sovereignty. Such an approach would be respectful of the capacity of Aboriginal peoples to make collective decisions about culturally appropriate ways of using their lands in a modern-day context. It would also involve a rejection of the paternalism implicit in the inherent limit, which seems to be based on an assumption that Aboriginal peoples cannot be trusted to preserve their lands for future generations.<sup>101</sup> Moreover, this approach is consistent with the concept of self-government, which is supported by the final two *sui generis* aspects of Aboriginal title that we will now consider, namely its communal nature and its inalienability.

## 5. The Communal Nature of Aboriginal Title

In *Delgamuukw*, Chief Justice Lamer affirmed that Aboriginal title is held communally.<sup>102</sup>

He explained:

Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.<sup>103</sup>

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<sup>101</sup> Alternatively, if it would be too much of an about-face for the Supreme Court to discard the inherent limit entirely, its application could be limited by according standing to invoke it only to members of the Aboriginal nation in question. If this were done, it could act as a last-resort safeguard against destructive acts, if internal community controls failed.

<sup>102</sup> The Supreme Court has said the same thing about other Aboriginal and treaty rights: see *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1112 (Aboriginal fishing right); *R. v. Sundown*, [1999] 1 S.C.R. 393, at 412 (para. 35-36) (treaty hunting right); *R. v. Marshall*, [1999] 4 C.N.L.R. 301, at 319 (para. 38) (treaty fishing right). See also *Pasco v. Canadian National Railway Co.*, sub nom., *Oregon Jack Creek Indian Band v. Canadian National Railway Co.* (1989), 56 D.L.R. (4th) 404 (B.C.C.A.), at 410; *R. v. Pamajewon and Jones* (1994), 120 D.L.R. (4th) 475 (Ont. C.A.), at 488, affirmed [1996] 2 S.C.R. 821.

<sup>103</sup> *Delgamuukw*, *supra* n.1, at 1082-83 (para. 115).

While this is all he said about Aboriginal title's communal nature, this short passage is very significant because it can be interpreted as an implicit acknowledgement of the Aboriginal peoples' inherent right of self-government.<sup>104</sup> This acknowledgement is revealed in two ways: first, by Lamer's acceptance that Aboriginal nations have legal personality which gives them the capacity to hold property; and secondly, by his recognition of the decision-making authority of those nations.

At common law, in order to hold title to property an entity must have legal personality, a status reserved for natural persons and corporations. Consequently, a collection of individuals like a club or other unincorporated association cannot own property in its own right; instead, title is vested in all the members for the time being.<sup>105</sup> So who actually holds the title to Aboriginal lands? A possible answer is that the members of an Aboriginal nation all hold title as individuals, in much the same way as do the members of an unincorporated association.<sup>106</sup> In light of the *Delgamuukw* decision, there are at least two problems with this approach. First, it does not seem to be what Lamer had in mind when he said that Aboriginal title "is a *collective* right to land held by all members of an aboriginal nation."<sup>107</sup> One reason for this is that this aspect of Aboriginal title would not be *sui generis* (which Lamer said it is<sup>108</sup>) if it did not differ from the manner in which property

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<sup>104</sup> For further discussion, see "Aboriginal Rights in Canada", *supra* n.6, at 285-91.

<sup>105</sup> See generally Dennis Lloyd, *The Law Relating to Unincorporated Associations* (London: Sweet and Maxwell Ltd., 1938); Harold A.J. Ford, *Unincorporated Non-Profit Associations: Their Property and Their Liability* (Oxford: Clarendon Press, 1959); S.J. Stoljar, *Groups and Entities: An Enquiry into Corporate Theory* (Canberra: Australian National University Press, 1973). Note that another option is for the legal title to be held by a trustee for the benefit of the members, but in that situation the members still hold the equitable title as individuals.

<sup>106</sup> See *Common Law Aboriginal Title*, *supra* n.11, at 211-15.

<sup>107</sup> *Delgamuukw*, *supra* n.1, at 1082 (para. 115) (emphasis added).

<sup>108</sup> See *supra*, quotation accompanying n.103.

is held by members of unincorporated associations.<sup>109</sup> Secondly, Lamer said repeatedly that Aboriginal perspectives have to be taken into account where Aboriginal title is concerned.<sup>110</sup> In many Aboriginal societies, the norm seems to be collective land rights (and responsibilities) vested *in the community* as an entity that transcends the members as individuals, rather than the unincorporated association model of several rights vested *in individuals* by virtue of their membership in the community.<sup>111</sup> Taking this perspective into account should result in most instances in a collective title held by Aboriginal nations as communities, rather than a title shared by their members as individuals.<sup>112</sup>

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<sup>109</sup> See also *Joe v. Findlay*, *supra* n.26, at 62, where Carrothers J.A., for the British Columbia Court of Appeal, concluded from ss. 2 and 18 of the *Indian Act*, R.S.C. 1970, c. I-6, that the right of Indian bands to their reserve lands "is a collective right in common conferred upon and accruing to the band members as a body and not to band members individually." While this conclusion was based on the provisions of the statute, in *Delgamuukw*, *supra* n.1, at 1085-86 (para. 120-21), Lamer C.J. affirmed Dickson J.'s holding in *Guerin*, *supra* n.2, at 379, that the Aboriginal interest in reserve lands and Aboriginal title lands is the same. As this equivalence seems to include the communal nature of the interest, Aboriginal title should also be vested in Aboriginal nations as bodies rather than in individuals by virtue of their membership in those nations.

<sup>110</sup> *Delgamuukw*, *supra* n.1, at 1066 (para. 81-82), 1081 (para. 112), 1099-1100 (para. 147-48).

<sup>111</sup> See generally Menno Boldt and J. Anthony Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985), Part 1, "Political and Philosophical Perspectives on Aboriginal Rights by Indian, Inuit and Metis Leaders", 15-68, and "Tribal Philosophies and the Canadian Charter of Rights and Freedoms", 165-79; Darlene M. Johnston, "Native Rights as Collective Rights: A Question of Group Self-Preservation" (1989) 2 *Can. J. Law & Jurisprudence* 19. See also Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-1990) 6 *C.H.R.Y.B.* 3, criticizing the application of what she calls the "rights paradigm" to Aboriginal societies: "the paradigm of rights based conceptually on the prototype of right of individual ownership of property is antithetical to the widely-shared understanding of *creation and stewardship responsibilities* of First Nation Peoples for the land, for Mother Earth" (at 29, emphasis added).

<sup>112</sup> Note, however, that in some Aboriginal societies, the landholding entity is not the nation, but a sub-national community, such as a house or clan: e.g. see "Address of the Gitksan and Wet'suwet'en Hereditary Chiefs to Chief Justice McEachern of the Supreme Court of British Columbia", [1988] 1 C.N.L.R. 17. For a useful discussion of the distinction between "collective entities" that exist in their own right and have legal, moral, and in some instances political rights, and mere "aggregations of individuals", see Vernon Van Dyke, "Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought" (1982) 44 *J. of Politics* 21, esp. 21-23. See also Frances Svensson, "Liberal Democracy and Group Rights: The Legacy of Individualism and Its Impact on American Indian Tribes" (1979) 37 *Political Studies* 421; Robert N. Clinton, "The Rights of Indigenous Peoples as Collective Group Rights" (1990) 32 *Arizona L. Rev.* 739.

If this is correct, it has important implications for the status of Aboriginal nations, as it means that, unlike any other collections of persons at common law, they have the capacity to hold title to property and therefore have legal personality, at least in that respect.<sup>113</sup> This *sui generis* aspect of Aboriginal title clearly places Aboriginal nations in a position that is very different from that of natural persons and corporations,<sup>114</sup> and more closely resembles the position of the federal and provincial governments in regard to their public property. Where those governments are concerned, the common law requirement of legal personality is satisfied, at least in theory, by vesting title to that property in the Crown as a corporation sole,<sup>115</sup> but in reality the federal and

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<sup>113</sup> Compare *Afton Band of Indians v. Attorney-General of Nova Scotia* (1978), 85 D.L.R. (3d) 454 (N.S.S.C.); *Pawis v. The Queen*, [1979] 2 C.N.L.R. 52 (F.C.T.D.), at 62-63; *The Queen v. Blackfoot Band of Indians*, [1982] 3 C.N.L.R. 53 (F.C.T.D.), at 61; *Attorney-General for Ontario v. Bear Island Foundation*, [1985] 1 C.N.L.R. 1 (Ont. S.C.), at 11-13. Query whether they also have other attributes of legal personality, such as the capacity to enter into contracts and to sue and be sued. There is a considerable body of case law on the legal capacity of Indian bands and band councils that might be of assistance in addressing this issue: e.g., see *Johnson v. British Columbia Hydro and Power Authority*, [1981] 3 C.N.L.R. 63 (B.C.S.C.); *Beauvais v. The Queen*, [1982] 4 C.N.L.R. 43 (F.C.T.D.); *Joe v. Findlay*, [1987] 2 C.N.L.R. 75 (B.C.S.C.); *Bannon v. Pervais*, [1990] 2 C.N.L.R. 17 (Ont. Dist. Ct.); *Ochapowace First Nation v. Araya*, [1995] 1 C.N.L.R. 75 (Sask. C.A.); *Chadee v. Norway House First Nation*, [1997] 2 C.N.L.R. 48 (Man. C.A.). However, the legal capacity of bands and band councils appears to be dependent on the fact that they have been created and granted statutory powers by the *Indian Act*, R.S.C. 1985, c.I-5: see *Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan*, [1982] 3 C.N.L.R. 181 (Sask. C.A.); *Paul Band v. R.*, [1984] 1 C.N.L.R. 87 (Alta. C.A.); *Heron Seismic Services Ltd. v. Muscowpetung Indian Band*, [1991] 2 C.N.L.R. 52 (Sask. Q.B.); *Telecom Leasing Canada v. Enoch Indian Band of Stony Plain Indian Reserve No. 135*, [1994] 1 C.N.L.R. 206 (Alta. Q.B.); compare *Tawich Development Corporation v. Deputy Minister of Revenue of Quebec*, [1997] 2 C.N.L.R. 187 (C.Q.). For an argument that band councils do not owe their existence and powers solely to the *Indian Act*, see Kent McNeil, "Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*" (1996) 34 *Osgoode Hall L.J.* 61, at 79-88. See also Geoffrey S. Lester, "Do Treaty Indians Have a Corporate Personality? A Note on the Pawis, Blackfoot and Bear Island Cases", [1990] 1 C.N.L.R. 1.

<sup>114</sup> While corporations are also collective entities in the sense that they are distinct from their shareholders (see Van Dyke, *supra* n.112, at 22), their existence and legal personality depends on statute or Crown grant. Aboriginal nations existed prior to Crown sovereignty, and their property-holding capacity does not depend on recognition by legislative or prerogative act: see *Guerin*, *supra* n.2, per Dickson J. at 376-79.

<sup>115</sup> Public property is vested in the Queen in her political capacity as the representative of her subjects (her body politic), rather than in her personal capacity (her natural body): on the development of this vital distinction, see Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton: Princeton University Press, 1957).

provincial governments each hold title in their own right,<sup>116</sup> for the benefit of the people of Canada and each province.<sup>117</sup> Those governments are nonetheless collective entities in the sense that they exist as units distinct from the people they represent,<sup>118</sup> in much the same way as Aboriginal nations exist as units distinct from their members. To carry this analogy one step further, the federal and provincial governments obviously have decision-making authority with respect to their public property, the exercise of which, to borrow a phrase from Peter Russell, is "a fundamental activity of government."<sup>119</sup> As Chief Justice Lamer acknowledged that Aboriginal communities also have decision-making authority over their Aboriginal title lands, this authority can likewise be regarded as the exercise of a right of self-government with respect to those lands.<sup>120</sup>

Upon reflection, it should be apparent that Aboriginal nations' communal property rights necessitate some kind of internal government structure for making decisions about land use,

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<sup>116</sup> Were this not so, the Crown in right of Canada could not sue the Crown in right of a province, and *vice versa*, though of course this happens frequently.

<sup>117</sup> This is sometimes expressed by the notion that public property is the "patrimony of the nation": see *Mabo*, *supra* n.30, per Brennan J. at 52-53, where the argument that this notion applied to give the Crown title to lands occupied by Indigenous peoples at the time the Crown acquired sovereignty over Australia was nonetheless rejected. See also *The Queen v. Symonds* (1847), [1840-1932] N.Z.P.C.C. 387 (N.Z.S.C.), per Martin C.J. at 395; *Williams v. Attorney-General for New South Wales* (1913), 16 C.L.R. 404 (H.C. Aust.). This notion has its roots in late medieval constitutionalism. In Bryce Lyon, *A Constitutional and Legal History of Medieval England* (New York: Harper and Row, 1960), at 587, it is stated in reference to fifteenth century England:

There was also a generally held conception that the king was a public person or prince who held the realm as real property which, however, was of a public character and could not be disposed of as private property. The royal proprietorship was public and must be shared with the community of the realm.

<sup>118</sup> See Van Dyke, *supra* n.112, at 24: "The sovereign state is the most obvious illustration of a collective entity with rights."

<sup>119</sup> Peter H. Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence" (1998) 61 *Sask. L. Rev.* 247, at 272.

<sup>120</sup> This is the point made by Russell, *ibid.* See also Hon. Mr. Justice Douglas Lambert, "*Van der Peet* and *Delgamuukw*: Ten Unresolved Issues" (1998) 32 *U.B.C.L. Rev.* 249, at 267-68.

possession, environmental protection, and so on, just as a government structure is needed within a province to make these kinds of decisions with respect to public lands. Without norms or rules and mechanisms for applying and enforcing them,<sup>121</sup> there would be a legal vacuum with respect to these matters that could have a negative impact on Aboriginal societies.<sup>122</sup> This is especially so because provincial land laws generally would not apply in this context, given that Aboriginal title lands are within the core of federal jurisdiction over "Lands reserved for the Indians" and are therefore insulated from most provincial laws by the doctrine of interjurisdictional immunity.<sup>123</sup> Moreover, unless justified under the *Sparrow* test,<sup>124</sup> federal laws would not apply either to the

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<sup>121</sup> Formulation of rules, exercise of administrative authority, and adjudication of disputes would seem to involve all three functions of government - legislative, executive and judicial.

<sup>122</sup> Although existing Aboriginal law might fill this vacuum to some extent, means would still be necessary to change those laws to take account of the present-day circumstances of Aboriginal nations. This necessity for maintaining the capacity of Indigenous nations to change their laws after British colonization was acknowledged by the Privy Council in the context of Maori customary adoption in New Zealand in *Hineiti Rirerire Arani v. Public Trustee* (1919), [1840-1932] N.Z.P.C.C. 1, at 6:

It may well be that ... the Maoris as a race may have some internal power of self-government enabling the tribe or tribes by common consent to modify their customs, and that the custom of such a race is not to be put on a level with the custom of an English borough or other local area which must stand as it always has stood, seeing that there is no quasi-legislative internal authority which can modify it.

It was accepted in *Mabo*, *supra* n.30, as well that the customary laws of an Indigenous community in relation to land could be changed by the community after the acquisition of British sovereignty: per Brennan J. at 61, Deane and Gaudron JJ. at 110, Toohey J. at 192. As was recognized in *Hineiti Rirerire Arani*, this implies the continuance of some kind of governmental authority within the community, despite the refusal of Chief Justice Mason, sitting alone, to envisage that possibility in *Coe v. Commonwealth* (1993), 68 A.L.J.R. 110 (H.C. Aust.), and *Walker v. New South Wales* (1994), 69 A.L.J.R. 111 (H.C. Aust.); see also *Thorpe v. Commonwealth of Australia [No. 3]* (1997), 71 A.L.J.R. 767 (H.C. Aust.). See generally Henry Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* (St. Leonards, N.S.W.: Allen & Unwin, 1996).

<sup>123</sup> Section 91(24) of the *Constitution Act, 1867*, *supra* n.48. See *Delgamuukw*, *supra* n.1, per Lamer C.J. at 1115-23 (para. 172-83), and discussion in the articles cited *supra* n.9.

<sup>124</sup> *R. v. Sparrow*, *supra* n.102. This test requires the government to justify any infringement of Aboriginal rights by showing a valid legislative objective that is substantial and compelling, and proving that the Crown's fiduciary obligations to the Aboriginal peoples have been respected. In *Delgamuukw*, *supra* n.1, at 1111-14 (para. 165-69), Lamer C.J. held that the justification test applies to infringements of Aboriginal title. For critical commentary, see *Defining Aboriginal Title*, *supra* n.10, at 16-23; "Constitutionally Protected Property Right", *supra* n.10, at 15-22.

extent that they infringe Aboriginal title.<sup>125</sup> This leaves a constitutional space that would need to be filled by Aboriginal governments exercising authority in relation to Aboriginal title lands.<sup>126</sup>

So Aboriginal title's communal nature reveals not only the landholding capacity of Aboriginal nations, but also demonstrates, like the inherent limit, a need for self-government. This brings us to the last *sui generis* aspect of Aboriginal title, inalienability, which leads in the same direction.

## 6. The Inalienability of Aboriginal Title

The *Delgamuukw* decision affirmed the long-standing rule that Aboriginal title is inalienable other than by surrender to the Crown.<sup>127</sup> Chief Justice Lamer put it this way: "Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as

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<sup>125</sup> The *Indian Act*, *supra* n.63, has, of course, provided for use, possession, etc., of reserve lands, but there is no equivalent legislative regime for Aboriginal title lands outside reserves. Moreover, to the extent that the *Indian Act* infringes Aboriginal and treaty rights, it may be unconstitutional. For example, as Indian reserves were often created pursuant to treaty, and sometimes consist of unsurrendered Aboriginal title lands, *Indian Act* provisions such as s.35, providing for expropriation of reserve lands, would appear to authorize infringement of treaty and/or Aboriginal rights in relation to those reserves, and therefore could not apply to them unless the infringement could be justified under the *Sparrow* test. However, if the expropriation amounted to *extinguishment* of the rights it could not be justified, as Lamer C.J. stated in *Van der Peet*, *supra* n.20, at 538 (para. 28), that "[s]ubsequent to s.35(1) [of the *Constitution Act, 1982*] aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in *Sparrow*".

<sup>126</sup> This argument also applies to other Aboriginal rights: see Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 *Queen's L.J.* 95. Regarding treaty rights, the Supreme Court said in *R. v. Marshall*, *supra* n.102, at 311 (para. 17), that they "do not belong to the individual, but are exercised by authority of the local community to which the accused belongs" (emphasis added) (Marshall had been charged with fishing out of season without a licence and selling his catch of eels). This authority over communal treaty rights is equivalent to the decision-making authority over Aboriginal title, and likewise implies a right of self-government with respect to those rights: see *supra* nn. 103-04 and accompanying text.

<sup>127</sup> On the existence of and basis for the rule in various common law jurisdictions, see *Common Law Aboriginal Title*, *supra* n.11, at 221-35.

a result, is [*sic*] inalienable to third parties."<sup>128</sup> As we have seen, Aboriginal title is "personal" in this sense of being inalienable, but this in no way detracts from its status as a property right.<sup>129</sup> Despite occasional judicial *dicta* to the contrary,<sup>130</sup> alienability is clearly not an essential attribute of real property, even at common law.<sup>131</sup> Apart from statute, a fee tail estate, for example, was not alienable as such, though it could be converted into an alienable fee simple by barring the entail.<sup>132</sup> Moreover, apparently the Crown (unlike private persons) can grant lands in fee simple with a condition prohibiting alienation.<sup>133</sup> Even more significantly in the present context, the Crown

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<sup>128</sup> *Delgamuukw*, *supra* n.1, at 1081 (para. 113).

<sup>129</sup> See *supra* n.34 and accompanying text. See also *Mabo*, *supra* n.30, per Brennan J. at 51-52; compare per Deane and Gaudron JJ. at 88-89, Toohey J. at 194-95. For further discussion, see "Racial Discrimination", *supra* n.47, esp. 25-28.

<sup>130</sup> E.g., see the questions Gould J. asked an expert witness at trial in the *Calder* case, *supra* n.2, quoted in Hall J.'s judgment at 372-73: "I want to discuss with you the short descriptive concept of your modern ownership of land in British Columbia, and I am going to suggest to you three characteristics... [: s]pecific delineation, exclusive possession, *the right of alienation*, have you found in your anthropological studies any evidence of that concept being in the consciousness of the Nishgas and having them executing such a concept?" (emphasis added).

<sup>131</sup> See Simpson, *supra* n.68, at 324, where the author, a foremost authority on the history of English land law, criticized the decision in *Milirrpum v. Nabalco Pty. Ltd.* (1971), 17 F.L.R. 141 (F.C. Aust.) (since overruled by *Mabo*, *supra* n.30) because, *inter alia*, it

... contains a discussion of the concept of ownership which perpetuates what seems to be an error - *the idea that alienability is an essential feature of this concept*. Ownership is a notion based upon the central idea of there being a special relationship between a person or group and a thing, and this relationship is thought of as having such importance as to justify conferring upon the owner a *right of excluding others* from whatever use the thing is capable of and seems to be appropriate. In extremely intense cases of ownership the exclusion is automatic.... *Hence it is a weak form of ownership which permits alienation; in more intense forms it is personal*, and thus it is that some forms of property are buried with the dead from whom they cannot be separated. [emphasis added]

<sup>132</sup> See A.W.B. Simpson, *A History of the Land Law*, 2nd ed. (Oxford: Clarendon Press, 1986), 90-91.

<sup>133</sup> See Joseph Chitty, *A Treatise of the Law on the Prerogatives of the Crown* (London: Joseph Butterworth and Son, 1820), 386 n.(h). See also *Pierce Bell Ltd. v. Frazer* (1972-73), 130 C.L.R. 575 (H.C. Aust.), at 584, where Barwick C.J. said that a statutory restraint on alienation of land granted by the Crown would not reduce, or make conditional, the fee simple estate obtained by the grantee. For discussion of another possible example of an inalienable fee, see Edward Jenks, "An Inalienable Fee Simple?" (1917) 33 *L.Q.R.* 11.

cannot alienate its underlying title,<sup>134</sup> for "[i]f the king grants land to J.S. in fee, to hold as freely as the king is in his crown, yet he shall hold of the king."<sup>135</sup> The explanation for this appears to be that the underlying title is an aspect of the Crown's sovereignty,<sup>136</sup> and so cannot be alienated, at least to a subject.<sup>137</sup> Lamer's affirmation that Aboriginal title is proprietary despite its inalienability is therefore well supported by legal principle and authority.

The Chief Justice linked inalienability to the inherent limit, stating that both are designed to maintain Aboriginal peoples' special relationship with the land:

Alienation would bring to an end the entitlement of the aboriginal people to occupy the land and would terminate their relationship with it. I have suggested above that the inalienability of aboriginal lands is, at least in part, a function of the common law principle that settlers in colonies must derive their title from Crown grant and, therefore, cannot acquire title through purchase from aboriginal inhabitants. It is also, again only in part, a function of a general policy "to ensure that Indians are not dispossessed of their entitlements": see *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 133. What the inalienability of lands held pursuant to aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-economic component. The land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value.<sup>138</sup>

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<sup>134</sup> In feudal terms, the Crown's underlying title is more commonly known as its paramount lordship, which is a form of real property that hovers over all lands within its common law dominions: see Pollock and Maitland, *supra* n.25, vol. 2, at 3-4, 38-39, 125-28, 152; Simpson, *supra* n.132, at 47-48; *Chippewas of Sarnia*, *supra* n.46, at para. 377, 419.

<sup>135</sup> Charles Viner, *A General Abridgement of Law and Equity*, 2nd ed. (London: Robinson, Payne, Brooke, Whieldon, and Butterworth, 1791-94), "Tenure", B. a 15.

<sup>136</sup> As Maitland put it, "[a]ll land in England must be held of the king of England, otherwise he would not be king of all England": Pollock and Maitland, *supra* n.25, vol. 2, at 3.

<sup>137</sup> See *Common Law Aboriginal Title*, *supra* n.11, at 82-83 n.19, 92 n.58. Note that, for a time at least, there appears to have been a prohibition on any alienation by the Crown of its rights and possessions, even to other sovereigns: see Charles Howard McIlwain, *The Growth of Political Thought in the West, from the Greeks to the End of the Middle Ages* (New York: The Macmillan Company, 1932), esp. 379-82; Kantorowicz, *supra* n.115, at 347-58. More generally, see Peter N. Riesenbergh, *Inalienability of Sovereignty in Medieval Political Thought* (New York: Columbia University Press, 1956).

<sup>138</sup> *Delgamuukw*, *supra* n.1, at 1090 (para. 129).

It is significant that Lamer did not even mention the *Royal Proclamation of 1763* in the context of inalienability.<sup>139</sup> Instead, he appears to have regarded this aspect of Aboriginal title as a common law restriction, arising in part from the incapacity of settlers and in part from the need to protect Aboriginal title so that the special relationship would continue into the future.<sup>140</sup>

While most judicial attention has focussed on the protective function of inalienability,<sup>141</sup> I think the incapacity rationale deserves more attention. Although Lamer said this is based on the common law principle that settlers in colonies must derive their title from Crown grant, this explanation ignores the fact that settlers probably could acquire title to land by occupancy *prior* to Crown sovereignty that would continue to be valid thereafter,<sup>142</sup> and could also acquire title against the Crown *after* sovereignty by adverse possession.<sup>143</sup> Adverse possession apart, the reason why

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<sup>139</sup> Among other things, the *Proclamation* prohibited private persons from settling on or purchasing Indian lands, and provided that if any Indian tribes or nations wished to dispose of their lands they could only be purchased by the Crown at an assembly of the Indians held for that purpose: for detailed analysis of the *Proclamation's* Indian provisions, see Slattery, *supra*, n.48.

<sup>140</sup> See also *Calder*, *supra* n.2, per Judson J. at 320-22, Hall J. at 377-79, 381-85; *Guerin*, *supra* n.2, per Dickson J. at 376-83; *Canadian Pacific Ltd. v. Paul*, *supra* n.2, at 677; *Chippewas of Sarnia*, *supra* n.46, at para. 277, esp. n.143.

<sup>141</sup> See esp. *Guerin*, *supra* n.2, per Dickson J. at 383, Estey J. at 392; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, per La Forest J. at 129-30, 133, 141. See also *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 (hereinafter *Blueberry River*), per McLachlin J. at 370, in reference to the provisions of the *Indian Act*, *supra* n.63, relating to surrender of reserve lands.

<sup>142</sup> See discussion of British Honduras and Pitcairn Island in *Common Law Aboriginal Title*, *supra* n.11, at 141-60.

<sup>143</sup> Acquisition of title to Crown land by adverse possession was first allowed by *The Crown Suits Act*, 21 Jac. I (1623), c.2. The *Nullum Tempus Act*, 9 Geo. III (1769), c.16, set the limitation period for this at 60 years. The latter Act has been held to be applicable in overseas dominions of the Crown, including Canada: see *Attorney-General for British Honduras v. Bristowe* (1880), 6 App. Cas. 143 (P.C.); *Attorney-General for New South Wales v. Love*, [1898] A.C. 679 (P.C.); *Hamilton v. The King* (1917), 35 D.L.R. 226 (S.C.C.). See also *Chippewas of Sarnia*, *supra* n.46, at para. 520. For discussion, see *Common Law Aboriginal Title*, *supra* n.11, at 87-92.

settlers could not acquire title to lands by occupancy after Crown acquisition of sovereignty is that lands that were vacant and unowned at that time would have automatically become Crown lands,<sup>144</sup> making them unavailable for acquisition by settlers by occupancy.<sup>145</sup> Moreover, where lands were held by French persons in Canada prior to the British Crown's acquisition of sovereignty, those lands appear to have been transferable to British settlers without the necessity of a Crown grant.<sup>146</sup> So the inability of settlers to acquire lands from Aboriginal peoples must have some other basis.<sup>147</sup>

I think this incapacity of settlers relates not so much to the need for Crown grants as to the special status of Aboriginal title, a status that is intimately connected with Aboriginal self-government. This connection is apparent in Judson J.'s oft-quoted observation in *Calder* that

... the fact is that when the settlers came, the Indians were there, *organized in societies and occupying the land* as their forefathers had done for centuries. This is what Indian title means....<sup>148</sup>

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<sup>144</sup> See *Attorney-General v. Brown* (1847), 1 Legge 312 (N.S.W.S.C.); *The Queen v. Symonds*, *supra* n.117, per Chapman J. at 388-90, Martin C.J. at 393; *Falkland Islands Company v. The Queen* (1863), 2 Moo. P.C. (N.S.) 266, at 272; *Mabo*, *supra* n.30, per Brennan J. at 53, Deane and Gaudron JJ. at 88, Toohey J. at 180-82, 211-12.

<sup>145</sup> See discussion in *Common Law Aboriginal Title*, *supra* n.11, at 134-41, using Barbados as an example.

<sup>146</sup> See *Drulard v. Welsh* (1906), 11 O.L.R. 647 (Ont. Div. Ct.), reversed on other grounds (1907), 14 O.L.R. 53 (Ont. C.A.).

<sup>147</sup> Note too that in some British colonies, such as India and the Gold Coast, private purchases of native land appear to have been generally accepted: see *Freeman v. Fairlie* (1828), 1 Moo. I.A. 305 (Ch.); *Mayor of Lyons v. East India Co.* (1836-37), 1 Moo. P.C. 175 (P.C.); K.M. Chatterjee, *The Law Relating to the Transfer of Immoveable Property Inter Vivos* (Calcutta: Thacker, Spink and Co., 1890), 139-40; H.W. Hayes Redwar, *Comments on Some Ordinances of the Gold Coast Colony* (London: Sweet and Maxwell Ltd., 1909), 25, 75-79; C.K. Meek, *Land Law and Custom in the Colonies*, 2nd ed. (London: Frank Cass and Co. Ltd., 1949), 169-73; Kwamena Bentsi-Enchill, *Ghana Land Law: An Exposition, Analysis and Critique* (London: Sweet and Maxwell, 1964), 60-65.

<sup>148</sup> *Supra* n.2, at 328 (emphasis added). See also *Van der Peet*, *supra* n.20, per Lamer C.J. at 540 (para. 33).

It is also evident in the *Royal Proclamation of 1763*, which acknowledged the pre-existing land rights of "the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection."<sup>149</sup> The *Proclamation* was thus based on the presupposition that the Aboriginal peoples had semi-autonomous status under the protection of the Crown, with whom they were connected as nations.<sup>150</sup> The existence of this nation-to-nation relationship at the time of the *Proclamation* was also recognized by Lamer J. (as he then was) in his unanimous decision in *R. v. Sioui*, where he said, in reference to the period up to the conquest of French Canada in 1759-60, that "the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations."<sup>151</sup>

The fact that the Aboriginal peoples were independent nations when North America was being populated by Europeans provides a principled, common law explanation for the inability of settlers to acquire Aboriginal lands. It is fundamental to British colonial law that subjects of the Crown cannot assume sovereignty for themselves,<sup>152</sup> but can only acquire it for the Crown with the

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<sup>149</sup> *Supra*, n.13, preamble to the Indian provisions. For authority that the *Proclamation* affirmed pre-existing land rights, see *Calder*, *supra* n.2, per Judson J. at 322-23, Hall J. at 394-97; *Guerin*, *supra* n.2, per Dickson J. at 376-79; *Roberts v. Canada*, [1989] 1 S.C.R. 322, at 340.

<sup>150</sup> See Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32 *American J. of Comp. Law* 361, at 368-74, esp. 370; "Wampum at Niagara", *supra* n.27.

<sup>151</sup> [1990] 1 S.C.R. 1025, at 1053.

<sup>152</sup> The anomalous example of Sarawak, ceded to a British subject in 1841-42, but not annexed to the Crown's dominions until 1946 (see Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens and Sons, 1966), 723-24, and Tan Sri Datuk Lee Hun Hoe, "A Short Legal History of Sarawak" [1977] 2 *Malayan L.J.* ms lviii), can perhaps be explained by the *dictum* of Jacobs J. in *New South Wales v. Commonwealth of Australia* (1975), 135 C.L.R. 337, at 490: "no subject ... could claim sovereignty over any part of the globe in his own right, unless that sovereignty was bestowed on him by a sovereign power recognized by the English Crown *and the new sovereignty was recognized by the English Crown*" (emphasis added).

Crown's authorization.<sup>153</sup> Given the independent nation status of the Aboriginal peoples during the period of colonization, Aboriginal title contained an element of sovereignty that would have disqualified British subjects from acquiring it by purchase or other means.<sup>154</sup> Moreover, we have seen that Aboriginal title is still a communal right held by Aboriginal nations as collective entities.<sup>155</sup> As this entails decision-making authority, there is a governmental quality to their title.<sup>156</sup> At least in so far as this title is concerned,<sup>157</sup> the governmental quality inherent in it provides continuity between the status of the Aboriginal peoples as independent nations during the period of colonization, and their right of self-government today. Aboriginal title can only be surrendered to a political entity like the Crown because what the Aboriginal nations are transferring is not a mere private property right, but a communal right that includes governmental authority and therefore is more in the nature of title to territory than title to land.<sup>158</sup> This also explains why the means

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<sup>153</sup> See *Campbell v. Hall* (1774), Lofft 655 (K.B.), at 708; *The Queen v. Symonds*, *supra* n.117, per Chapman J. at 389, per Martin C.J. at 395; *Re Southern Rhodesia*, [1919], A.C. 211 (P.C.), at 221; Chitty, *supra* n.133, at 30; Roberts-Wray, *supra* n.152, at 100; Sir Charles James Tarring, *Chapters on the Law Relating to the Colonies*, 4th ed. (London: Stevens and Haynes, 1913), 23.

<sup>154</sup> Private persons could not acquire the communal title (in part for reasons related to the issue of legal personality: see *supra* nn. 105-20 and accompanying text), nor would it make sense to apply the inherent limit to them. So if they were to acquire Aboriginal lands, the title would have to be converted into some common law interest, e.g. a fee simple. But given that Aboriginal titleholders have a *sui generis* interest instead of the fee (*Delgamuukw*, *supra* n.1, per Lamer C.J. at 1080-81 (para. 110-11)), this possibility would be precluded by the fundamental common law rule that conveyors of land cannot transfer what they do not have.

<sup>155</sup> See *supra* nn. 102-26 and accompanying text.

<sup>156</sup> See *supra* nn. 119-26 and accompanying text.

<sup>157</sup> The same reasoning applies, nonetheless, to other Aboriginal and treaty rights, as they are also communal: see *supra* n.102.

<sup>158</sup> Title to territory entails sovereignty and jurisdiction, whereas title to land is merely proprietary: on this distinction, see M. de Vattel, *Le Droit des Gens* (A Leide, aux Dépens de la Compagnie, 1758), Bk. I, Ch. 18, §§ 204-05; Sir John Salmond, *Jurisprudence*, 7th ed., (London: Sweet and Maxwell Ltd., 1924), 554; Roberts-Wray, *supra* n.152, at 99, 625-36; *Mabo*, *supra* n.30, per Toohey J. at 180. For more detailed discussion of the territorial aspect of Aboriginal title, see "Aboriginal Rights in Canada", *supra* n.6, at 291-98.

employed for the surrender of Aboriginal title has always been treaties,<sup>159</sup> as these are agreements between nations,<sup>160</sup> and are the appropriate way to transfer territory from one sovereign to another.<sup>161</sup>

This incapacity of British subjects is a common law restriction. It applies to acquisition of Aboriginal title as such, but should not prevent the creation of sub-interests by Aboriginal nations if that is permitted by their laws. For example, if the laws of a particular Aboriginal nation allow persons who are not members of that nation to acquire interests in land within its territory subject to its laws and jurisdiction, that would not offend the common law rule against alienation because the nation's Aboriginal title would be retained by it as a communal right. This possibility was envisaged by John Marshall, Chief Justice of the United States, in his seminal decision in *Johnson v. M'Intosh*, where, after holding that Indian title could not be acquired by private purchasers, he said this:

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<sup>159</sup> While modern land claims agreements are generally not called "treaties" (perhaps because the Canadian government fears the implications of that term), s.35(3) of the *Constitution Act, 1982*, *supra* n.44, affirms that they are treaties nonetheless. It provides: "For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired." Note, however, that *The Nisga'a Final Agreement*, initialled Aug. 4, 1998, provides in s.1: "This Agreement is a treaty and a land claims agreement within the meaning of sections 25 and 35 of the *Constitution Act, 1982*."

<sup>160</sup> See *Worcester v. Georgia*, 6 Pet. 515 (1832) (U.S.S.C), per Marshall C.J. at 559-60: The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense.

<sup>161</sup> I am not suggesting that the Indian treaties necessarily involved a complete transfer of title and jurisdiction, as that would depend on the terms of the particular treaty, and on the intention and understanding of the Aboriginal parties: e.g., see René Fumoleau, *As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (Toronto: McClelland and Stewart Ltd., 1975); Richard Price, ed., *The Spirit of the Alberta Indian Treaties* (Edmonton: Pica Pica Press, 1987); Treaty 7 Elders and Tribal Council, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996); Patrick Macklem, "The Impact of Treaty 9 on Natural Resource Development in Northern Ontario", in Asch, *supra* n.2, 97; Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective", *ibid.*, 173.

The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws.<sup>162</sup>

He then equated this situation with a grant made by an Aboriginal nation to one of its members, "authorizing him to hold a particular tract of land in severalty."<sup>163</sup> This part of Marshall's judgment is significant both because it acknowledges that Aboriginal systems of law continued to apply within Indian nations after European colonization, and because it allows for acquisition of interests other than Aboriginal title by private purchasers under those systems of law.<sup>164</sup> It also suggests a means of avoiding the impediment to economic development of an absolute prohibition on alienation, other than by surrender to the Crown, of any interest in Aboriginal lands.

Basing inalienability on the incapacity of private persons to acquire the communal title of the Aboriginal peoples provides a solution to another unresolved issue as well, namely whether Aboriginal title can be transferred from one Aboriginal nation to another after Crown assertion of sovereignty.<sup>165</sup> As the Aboriginal peoples had sovereign status as independent nations during the process of European colonization,<sup>166</sup> and have retained decision-making authority over their

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<sup>162</sup> 8 Wheat. 543 (1823) (U.S.S.C.), at 593.

<sup>163</sup> *Ibid.*

<sup>164</sup> See Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983), 29. Moreover, as Marshall also admitted the power of the Indian nations "to change their laws or usages" (*Johnson v. M'Intosh*, *supra* n.162, at 593), his judgment supports the concept of self-government that he expanded on in *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831), and *Worcester v. Georgia*, *supra* n.160.

<sup>165</sup> If this were not permissible, the validity of some treaties might be called into question, as the Aboriginal nations who entered into them were not always the nations who occupied the lands covered by them at the time the Crown asserted sovereignty: e.g., on population shifts on the Prairies, see David G. Mandelbaum, *The Plains Cree: An Ethnographic, Historical and Comparative Study* (Regina: Canadian Plains Research Center, University of Regina, 1979), 15-49; Leo Pettipas, *Aboriginal Migrations: A History of Movements in Southern Manitoba* (Winnipeg: Manitoba Museum of Man and Nature, 1996).

<sup>166</sup> See *supra* n.151 and accompanying text.

communally-held Aboriginal lands,<sup>167</sup> they should be able to transfer those lands *inter se*. Given their status as political entities with governmental authority over their lands,<sup>168</sup> they are not handicapped by the incapacity suffered by private persons. Moreover, the rationale of protection as a justification for the inalienability of Aboriginal title does not have the same force where a transfer between two Aboriginal nations is concerned. So absent restrictions in the laws of the Aboriginal nations themselves, Aboriginal title should be transferable among them.<sup>169</sup> Support for this can be found in La Forest J.'s judgment in *Delgamuukw*, where he said that continuity of occupation by an Aboriginal group need not date from the time of Crown sovereignty, as

... one aboriginal group may have ceded its possession to subsequent occupants or merged its territory with that of another aboriginal society. As well, the occupancy of one aboriginal society may be connected to the occupancy of another society by conquest or exchange.<sup>170</sup>

To sum up, the inalienability of Aboriginal title, while derived in part from a policy-based need to protect Aboriginal peoples from European settlers, is doctrinally grounded in the incapacity of those settlers to acquire a communal title that includes governmental authority. Because Aboriginal title is held by Aboriginal nations as political entities, it can only be acquired by another political entity. This explains why Aboriginal title can be surrendered to the Crown, and can

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<sup>167</sup> See *supra* n.103 and accompanying text.

<sup>168</sup> See *supra* nn. 119-20 and accompanying text.

<sup>169</sup> See Slattery, *supra* n.31, at 742-43, 759. One problem that might arise in this context is the impact of a transfer on the inherent limit. As that limit depends on the connection with the land of the particular Aboriginal nation that was in occupation at the time of Crown assertion of sovereignty (see *supra* nn. 77-78 and accompanying text), it might not be appropriate to impose the same limit on the acquiring Aboriginal nation whose relationship with land might be quite different. In my opinion, this difficulty should not prevent Aboriginal title from being transferable from one Aboriginal nation to another. Instead, I think it is yet another indication that the inherent limit, as formulated by Lamer C.J. in *Delgamuukw*, is flawed.

<sup>170</sup> *Supra* n.1, at 1130 (para. 198), relying on Slattery, *supra* n.31, at 759.

probably be transferred to other Aboriginal nations, but cannot be acquired by private individuals or corporations. However, the general inalienability of Aboriginal title should not prevent Aboriginal nations from creating sub-interests in their lands under their own laws, as long as they retain their communal title.

## Conclusions

Our discussion of the nature and content of Aboriginal title has identified and analyzed six elements of the Supreme Court's definition of the title in *Delgamuukw*:

1. The *source* of Aboriginal title is occupation of land prior to Crown assertion of sovereignty over what is now Canada. Occupation can be established both by physical presence on the land and Aboriginal law. The relevance of Aboriginal law in this context appears to be twofold: it can provide evidence of occupation of lands, or it can be used to show that jurisdiction was exercised, and therefore Aboriginal title existed, over the territory of the nation claiming the title. In any case, Aboriginal title is *sui generis* in its source because it originates before Crown sovereignty, unlike other land titles that arise afterwards.

2. Aboriginal title is *proprietary*. It is an interest in land that amounts to a right to the land itself. As such, it has equivalent status and stands on equal footing with other proprietary rights, and is entitled to the same common law protection. In addition, unlike other property rights in Canada, it also enjoys constitutional protection.<sup>171</sup>

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<sup>171</sup> The matter of the constitutional protection accorded to Aboriginal title, while not addressed in this paper, is discussed in *Defining Aboriginal Title*, *supra* n.10, at 16-23, and "Aboriginal Title as a Constitutionally Protected Property Right", *supra* n.10. Also, unlike most other property rights, Aboriginal title is within the core of exclusive federal jurisdiction: on the consequences of this, see the articles cited *supra* n.9.

3. Regarding *content*, Aboriginal title includes the right to exclusive use and occupation of the land. It is not limited to uses made of the land by the Aboriginal nations prior to Crown sovereignty. So the title encompasses natural resources on and under the land - forests, minerals, oil and gas, etc. - whether or not those resources were utilized by the Aboriginal nation in question before Crown sovereignty.

4. There is, however, an *inherent limit* on Aboriginal title that prohibits uses of the land that are irreconcilable with the nature of the attachment to the land that is the basis for the title. This *sui generis* element of the title means some uses, such as strip mining, will not be allowed if they destroy the land's usefulness for the purpose (or purposes), such as hunting, relied upon to establish Aboriginal title in the first place. The reason for the inherent limit is to preserve the land for future generations of the Aboriginal nation concerned. However, in my opinion this limit, while well-intentioned, is paternalistic, and reveals a lack of trust in the capacity and willingness of the Aboriginal nations to preserve their lands of their own accord. Recognition of the right of Aboriginal nations to exercise powers of self-government over their lands would be a more appropriate way for the goals behind the inherent limit to be met.

5. Aboriginal title is not vested in individuals. Unlike other property rights in Canada, it is a *communal* right vested in Aboriginal nations (or other groups) as distinct units. This *sui generis* aspect of Aboriginal title has two important implications. First, it implies that Aboriginal nations as such have the legal personality necessary for them to hold title to property. It also means that they must have the decision-making authority necessary for them to distribute entitlements to and regulate use of their lands. As a governmental structure is required for exercising this authority, the communal nature of Aboriginal title also demonstrates a need for self-government.

6. Aboriginal title is *inalienable*, other than by surrender to the Crown or possibly transfer to another Aboriginal nation. While alienability is not an essential feature of common law property, Chief Justice Lamer nonetheless regarded this as another *sui generis* element of Aboriginal title. Although inalienability has a protective function, our discussion has focussed more on the basis for it in the incapacity of private persons to acquire Aboriginal title for themselves. I have argued that this incapacity stems from the very nature of Aboriginal title as a communal right that is held by Aboriginal nations as political entities. Because of this unique feature, it can only be acquired by another political entity, such as the Crown or another Aboriginal nation. However, inalienability should not prevent the creation of sub-interests in Aboriginal title lands if that is permitted by Aboriginal law.

Of these six elements of Aboriginal title, we have seen that four - namely source, inherent limit, communal nature, and inalienability - are *sui generis*. The source is located in part in Aboriginal law, which relates to self-government. While the inherent limit, as formulated by Chief Justice Lamer, is not connected to self-government, I have argued that the goals of the limit could be more appropriately met by Aboriginal governments than by Canadian courts. The communal nature of Aboriginal title, on the other hand, is directly related to self-government, as it depends on the existence of political entities that are capable of holding Aboriginal lands and making decisions respecting them. Moreover, inalienability seems to be due in part to the same governmental qualities that inhere in the communal nature of Aboriginal title. Taken together, the *sui generis* elements of Aboriginal title therefore indicate that self-government is not only integral to, but also necessitated by, the Supreme Court's definition of it.