

Delgamuukw and Modern Treaties

Delgamuukw National Process

Gordon Christie

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I. Introduction

Since the Supreme Court of Canada decision in *Calder v. Attorney General of British Columbia*¹ in 1973, the governments of Canada and various Aboriginal peoples have been negotiating agreements meant to ameliorate long-standing disputes concerning the right and proper relationship between Canada and the First Peoples living within its borders. The 1997 Supreme Court decision in *Delgamuukw v. British Columbia*² offered guidance on a variety of hitherto judicially unresolved matters concerning the nature of Aboriginal title³. Kent McNeil has argued that:

... there can be no doubt that *Delgamuukw* is a landmark decision. [I]t will have a dramatic effect, especially in areas of Canada where land cession treaties or land claims agreements have not yet been signed. [I]t helps to level the playing field between Aboriginal peoples and non-Aboriginal governments in the negotiation of land claims. It could also alter the nature of those negotiations very significantly⁴.

Insofar as the pronouncements in *Delgamuukw* may alter the understandings that have informed the goals and strategies of negotiating parties since the time of *Calder*, it is essential that this judgment be analyzed, and the results of this analysis employed as the basis for careful reflection. To take up the

¹ Arguably *Calder v. Attorney General of British Columbia* [(1973) S.C.R. 313], hereinafter *Calder*], insofar as it was the first occasion upon which members of the highest Canadian court recognized the existence of Aboriginal title as a pre-existing right, was the primary impetus behind the start-up of the modern land claims process.

² [1997] 3 S.C.R. 1010, [hereinafter *Delgamuukw*].

³ In the early seminal decision, *St. Catherine's Milling and Lumber Co. v. The Queen* [(1888), 14 A.C. 46] (hereinafter *St. Catherine's Milling*), the Privy Council held that Aboriginal title was a "personal and usufructuary right" (at p. 54). As Lamer C. J. states in *Delgamuukw*, (*supra* note 2, at paragraph 116) the court then "declined to explain what that meant because it was not 'necessary to express any opinion upon the point' (at p. 55)". Lamer goes on to point out that: "Similarly, in *Calder* [*supra* note 1], *Guerin* [*Guerin v. The Queen*, [1984] 2 S.C.R. 335 (hereinafter *Guerin*)], and *Paul* [*Canadian Pacific Ltd. v. Paul* (1988) 2 S.C.R. 654 (hereinafter *Paul*)], the issues were the extinguishment of, the fiduciary duty arising from the surrender of, and statutory easements over land held pursuant to, [A]boriginal title, respectively; the content of title was not at issue and was not directly addressed." Apart from this reluctance to define the content of Aboriginal title, the courts have (i) devised a test to determine the validity of a claim to title [*Hamlet of Baker Lake v. Minister of Indian Affairs*, (1980) 1 F.C. 518 (T.D.) (hereinafter *Baker Lake*)], (ii) set out a test for the legitimate infringement of Aboriginal rights by the Crown [*R. v. Sparrow*, (1990) 2 S.C.R. 1075 (hereinafter *Sparrow*)], (iii) modified this test somewhat [*R. v. Gladstone*, (1996) 2 S.C.R. 723 (hereinafter *Gladstone*)], and (iv) laid out the nature of Aboriginal rights in general [*R. v. Van der Peet*, (1996) 2 S.C.R. 507 (hereinafter *Van der Peet*)]. Since the Supreme Court had put some distance between Aboriginal rights and Aboriginal title [*R. v. Adams*, (1996) 3 S.C.R. 101 (hereinafter *Adams*)], the nature of title remained to be determined.

⁴ See Kent McNeil, *Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got It Right?* (Toronto: Roberts Centre for Canadian Studies, 1998) (hereinafter *Defining Aboriginal Title*), at pages 26 - 27.

analysis of the judgement in relation to modern agreements, two recent land claims agreements⁵ – those of the Nisga’a and the peoples of the Yukon⁶ – will be explored in relation to the dicta from the Supreme Court decision⁷.

Does the decision in *Delgamuukw* promise to “level the playing field”? Will it “alter the nature of ... negotiations very significantly”? An analysis of the nature of Aboriginal title as rendered in *Delgamuukw*, set alongside recent land claims agreements, will cast some doubt on these assertions.

As we will see through the unpacking of *Delgamuukw*, it is not entirely clear that Aboriginal peoples will have a radically stronger position going into treaty negotiations. Furthermore, while it is likely true that the threat of litigation, with *Delgamuukw* as the sword, will bolster the strategic position of

⁵ In modern nomenclature these agreements are referred to, often unreflectively, as ‘land claims agreements’, though this language emanates from federal policy. In all relevant respects, keeping in mind subsections 35 (1) and (3) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11 [(1) “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”, and (3) “For greater certainty, in subsection (1) ‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired.”], these are treaties, and some prefer to refer to these as ‘modern treaties’, to be distinguished from those reached in the treaty period leading up to the 1920’s.

In fact, the federal approach to these sorts of agreements has changed little from the early treaty period to the modern process (where the core provision remains the surrender of all (or virtually all) Aboriginal rights in exchange for certain defined rights), with the glaring exception that now the federal government is reluctant to call its own process treaty-making (perhaps in recognition of the fact that the surrender/exchange model does not bfit a treaty, especially when those ‘surrendering’ do not wish to do so). One might argue that if the federal government does not break from the mind-set it has inherited from the early treaty process, the modern process will be open to continued failure and animosity. See Michael Asch and Norman Zlotkin, *Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations*, in Michael Asch, (ed.), *Aboriginal and Treaty Rights in Canada*, (Vancouver, U. British Columbia Press, 1997), 208 - 229 (hereinafter *Aboriginal and Treaty Rights*).

⁶ *Nisga’a Final Agreement, 1998* (hereinafter *Nisga’a Agreement*); *Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon* (Ottawa: Supply and Services Canada, 1993) (hereinafter *Yukon Agreement*).

⁷ While as of the writing of this paper the *Nisga’a Agreement* was within sight of final ratification by all three parties, the *Yukon Agreement* studied in this paper is an umbrella document, meant to lay the framework for subsequent agreements reached by the Yukon First Nations that are party to this arrangement.

There are 14 Yukon First Nations under the Council for Yukon Indians, signatories to the *Umbrella Final Agreement, 1993*: Carcross/Tagish First Nation, Champagne and Aishihik First Nation, Dawson First Nation, Kluane First Nation, Kwanlin First Nation, Liard First Nation, Little Salmon/Carmacks First Nation, First Nation of Nacho Nyak Dun, Ross River Dena Council, Selkirk First Nation, Ta’an Kwach’an Council, Teslin Tlingit Council, Vuntut Gwitchin First Nation, and White River First Nation. At the time of the signing of the Umbrella Agreement, the Champagne and Aishihik First Nations, the First Nation of Nacho Nyak Dun, the Teslin Tlingit Council and the Vuntut Gwitchin First Nation entered into Final Land Claim Agreements, concurrently with Self-Government Agreements (authorized under c. 24 of the Umbrella Agreement, but themselves constituting separate agreements). Since then the Selkirk First Nation concluded a Final Land Claim Agreement (1996), the Little Salmon/Carmacks First Nation concluded a Self-Government Agreement (1997), and the White River First Nation concluded both a Final Land Claim and Self-Government Agreement (1998)

Aboriginal peoples, the playing field that is *interesting*, the field on which the Crown and Aboriginal peoples meet to reach a *true* measure of reconciliation, remains an ephemeral dream for First Peoples. On the playing field built by the Crown, the playing field on which they have invited Aboriginal peoples to play, *Delgamuukw* acts only to marginally reduce the nearly vertical inclination in favour of the governments of Canada.

Most assuredly the material and economic gains the decision holds out are not ephemeral – Aboriginal peoples might realize (i) a (slightly) larger land base, (ii) greater and deeper representation on bodies that manage and administer land use policies, and (iii) an enhanced status as communities which must be consulted, in the least, on matters pertaining to the use of their traditional lands. But without strategies based on the opportunities presented by the Supreme Court, these gains will not be realized. Not surprisingly, the sorts of opportunities the Court has made available to Aboriginal peoples will not simply materialize into benefits for First Peoples – First Nations will have to know what opportunities have been created, and fight hard to convert them into true gains.

In the background is the ever-present concern, the worry that the sort of ‘title’ that Aboriginal peoples might wish to protect and preserve – sacred connections to lands put in their hands by the Creator, connections spelled out in terms of sacred responsibilities⁸ – has not been well respected in agreements preceding *Delgamuukw*, and is unlikely to be truly respected in agreements that *Delgamuukw* might influence. The best one can say about this concern at this time is that opportunities presented by the Court’s pronouncements on Aboriginal title must be seized, and then shaped as best they can to suit the deepest needs and interests of Aboriginal communities.

I. (i) Preliminary Considerations

In discussing the impact of the *Delgamuukw* decision on the *Yukon and Nisga’a Agreements*, several provisos are in order. It must be kept in mind that while the decision in *Delgamuukw* may have significantly altered the legal doctrine of Aboriginal title this does not necessarily imply that negotiations leading up to these agreements would have been conducted differently, or that these agreements would have had a significantly different structure, had this new legal outlook been known at the time⁹. Other factors weigh heavily in these situations, including for example (and unfortunately), the respective powers of the negotiating parties¹⁰. While it might have been the case that knowledge of the Supreme Court’s ruminations could have aided one side or the other in pressing a particular position, the parties were

⁸ “We hold these lands by the best of all titles. We have received them as a gift from the Creator to our Grandmothers and Grandfathers, and we believe that we cannot be deprived of them by anything short of direct injustice.” Statement of the Gitksan Chiefs, quoted in Ardythe Wilson and Don Monet, *Colonialism on Trial* (Philadelphia: New Society Pub., 1992)

⁹ The decision in *Delgamuukw* came down during the last stages of negotiation between the Nisga’a Nation and the governments of Canada and British Columbia. The parties took the time to assess the nature of the decision, and agreed to work toward completion of the treaty without alteration on the basis of this particular decision.

¹⁰ The impact of *Delgamuukw* may also be minimized by a desire on the part of Aboriginal peoples to settle in order that they might begin to fully participate in the economic development of their territories. Prior to negotiated settlements the inability to raise capital and entice investors – to a large degree brought about by the inalienability of their lands – would raise a barrier to this development. Regardless, then, of the strengthening of their position vis-a-vis the *Delgamuukw* decision, an Aboriginal people might see itself as exchanging *whatever* form of title it possesses for the ability to join the greater economy.

engaged in a long and drawn-out process necessitated by generations of colonization¹¹. Second, only the face of the text of these agreements will be explored, and this limits analysis to the *results* of years of negotiations – by and large this paper will not venture beyond the letter of the various texts, and so is silent on the greater context surrounding the birth of these agreements.

The intent in this paper is to map out the relationship between the judicial pronouncements and the agreements, when both are conceived of as *doctrine* concerning the nature of Aboriginal title.

The first section contains an extended discussion of the nature of Aboriginal title as determined by the Supreme Court of Canada. Certain features of Aboriginal title are explored in some detail, as these are the features which are most likely to directly impact on the modern treaty process. In general, this discussion is focused on the question of the *power* that Aboriginal peoples might enjoy on the basis of the court's determination.

The second section explores the nature of the land provisions in the *Yukon* and *Nisga'a Agreements*, agreements which serve as touchstones of the modern treaty process.

The final section then explores the possibility that the doctrine in *Delgamuukw* might lead into a *modified* modern treaty process, one which would go some way to advancing the interests of Aboriginal peoples. The degree of synchronization is measured between the doctrine in *Delgamuukw* and the policies that inform the current process, the outcome being the realization that while 'Aboriginal title' provides Aboriginal peoples a strong claim to their land, its strength lies in its economic dimension and its weakness in its spiritual dimension. It would appear that the decision in *Delgamuukw* is designed to entice Aboriginal peoples into the modern treaty process with both promises of material gain and threats of continued diminution in the enjoyment of their lands should the treaty process be put off. This should not, however, be seen simply as an indictment of the *Delgamuukw* decision – rather, Aboriginal peoples must focus on the opportunities presented by the court's emphasis on material gains, and force the issue, whenever possible, on questions of jurisdiction and control over land use policy and administration.

II. The Nature of Aboriginal Title

II (i) The Nature of Aboriginal Title: A Right to Land

According to the court in *Delgamuukw*, Aboriginal title is *neither* (i) "tantamount to an inalienable fee

¹¹ On the other hand, in those contexts in which negotiations are just now beginning to move forward the judicial determinations in *Delgamuukw* may figure prominently. As was mentioned earlier, and without getting into the particular determinations made in *Delgamuukw*, insofar as an Aboriginal people may feel that its threat of litigation now has some real sting to it, its negotiating position may be strengthened. Furthermore, the sort of recognized rights up for exchange in an agreement are now more clearly understood.

It should be noted as well that some argue that having the courts define rights before negotiations reach settlements can have a detrimental impact on the negotiating process, for out of legal battles come articulations of legal rights which may create a degree of inflexibility in negotiations. See Harry Slade and Paul Pearlman, "Why Settle Aboriginal Land Rights? Exploring the Legal Issues of Litigation and Negotiation", in Roslyn Konin (ed.), Prospering Together: The Economic Impact of the Aboriginal Title Settlements in B.C. (Vancouver: The Laurier Institution, 1998), 45 - 83. Slade and Pearlman argue that "... court decisions, clear though they might be in their definition of rights, are blunt tools when used to establish ground rules for the ongoing relations between diverse cultures. If there is a lesson for governments in the *Saanichton Marina Ltd. v. Claxton* [(1989), 57 D.L.R. (4th) 161 (B.C.C.A)] and *Sparrow* [*supra*, note 3] cases, it is that the best time to make mutually beneficial agreements is before the courts define constitutionally protected Aboriginal rights." Of course this may not be a lesson for the Aboriginal peoples concerned.

simple”¹², nor (ii) “no more than a bundle of rights to engage in activities which are themselves aboriginal rights recognized and affirmed by s. 35(1)”, the bundle having “no independent content”¹³, nor (iii) “at most, encompass[ing] the right to exclusive use and occupation of land in order to engage in those activities which are aboriginal rights themselves”¹⁴, where s.35(1) would merely constitutionalize the “notion of exclusivity”¹⁵.

In spelling out the content of Aboriginal title Lamer C.J. attempted to chart a course between these positions, finding that:

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 societies¹⁶.

In making this determination, Lamer C.J. not only placed the analysis of Aboriginal title in a different conceptual space from that constructed in *Van der Peet*¹⁷ in relation to other Aboriginal rights, but also prepared the way for interesting questions about such recent land claim settlements as the *Nisga’a* and *Yukon Agreements*. It is plausible to suppose that these agreements were reached on the understanding that this sort of ‘right in land’ view of Aboriginal title would not be forthcoming from the courts¹⁸. In particular, it would have seemed entirely plausible during negotiations to have thought that the Supreme Court would tie Aboriginal title down to *traditional uses* of the land, in keeping with the understanding of the nature of Aboriginal rights in general¹⁹.

Over the last few decades the judiciary has come to see itself as upholding the interests of Aboriginal peoples as *Aboriginal peoples*. Integral to this task is the *protection* of ‘Aboriginality’, the various essences of diverse Aboriginal cultures expressed through their historic practices and customs. In *Van der Peet* Lamer C.J. laid down a fundamental understanding of the nature of constitutionally protected

¹² *Delgamuukw*, *supra* note 2, at paragraph 110.

¹³ *Ibid.*, at paragraph 110.

¹⁴ *Ibid.*, at paragraph 110.

¹⁵ These are three positions advanced by the parties, the first by the appellants, the last two as alternatives presented by the respondents, the governments of British Columbia and Canada.

¹⁶ *Delgamuukw*, *supra* note 2 at paragraph 111. That this does not amount to some form of inalienable fee simple estate will be made clear as the full content of Aboriginal title is revealed.

¹⁷ *Van der Peet*, *supra* note 3.

¹⁸ This is not to say that the Aboriginal parties would not have held such positions themselves, or have thought that such a position was what the law *should* have advanced. A use-based view of Aboriginal title would have been the position of the governments of Canada.

¹⁹ That the governments of Canada limited discussion to such a point of view is clear, for in the agreements reference is only made to notions of traditional uses of land within traditional territories. No mention is made (except to various rights to land that Aboriginal peoples will receive in partial exchange for surrender of their rights, if one were to characterize this as ‘aboriginal title’) to Aboriginal title as a title to land.

Aboriginal rights, saying that they are known as *Aboriginal* rights precisely because the aim has been to constitutionally protect Aboriginal peoples *as Aboriginal peoples*, something only made possible with the protection of particularly *Aboriginal* practices²⁰. Insofar as *Delgamuukw* stands for the proposition that uses of the land may be *Aboriginal in nature*, when falling under Aboriginal title, *even when not tied to historic uses*, the Court has taken a step away from this approach to Aboriginal rights.²¹

This new approach to Aboriginal title must be seized upon by Aboriginal peoples, for it defines an approach to land rights which can open up economic and material benefits hitherto unavailable, given the jurisprudence marking Aboriginal rights as restricted to historic relics. In saying that “not all of” activities which an Aboriginal people have a right to engage in on their lands “need be aspects of practices, customs”, etc., the Court has opened the door to challenges to interference with activities which are not strictly ‘traditional’. As we will see, only one limitation is imposed on the range of uses Aboriginal peoples are entitled to defend as being rights to engage in. The implications of having a right to land, rather than a right to activities, must be clearly understood by Aboriginal peoples with claims to Aboriginal title. As we will see, however, the nature of Aboriginal title as *non-Fee Simple* must equally be in the mind of the claimants.

It is not enough, then, to simply seize this ‘right to land’ approach as the lens of analysis. Before looking at the nature of the agreements we need to fill in the picture of Aboriginal title as painted by the Supreme Court. The impact of the new ‘right to land’ direction for Aboriginal title must be measured against the many elements that go into its ‘*sui generis*’ nature as defined by the Supreme Court²².

II. (ii) The Nature of Aboriginal Title: Exclusivity

The court made a number of fairly innocuous findings²³, and mixed these up with several more

²⁰ See *Van der Peet*, [*supra*, note 3]: “... Aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by Aboriginal members of society. They arise from the fact that Aboriginal people are *Aboriginal*.” [para. 9, emphasis in original] And later: “... The test for identifying the Aboriginal rights recognized and affirmed by s. 35(1) must ... aim at identifying the practices, traditions and customs central to the Aboriginal societies that existed in North America prior to contact with the Europeans.” [para. 44]

²¹ As will be seen when discussing an ‘inherent limit’ that the court found built into the notion of Aboriginal title, *protecting* Aboriginal societies – in this instance from themselves – is still an underlying theme in the notion of Aboriginal title as developed in *Delgamuukw*.

²² That Aboriginal title is ‘*sui generis*’ in nature has been an explicit tenet of Canadian law since Dickson J. concluded in *Guerin* [*supra*, note 3] that; “... in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law.” In light of this inappropriateness, a few lines later Dickson characterized the Indian interest in land as ‘*sui generis*’.

This line of reasoning is carried forward in *Sparrow* [*supra*, note 3] where Dickson J. and La Forest J. held that “... courts must be careful ... to avoid the application of traditional common law concepts of property as they develop their understanding of ... the ‘*sui generis*’ nature of aboriginal rights.”

In *Delgamuukw* [*supra*, note 2, at paragraphs 112-113] Lamer C.J. held that: “Aboriginal title has been described as *sui generis* in order to distinguish it from ‘normal’ proprietary interests, such as fee simple.” This aspect of Aboriginal title, which might seem to grant a license to the Supreme Court to make things up as they go, will form the core of the discussion later, when we explore the proof requirements set out in *Delgamuukw*.

²³ ‘Innocuous’ in this context is measured against the jurisprudence on Aboriginal title, such as it

interesting determinations. Aboriginal title was found, to no one's surprise, to be a collective or communal right, not an interest grounded in the rightful claims of individual Aboriginal people. This has long been a common understanding of Aboriginal claims to land²⁴. Aboriginal title was also found to be inalienable, except to the Crown. This also is no surprise, and has underscored Crown dealings with issues of Aboriginal claims to land at the very least since the Royal Proclamation²⁵.

In finding a right to land itself, however, the court also found an *exclusivity* of ownership absent from earlier decisions on Aboriginal title²⁶. To say that Aboriginal title is marked by the right to the *exclusive* use and enjoyment of the land is to recognize a particular sort of ownership, for when such a right is acknowledged the land-owner not only has the right to enjoy the land and its fruits, but also, to some degree, the ability to determine how – if at all – others will do likewise.

Exclusivity would seem to entail a significant degree of control, including, as Kent McNeil points out, “as much right as any other landholder to prevent others – and this includes governments – from intruding on and using their lands without their consent”²⁷. It must be kept in mind that a common land-owner, lacking the radical or underlying title vested in the Crown (not being a sovereign power), can find her consent ignored or over-ridden in certain clearly defined situations. But still this would appear to be a powerful feature of Aboriginal title.

This aspect of Aboriginal title would appear to be further strengthened when the place of this right in the Constitutional scheme is brought to mind: “Indeed”, McNeil continues, “[Aboriginal title-holders] should have even greater protection against government intrusion than other landholders because their Aboriginal rights have been recognized and affirmed by the Constitution, whereas the property rights of other landholders have not.”²⁸

existed up to this point.

²⁴ *Delgamuukw*, *supra* note 2, at paragraph 115: “A further dimension of [A]boriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an [A]boriginal nation.”

²⁵ From the *Royal Proclamation of 7 October, 1763*, R.S.C. 1985, App. II, No. 1:

... We do, with the advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name. ...

²⁶ *Delgamuukw*, *supra* note 2, at paragraph 117: “... The content of Aboriginal title can be summarized by two propositions: first, that [A]boriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those [A]boriginal practices, customs and traditions which are integral to distinctive [A]boriginal culture.” The second proposition concerned the ‘inherent limit’ to Aboriginal title, discussed in the next section.

²⁷ McNeil, *Defining Aboriginal Title*, *supra* note 4, at 11.

²⁸ *Defining Aboriginal Title*, *supra* note 4, at 11. McNeil goes on to point out that this feature does not seem to be given the weight it should by the Supreme Court, for later in *Delgamuukw* the court lays down the law concerning the infringement of Aboriginal title, presenting a picture of legitimate infringement which would not seem applicable to common landholder's interests. This is discussed more fully later in this paper.

One must be careful, however, to locate the precise locus of power this aspect of title generates. The exclusivity of Aboriginal title appears later in the judgment, as Lamer C.J. takes note of several features which go into determining the particular form and content of the fiduciary duty that the Crown will fall under in its dealings with Aboriginal peoples vis-a-vis their land²⁹. In this discussion of the form and content of the Crown's fiduciary duties the use to which this aspect of Aboriginal title may be put – its 'cash value' – is revealed. An Aboriginal people are not like glorified land-owners, able to straightforwardly defend their rights to land on the basis of rights such as that to choose uses to which the land may be put – rather, a First Nation with a recognized claim to Aboriginal title finds itself *capable* of demanding that certain procedural and substantive measures be undertaken by Canadian governments contemplating, or engaged in, interference with the rights that fall under the title³⁰.

Aboriginal peoples must be careful, then, not to imagine that the Court has recognized either a power to actually exclude others from their territory, or the right to unilaterally choose the uses to which this territory may be put. In recognizing that Aboriginal title is exclusive in nature, and that this entails that Aboriginal peoples may have the right to choose the uses to which their lands may be put, the Court is saying that Aboriginal peoples interests in their lands must be *respected* when the radical title-holder, the jurisdictional authority – *the Crown* – makes its decisions about what it determines to be best for the Canadian community. This is one way by which the non-Fee Simple nature of Aboriginal title is starkly revealed.

While the nature of the requirements imposed on the governments of Canada in virtue of their fiduciary obligations is more fully discussed in a later section, here it can be noted that what the Court has constructed is a matrix which itself says a great deal about the form of land ownership recognized by the Supreme Court. If Aboriginal peoples enjoyed a form of title in line with private ownership principles, the situation would not be so difficult to comprehend. The key to comprehension lies in continually reminding oneself that Aboriginal title is 'sui generis' – any comparisons to other forms of title must be carefully considered, and attention primarily focused on the precise formulation of Aboriginal title articulated by the Supreme Court. As it is, then, Aboriginal peoples need to grasp the nature of the form of title *acknowledged by the Court*, and work with this to best further their interests in protecting their lands and ways of life.

II. (iii) The Source and Proof of Aboriginal Title

The test for the proof of Aboriginal title is set out in a separate section of the decision in *Delgamuukw*. It begins with this overview:

In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty

²⁹ “[A]boriginal title encompasses *the right to choose* to what uses land can be put ...” *Delgamuukw*, *supra* note 2, at paragraph 166 [emphasis in original]. A few paragraphs later Lamer C.J. repeats: “[A]boriginal title encompasses within it a right to choose to what ends a piece of land can be put.” [para. 168] While exclusivity and the right to choose ends are presented as separate aspects of Aboriginal title in these paragraphs, the latter must issue from the former, for no mention is made of the right to choose ends when the court presents its definition of Aboriginal title.

³⁰ The nature of these measures will be examined in the section of this paper dealing with legislative infringement of Aboriginal title.

occupation, and (iii) at sovereignty, that occupation must have been exclusive³¹.

Not mentioned in this overview is the role that the *form* of prior occupation plays in determining the content of the title established. In establishing title the Court imagines that an Aboriginal people will show *how* the land in question was occupied, thereby revealing the special connection that the people traditionally had – and hopefully continue to have – to this land³². This does not make clear, however, the role (if any) that revealing the form of occupation will play in determining the *nature* of Aboriginal title.

The issue came to the fore before the Court in the context of a dispute between the appellants and respondents over the *source* of Aboriginal title. While the governments of Canada and British Columbia argued that the source lies in the ‘physical reality’ at the time of the assertion of sovereignty, the Gitksan argued that “aboriginal title arises from *and should reflect* the pattern of land holdings under aboriginal law”³³.

The Chief Justice felt that the source of title lay in a conjunction of the two, lying in both physical occupation and the ‘Aboriginal perspective’ (in its relationship to the common law), the latter including such things as Aboriginal systems of law in place at the time of the assertion of Crown sovereignty:

[Aboriginal title] arises from the prior occupation of Canada by [A]boriginal peoples. That prior occupation is relevant in two ways. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law. ... What this suggests is a second source for [A]boriginal title – the relationship between common law and pre-existing systems of [A]boriginal law³⁴.

... 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”³⁵.

On the physical side of the equation, occupation can be shown “in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources.”³⁶ Showing physical occupation is clearly

³¹ *Delgamuukw*, *supra* note 2, at paragraph 143.

³² “... [O]ne of the critical elements in the determination of whether a particular [A]boriginal group has [A]boriginal title to certain lands is the matter of the occupancy of those lands. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, 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.” *Delgamuukw*, *supra* note 2, at paragraph 128.

³³ *Delgamuukw*, *supra* note 2, at paragraph 147 [emphasis added].

³⁴ *Delgamuukw*, *supra* note 2, at paragraph 114.

³⁵ *Ibid.*, at paragraph 148.

³⁶ *Ibid.*, at paragraph 149.

quite important, for this can serve as proof of title at common law³⁷.

The Aboriginal perspective is also, however, relevant to showing occupation of the land in question. A traditional Aboriginal legal regime may be introduced, for example, when the need to demonstrate exclusivity is considered³⁸. Since the very notion of exclusivity, Lamer C.J. notes, is “a common law principle derived from the notion of fee simple ownership”, it “should be imported into the concept of [A]boriginal title with caution.”³⁹ The Aboriginal perspective comes in, then, to temper this importation, allowing the Aboriginal party to show exclusivity through traditional systems of land holding and land use regulation.

Lamer C.J. does *not*, however, go *beyond* employing the Aboriginal perspective in this sort of manner. What this strongly implies is that, contrary to the contention of the Gitskan, this source of Aboriginal title does not itself *reflect* on, or go into, the nature of this title. While the Aboriginal perspective – including Aboriginal systems of law – is one element going into the *source* of Aboriginal title, title itself is not *defined* in relation to this perspective.

Ultimately, then, while Lamer C.J. found that prior occupation may be shown in terms of particular activities⁴⁰, a task that *may* call for the introduction of evidence concerning the particular institutional

³⁷ This admission simplifies matters considerably, for issues of proof can then devolve to issues of physical occupation, complicated though this may be by questions about when the fact of occupation must be established, and the sort of historical continuity that may be required to run this fact of occupation up to present. See discussion in Kent McNeil, *Defining Aboriginal Title*, *supra* note 4. Lamer C.J. culled much of his discussion from an earlier work by McNeil, “The Meaning of Aboriginal Title”, found in *Aboriginal and Treaty Rights*, *supra* note 5, at 135 - 154.

³⁸ Further to this, two points can be noted. First, clearly the aim in introducing the Aboriginal perspective is not to instruct Canadian courts to seriously entertain the task of recognizing and affirming Aboriginal legal systems. Courts are being instructed, in this discussion, to bear in mind that, when looking at attempts to prove title, *it may be useful* to look to the ways by which the Aboriginal party traditionally regulated land distribution and use. Furthermore, this is not a determinative factor, for the Aboriginal perspective is bound up with the common law, and the common law must be addressed.

Interestingly, however, when the common law is brought into the picture, *it does suffice*, on its own, to settle issues of title. Whereas laws an Aboriginal society may have had in relation to the land “would be *relevant* to establishing the occupation of lands ... , ... at common law, the fact of physical occupation *is proof of* possession at law, which in turn will ground title to land.” [Ibid., at paragraphs 148 - 149, emphasis added. It is interesting to note that Lamer C.J. goes on to state that Aboriginal legal systems *would* be relevant *if* there were such. Clearly in his mind it is an issue whether there are in fact such ‘laws in relation to land’ in place originally in Aboriginal societies.]

The second point is that Aboriginal systems of law, as much as they may exist, are introduced in such a way that it would seem they are purely historical in nature. These systems may be introduced in evidence to assist in demonstrating title, but they would relate to the “regime that prevailed before”, not the regime that is now in place [while the phrase comes from Mahoney J. in *Baker Lake* (*supra* note 3), it met with approval by Lamer C.J.. Furthermore, Lamer C.J. *treats* such legal systems as historic in nature].

³⁹ Ibid., at paragraph 156.

⁴⁰ In discussing the nature of an ‘inherent limit’ that restricts the contemporary uses to which Aboriginal peoples may put their land (discussed in the next section), Lamer C.J. remarked that physical occupation would be shown by reference to such activities as hunting or conducting ceremonies. *Delgamuukw*, *supra* note 2, at 128.

structures that *regulated* the various uses to which the traditional lands were put to, this would only be to *establish* occupation, not to *define* Aboriginal title⁴¹. In actually determining the *content* of the title thereby established, Aboriginal institutions, including traditional systems of law, appear to play little or no role⁴². It would be somewhat premature, then, to invest significant resources in articulating the sorts of traditional systems that governed such matters as land use in an effort to show the nature of the title to which an Aboriginal people lay claim. It would be most efficient to put time and energy into showing the nature of the physical occupation of the land in question, for once established this can go straight into proving title, only delving into questions of traditional legal systems when these assist in showing the exclusivity traditionally enjoyed.

II. (iv) The Inherent Limit

Recall that the nature of the relationship between an Aboriginal people and the lands in question goes into proving Aboriginal title, but that since physical occupation is sufficient proof at common law, the only element of title this relationship determines is the *extent* of the occupation.

Extent, however, can be measured both by size and depth. Besides using evidence of the relationship to establish the borders of the claimed territory, the *strength* of the relationship can be determined, and this then employed in determining the *sort* of land-ownership that will be recognized at law⁴³. In exploring the vertical nature of the relationship Aboriginal peoples, *as communal land-owners*, enjoyed with their land, Lamer C.J. found that out of the fact of communal title comes a limit on the uses to which they might put their land.

In carrying out the task of the law in offering legal protection *today* for occupation that is grounded in the *past*, the law finds “[i]mplicit in the protection of historic patterns of occupation ... a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.”⁴⁴

This recognition, in turn, directs the court toward finding a limit built into the notion of Aboriginal title, a limit which prescribes the very uses to which an Aboriginal people may put their land. If Aboriginal title over a parcel of land is shown, for example, by demonstrating the central importance this particular piece of land has traditionally had as a hunting ground – that is, by reference to the particular

⁴¹ The Aboriginal perspective may reveal, for example, that the Aboriginal people in question had a system of regulation which included such tools as trespass laws, and treaties with neighboring peoples governing land use over particular regions. This goes to show better the sort of *exclusivity* that the people enjoyed.

⁴² See John Borrows, “Aboriginal Rights in British Columbia: An Analysis of *Delgamuukw v. The Queen*”, *Osgoode Hall Law Journal*, forthcoming [hereinafter *An Analysis of Delgamuukw*]; Kent McNeil, *Defining Aboriginal Title*, *supra* note 4, at page 15; and Kent McNeil, “Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty” (1998) 5 *Tulsa Journal of Comparative and International Law* 253 [hereinafter *Territorial Sovereignty*].

⁴³ Lamer C.J. acknowledged that the land in question must be of central significance to the people in question and that this would still form a component of Aboriginal title (as he had stated in *Adams*, *supra* note 3), but felt that this would play no practical role in determining Aboriginal title, for over any land for which an Aboriginal people maintained a substantial connection it would be reasonable to assume that the relationship to this land was of this nature. In establishing title, as well, Lamer C.J. noted that the procedure would be to show how the land in question was of central significance by showing the traditional uses to which it would have (and would continue to be) put. This is to show the *strength* of the relationship. *Delgamuukw*, *supra* note 3, at paragraphs 150 – 151.

⁴⁴ *Delgamuukw*, *supra* note 2, at paragraph 126.

sort of relationship between the people and the land, and the *strength* of this relationship – then in seeking to perpetuate this important hunting relationship the law must endeavour to prevent the Aboriginal people in question (the land-owners themselves) from now undertaking to use this land for a purpose which would destroy its viability as a hunting area. Here is a second point at which the nature of Aboriginal title as non-Fee Simple is starkly revealed⁴⁵.

This is one place, then, where traditional attachments to the land come in to *both* ground *and* partially define Aboriginal title. While Aboriginal legal systems can demonstrate historic exclusivity, as we have seen these systems do not go into the *content* of Aboriginal title. Traditional use of the land as a hunting ground, however, reaches forward to the present, and plays a role in partially defining the very content of Aboriginal title.

Interestingly, however, this operates not to buttress ownership claims, but rather as a limit on the ability of the land-owners to decide the uses to which land may be put.⁴⁶ Should an Aboriginal people run up against this limit to their title, they have only one option: to surrender their Aboriginal title, exchanging this for the sort of title which allows for the unencumbered utilization of this territory⁴⁷.

⁴⁵ Lamer C.J. drew a parallel between the common law doctrine of equitable waste and this limit on Aboriginal title. But the analogy is severely strained, to say the least, for the Court is not contemplating preventing Aboriginal peoples from laying waste to their lands – rather it is considering cases of economic utilization which make it impossible to carry out those traditional activities that define the Aboriginal relationship to this land. While the doctrine of equitable waste protects land from environmental catastrophes, so that the land may continue to be economically viable for future owners or users, the inherent limit protects land from *full economic exploitation*, and points the way to its own legitimate removal.

⁴⁶ See McNeil, *Defining Aboriginal Title*, *supra* note 4, pp. 12-13, and p. 26. In the latter section McNeil suggests that this is not a problem if the courts were to allow for the modification of the nature of the attachment to the land over time. As simple and natural as this might seem, it would run counter to the principles underlying the court's treatment of Aboriginal rights, where the motivating force is the protection of *Aboriginal* societies, where these are frozen at a time in the distant past.

⁴⁷ This is a requirement set out by Lamer C.J. in *Delgamuukw* [*supra* note 2, at paragraph 131]:

.... [w]hat I have just said regarding the importance of the continuity of the relationship between an aboriginal community and its land, and the non-economic or inherent value of that land, should not be taken to detract from the possibility of surrender to the Crown in exchange for valuable consideration. On the contrary, the idea of surrender reinforces the conclusion that aboriginal title is limited in the way I have described. If 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.

Once the nature of the inherent limit is understood, it is seen as a continuation and extension of the 'aboriginality' line of reasoning. Since we noted earlier that *Delgamuukw* moves away from this line of reasoning (in holding that Aboriginal title is a right in land, to some degree removed from concerns over traditional practices and customs), this shows a tension running through the reasoning. First, note that the 'special relation' to the land that marks out the nature of the claim to Aboriginal title is frozen at a point in the historic past [in *Delgamuukw* (*supra* note 2, at paragraph 144) this is set at the time of Crown assertion of sovereignty]. Imagine, then, that a particular Aboriginal community has a clearly defined relationship to a parcel of land in the here and now, a relationship which does not preclude their making use of the land in any number of economically attractive ways. To decide to use their land in a manner which conflicted with the relationship they had in the past, however, would require that they surrender

II. (v) Over-Lapping Claims

During the discussion of exclusivity, Lamer C.J. remarked on the nature of, and some possibilities surrounding, ‘joint title’, ‘shared exclusivity’, and ‘non-exclusive, site-specific Aboriginal rights’. The impact of this brief discussion on land claim agreements may be immense, for the remarks suggest new procedures and protocol that might have to be injected into the modern treaty process.

These three concepts arise outside the ‘usual’ situation of a claim to ‘pure’ exclusive Aboriginal title. When an Aboriginal people lay claim to exclusive title (following the federal policy dictates, culled from *Baker Lake*⁴⁸), it asserts that its title encompasses the right to exclude all others. But what if a piece of land was apparently occupied or used by two or more distinct Aboriginal peoples? Three possible scenarios follow, each of which Lamer C.J. suggested could be developed further in Canadian law on Aboriginal title and rights.

The first scenario is simply exclusive Aboriginal title enjoyed by one of the Aboriginal peoples. Others may use (or even temporarily occupy) the land in question, but should the Aboriginal people claiming title show that they alone *controlled* or *regulated* these practices, rather than hinder their claim this sort of activity reinforces their assertion that they were the sole rightful owners of the land⁴⁹.

The second two scenarios occur when two or more Aboriginal peoples not only shared the land, but did so in a manner which suggests that neither was in exclusive control of the use-patterns of the other. The first of these scenarios arise when the Aboriginal peoples traditionally using this land did so to the exclusion of all others, and had some sort of agreement between them on how they would jointly manage their coordinated land use activities. This introduces the possibility of joint title, a form of title made sensible in *Delgamuukw* by introducing the common law concept of shared exclusivity. As Lamer C.J. states: “[t]he requirement of exclusive occupancy and the possibility of joint title could be reconciled by recognizing that joint title could arise from shared exclusivity.”⁵⁰

The final scenario occurs when none of the Aboriginal peoples sharing the land can show that they separately or conjointly exerted sufficient control over the land to demonstrate the requisite degree of exclusivity. To the degree that the people asserting claims over this land traditionally made use of its resources or aspects of its landscape, the land may be subject to claims of Aboriginal *rights*, measured by

this land, for the sort of people they are *now* has been determined by the court (in virtue of their new form of relationship to the land) to be such that they are no longer the *Aboriginal* people that deserve to have claims to land recognized and affirmed as *Aboriginal* rights or title. In effect, these people are no longer Aboriginal.

⁴⁸ *Baker Lake*, *supra* note 3.

⁴⁹ In discussing the requirement of exclusivity Lamer C.J. states [*Delgamuukw*, *supra* note 2, at paragraph 156]:

... it is important to note that exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under these circumstances, exclusivity would be demonstrated by ‘the intention and capacity to retain exclusive control’ (McNeil, *Common Law Aboriginal Title*, [Oxford: Clarendon Press, 1989], at p. 204). Thus, an act of trespass, if isolated, would not undermine a general finding of exclusivity, if aboriginal groups intended to and attempted to enforce their exclusive occupation.

⁵⁰ *Delgamuukw*, *supra* note 2, at paragraph 158.

the tests laid out in *Van der Peet*⁵¹ – this land would not, however, be subject to claims of Aboriginal title. In relation to this land, then, there would only be non-exclusive, site-specific Aboriginal rights.

Should these findings work their way into general policy governing the production of land claims agreements the changes will likely be profound. In establishing a claim in relation to traditional territories an Aboriginal people may find it necessary to compartmentalize into various interests that exist in relation to different tracts of traditional territory.

There will certainly be core lands, those over which the Aboriginal party asserted exclusive control, encompassing the right to exclude all others from this land. There may be, as well, land over which the Aboriginal people had reached an agreement with neighboring people(s), an agreement which worked out their shared use of this tract, but to the exclusion of all others. Following the discussion in *Delgamuukw*, the Aboriginal people may, then, assert title over this land – with the other Aboriginal people(s)! – and so bring the claim to the negotiating table⁵². Finally, there may be lands which were traditionally put to some use by an Aboriginal people, but not in such a way that they can show that it was to the exclusion of all others. Furthermore, it may be that no other Aboriginal people can show the requisite degree of exclusivity in relation to these lands. This tract may, then, be subject to site-specific Aboriginal rights, claimed by any number of Aboriginal peoples, but not to Aboriginal title.

While it makes sense that neighboring Aboriginal peoples claiming joint title – or even for that matter, a mixture of title and rights – coordinate their efforts at the negotiation stage⁵³, strictly as a matter of the effect on pre-agreement entitlements, coordination between Aboriginal peoples would not seem to *have* to be a pre-requisite to any one party settling their disputes with the Crown. Any Aboriginal party settling its claims would thereby relinquish its claims in exchange for other defined rights, but this would not, in itself, necessarily impact on the existence of Aboriginal rights which *other peoples* may have in relation to that land. One Aboriginal people could not conceivably discharge, or in any sense impair, the Aboriginal rights of another.

II. (v) (a) Over-Lapping Claims and Shared Exclusivity

Interesting questions surface when one imagines the various situations that might need to be addressed, given the new legal environment suggested by the brief remarks in *Delgamuukw*.

Imagine that apart from their core traditional lands, two neighboring Aboriginal peoples have traditionally shared exclusive control over a strip of land that lies between them. Now imagine that of the two one arrives at the negotiation table ahead of the other. Keep in mind that pressure exists to lay claim to all land possible, all land over which a measure of control can be demonstrated, for it is common knowledge that, of the land claimed, somewhere in the neighborhood of four to seven percent will likely remain in the hands of the Aboriginal people after an agreement is reached⁵⁴. If a party has a choice of going to the table with proof of ownership over 5,000 square kilometers (the land over which exclusive

⁵¹ *Van der Peet*, *supra* note 3, at paragraphs 44 – 74.

⁵² What this envisions, then, is a negotiating table incorporating Aboriginal people X, and those neighboring Aboriginal peoples with historic agreements regarding shared land use and occupation.

⁵³ One might go so far as to argue that practically speaking this should be considered necessary, if only for coordination reasons.

⁵⁴ While the British Columbia government claims that no percentage can be said to apply to all land claims situations (since, amongst other things, there will be a major difference between settlements with remote Aboriginal peoples and with those living in urban or semi-urban locations), over the province the final land total ‘set aside’ as a result of the land claim process will be no more than 5% of the land area of British Columbia (B.C. Government Information Bulletin _____).

control was traditionally exercised) or 10,000 square kilometers (the core land plus that land over which a measure of exclusive control was traditionally exercised in concert with the neighboring nation), the choice is essentially between achieving a post-agreement land-base of somewhere around either 250 square kilometers or 500 square kilometers. As this land-base may be the only truly protected land the Aboriginal people will enjoy in perpetuity, the original choice of how much land to claim when approaching the table can be very difficult to make.

If it were not for the general government policy of treating land over which a negotiated settlement has been reached as now free of the burden of Aboriginal title, there would be not necessarily be a problem⁵⁵. The second Aboriginal party could also include the strip of land in its original claim, and hope to also secure a larger tract as post-agreement lands. Since the Supreme Court has signaled its willingness to recognize the concept of joint Aboriginal title, government policy seems in conflict with the law as it is developing in this situation. As noted earlier, there seems to be no possible connection between the surrender of a claim to Aboriginal title to a tract of land by one Aboriginal people and the valid claim of another Aboriginal people. Should there be three Aboriginal parties involved in the traditional ‘shared exclusivity’ of a tract of land, the government should be required to treat all three claims separately, as parts of three claims to traditional territory (or, more efficiently, to begin to develop and implement a process whereby all relevant parties gather at one time and place to discuss an agreement over this land).

II. (v) (b) Over-Lapping Claims: Title and Rights

The second situation that introduces possible problems parallels the first in that we imagine several Aboriginal peoples have valid claims to a particular tract of land – however, rather than a situation which might fall under joint title, imagine one particular Aboriginal people enjoys exclusive control over the land in question⁵⁶, but that another Aboriginal people has been traditionally accorded recognition of its right to site-specific activities in this region. So, while all parties have commonly recognized this as being the land of Aboriginal people X, all – including Aboriginal people X – have also recognized the long-standing right of Aboriginal people Y to use this land at particular times, at particular places, to engage in various activities of central importance to the culture of this neighboring people.

This adds another layer of complexity to negotiations that should be carried out. Besides dealing with the possibility of joint title, the governments of Canada should be concerned to deal with all site-specific Aboriginal rights to which this land might be subject. Again, simply procuring the surrender of the title-claims of some Aboriginal parties should not be seen as invalidating, or eliminating, the valid claims of other Aboriginal peoples. This land is not free of the ‘burden’ of Aboriginal claims until all parties with claims to exclusive use *and* all parties with claims to traditionally recognized rights to use have been to the table and come away with their own satisfactory agreements.

Clearly, then, the remarks in *Delgamuukw* point to the need to carefully consider the various permutations and combinations that may arise in these contexts, keeping in mind that Aboriginal title and Aboriginal rights are understood as lying along a spectrum⁵⁷.

⁵⁵ At least one could say there would not be a problem for the Aboriginal people concerned, outside of the problem alluded to earlier, of the possibility of coercion or compulsion as a result of the immense power imbalance at play at the negotiation stage.

⁵⁶ Or, several Aboriginal peoples enjoy shared exclusivity, and so a form of joint title. This would not affect the dynamics of this situation.

⁵⁷ See *Delgamuukw*, *supra* note 2, at para. 138:

The picture which emerges from *Adams* [wherein a conceptual break between Aboriginal rights and Aboriginal title was established] is that Aboriginal rights ... fall along a spectrum with

II. (vi) Infringement of Aboriginal Title

To complete our analysis of the nature of Aboriginal title in *Delgamuukw* we need to consider remarks coming at the end of the judgment, as the Court turned to the question of legitimate legislative infringement of Aboriginal title. While these latter remarks do not purport to illuminate the content of Aboriginal title, they have an enormous impact on the sort of title Aboriginal peoples will be able to assert. It is in this discussion that some light is shed on the *use* to which Aboriginal peoples will be able to their 'exclusive right to land', keeping in mind that Aboriginal title is *sui generis*. In examining the power that the governments of Canada enjoy over Aboriginal lands the power in the hands of Aboriginal peoples is thrown into negative relief.

The *Sparrow* decision laid the ground-work for the determination of legitimate infringement of Aboriginal rights by legislative action⁵⁸. In that decision the court found that only 'compelling and substantial' legislative objectives could legitimately diminish the enjoyment of Aboriginal rights by an Aboriginal people⁵⁹. In particular the court took the time to point out that 'the public interest' is simply too vague an objective to stand up as justification for an infringing piece of legislation, or a regulation falling thereunder⁶⁰. In *Gladstone*, however, the court pulled back from this very point, and took the position that balancing with third party or public interests is precisely the sort of process that can be undertaken in determining the appropriateness of potentially infringing governmental action⁶¹.

In *Delgamuukw* the *Gladstone* line of reasoning not only continues, but is strengthened. The very sorts of 'public interest' objectives that the court presents as examples of legitimate legislative goals are those that typically fall under the jurisdiction of the provincial governments, governments that have traditionally been thought of as constitutionally limited in relation to matters that affect Aboriginal peoples⁶². This has been thought to be so especially on reserve land (falling as this does clearly under the

respect to the degree of connection with the land. At the one end, there are those [A]boriginal rights which are practices, customs and traditions that are integral to the distinctive [A]boriginal culture of the group claiming the right. ... In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an [A]boriginal group may not be able to demonstrate title to land, it may nevertheless have a site-specific right to engage in a particular activity. ... At the other end of the spectrum, there is [A]boriginal title itself. ... What [A]boriginal title confers is the right to the land itself.

⁵⁸ *Sparrow*, *supra* note 3.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, at 1113: "We find the 'public interest' justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights."

⁶¹ *Gladstone*, *supra* note 3, at paragraph 73.

⁶² It should be kept in mind that s. 91(24) of the *Constitution Act, 1867* [(U.K.), 30 & 31 Vict., c.3 (formerly the *British North America Act, 1867*)], granted federal jurisdiction over 'Indians and Lands Reserved for Indians'. The use of 'Aboriginal peoples' here is a bit over-broad.

In *Delgamuukw*, *supra* note 2, at paragraph 165; Lamer C.J. makes the following somewhat startling claim:

In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the

jurisdiction of the federal government by way of s. 91(24) of the *Constitution Act*⁶³), and since the court has gone so far as to equate Aboriginal interests in reserve land to Aboriginal interests in land over which there exists a valid claim to Aboriginal title⁶⁴, this should be so in relation to much of the land which is the subject of comprehensive land claims. Somewhat mysteriously, the court indicated otherwise in *Delgamuukw*⁶⁵.

What this would seem to mean ‘on the ground’ is that Aboriginal peoples (particularly those in more remote areas of Canada, those locations on the forefront of development pressures) will find that while they are now recognized as being owners – of a sort – of their traditional territory, this ownership is subject to development activities, regardless of the willingness of the Aboriginal party to participate in the process.

II. (vi) (a) Legitimate Infringement: The Crown’s Fiduciary Relationship to Canada’s Aboriginal Peoples

There is in *Delgamuukw* a complex, and at times confusing, discussion of the sort of involvement required of, or reparation owed to, an Aboriginal people adversely affected by legitimate infringement of the enjoyment of their title and associated rights⁶⁶. Only in certain circumstances, however, does it appear that *consent* is required before government action is taken:

[A]boriginal title encompasses within it a right to choose to what ends a piece of land can be put. There is always a duty of consultation. ... In most cases, it will be significantly deeper than mere consultation. Some cases *may* even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.⁶⁷

This might seem to strengthen the Aboriginal position, for depending on the Aboriginal right in question (i.e., a powerful connection to a particular piece of land, of central importance to the people in

general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support these aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of Aboriginal title.

⁶³ *Constitution Act, 1867*, *supra* note 62.

⁶⁴ This was determined to be the case in *Guerin*, *supra* note 3, at 379. John Borrows has argued that this link between Aboriginal title and Aboriginal interests in reserve land seriously diminishes the strength of Aboriginal interests in non-reserve land (for Aboriginal interests in reserve land are themselves subordinate to the greater – indeed overwhelming – interests and powers of the federal government). See John Borrows, *An Analysis of Delgamuukw*, *supra* note 42.

⁶⁵ See Kerry Wilkins, “Of Provinces and s. 35 Rights” (1999) 22 *Dalhousie Law Journal* 1, at 185; John Borrows, “An Analysis of Delgamuukw”, *supra* note 42; Kent McNeil, *Defining Aboriginal Title*, *supra* note 4; and Nigel Bankes, “Delgamuukw, Division of Powers and Provincial Land and Resource Law: Some Implications for Provincial Resource Rights” (1998) 32 *U.B.C.L.R.* 317.

⁶⁶ *Delgamuukw*, *supra* note 2, at paragraphs 166 – 169.

⁶⁷ *Ibid.*, paragraph 168, emphasis added. Note the connection in this passage to ‘traditional activities’, those central to the distinctive culture of the Aboriginal people in question.

question), this might, after all, necessitate obtaining consent before infringement can be legitimated.

This remark must, however, be taken in the context of the Courts' discussion of the power of the Crown in relation to Aboriginal title. In this regard we must consider the nature of the fiduciary duty the Crown must acknowledge in relation to Aboriginal peoples and their lands, and the manner by which the Crown may properly discharge this duty. It is the fiduciary duty which structured the discussion of infringement in *Sparrow* and *Gladstone*, for absent this duty it is not clear that the Crown would have any greater duty in regards to Aboriginal peoples than it has to any other subset of the Canadian population⁶⁸.

The theory that informs discussions about this duty, Lamer C.J. noted, was that the fiduciary relationship between the Crown and Aboriginal peoples required that Aboriginal interests be given priority⁶⁹. Priority allocation, however, turned out not to be a simple matter, as *Gladstone* demonstrated. While in *Sparrow* the alleged right was only for fishing for food purposes, in *Gladstone* the alleged right was to a commercial scale fishery. The court could not sanction placing an Aboriginal fishery *ahead* of all other concerns (except conservation), and so avoided a simple priority allocation by devising a complex matrix dependent on the 'form' of the fiduciary duty and the 'degree of scrutiny' that would be demanded of the government legislation.

Sparrow had already seen the introduction of the notion that the form of the fiduciary obligation could vary according to the 'legal and factual context' of the situation. The fiduciary duty, the Supreme Court held, could be articulated in different ways, requiring, for example, that there be as little infringement as possible, that compensation be on the table if the situation is one of appropriation, and that, if the matter concerns decision-making which might adversely affect the alleged Aboriginal right, consultation be carried out⁷⁰.

Gladstone added the notion that there could be variation in the degree of scrutiny, variation which impacts on the manner by which the Crown *prioritizes* Aboriginal interests in the mix with other concerns⁷¹. Since the alleged right in *Gladstone* was for a commercial fishery, the Crown was held to a much lower standard of scrutiny, and was only asked that the potentially infringing actions *reflect* the prior Aboriginal interests, in effect insuring that the allocation of any resources be carried out *respectfully*. Far from demanding, then, that the Aboriginal interests be placed at the penultimate position when interests are to be prioritized⁷², this new approach to satisfying the Crown's fiduciary duty only requires that the Crown *show respect* for the fact that Aboriginal peoples were present in Canada long before the Crown (and Canada) were facts of the political landscape⁷³.

⁶⁸ While it might be suggested that the existence of s.35 generates particular duties that the Crown must acknowledge, s.35 is itself being understood and applied through the conceptual framework of fiduciary doctrine. This is made quite clear in *Van der Peet* (*supra* note 3), where the constitutionalization of Aboriginal rights is seen as encompassing mere recognition that the Canadian government owes a duty to Aboriginal peoples to respect their prior presence in Canada, a fact which then meshes with the process of 'respect' explained and developed in *Gladstone* (*supra* note 3).

⁶⁹ *Ibid.*, paragraph 162.

⁷⁰ *Sparrow*, *supra* note 3.

⁷¹ *Gladstone*, *supra* note 3, at para. 62, noted in *Delgamuukw*, *supra* note 2, at para. 164.

⁷² That is, the interest would follow valid conservation measures.

⁷³ Consistent with the current treatment of Aboriginal rights, this discussion hinges on the notion that the aim in contemporary jurisprudence must be to facilitate the reconciliation of the prior presence of Aboriginal societies with the assertion of Crown sovereignty.

The court in *Delgamuukw* applied this complex matrix to Aboriginal title. Lamer C.J. found three aspects of Aboriginal title which would affect the form of, and scrutiny attached to, the fiduciary duty of the Crown: the right to the exclusive use and occupation of the land, the right to choose the ends to which the land can be put, and an inescapable economic component to this title⁷⁴. These aspects go into structuring the particular legal and factual context, and result in the Crown prioritizing Aboriginal interests in ways which *reflect* the priority of these interests.

The result is a framework which tells us much about the nature of Aboriginal title. In light of the first aspect of title, the Crown may have to work to include the affected Aboriginal peoples in the operations it wishes to advance or promote. In *Gladstone* this was spelled out in terms of boosting Aboriginal participation in the over-all fishery. We can imagine that in relation to Aboriginal title this might spell out, for example, in *efforts* to include Aboriginal peoples in forestry operations where these might impact on tracts of Aboriginal title land. In light of the second aspect of title, the Crown may have to either consult with, or even seek the consent of, the Aboriginal peoples potentially affected by the contemplated legislative action. We might imagine that this would spell out, to return to the same example, in efforts to reach agreements over forestry operations before licensing these activities, agreements that attempt to take Aboriginal interests into account. Finally, in light of the third aspect of title, the Crown may have to compensate Aboriginal peoples for actions on its part, or which it facilitates, which negatively impact on the economic enjoyment of the land by the Aboriginal peoples in question.

II. (vi) (b) The Impact of Infringement on Aboriginal Parties in the Modern Treaty Process

Far from simply revealing newfound strength for the Aboriginal position, the discussion of legitimate infringement demonstrates the need to carefully consider strategies that may work with this legal structure in such a way as to move the governments of Canada toward more acceptable modern treaties⁷⁵.

On the one hand, it must keep in mind that the Court's treatment of legitimate infringement sets out *minimal* requirements the government must meet in order to satisfy its fiduciary obligations to Aboriginal peoples. These requirements, *post-Gladstone* and adjusted for the nature of Aboriginal title, do not, on their face, go beyond 'respectfully' placing Aboriginal people within the set of concerns that need to be addressed by a government of Canada. Once again we see the status of Aboriginal peoples in the eyes of the judiciary – as land-owners, but possessed of a very peculiar sort of title. The only 'special status' accorded is in virtue of Aboriginal peoples being temporally the first land-owners within Canada. In light of the other general duty binding Canadian governments – to govern in the interests of the Canadian population – it would be asking too much, the court has determined, to ask of these governments that they single out Aboriginal interests beyond that demanded by this simple fact.

On the other hand, for an Aboriginal people to try to solidify its rights to land by reaching an agreement with the Crown requires that it either seriously weaken or release its Aboriginal rights, thereby embedding itself permanently in the general population (subject only to the rules and limitations imposed by the agreement⁷⁶). These agreements attempt to spell out determinate conditions for legislative action

⁷⁴ *Delgamuukw*, *supra* note 2, at paragraph 166.

⁷⁵ This is especially so when the modern treaty process is thought of, simplistically and mistakenly, as merely settling a dispute over ownership of land – that is, as a land claims process.

⁷⁶ While the treaty would create constitutionally protected rights (via s. 35(3) of the *Constitution Act, 1982*), their treatment would not be akin to that afforded older treaties, for (1) within these treaties are provisions which purport to spell out how disputes will be resolved – measures which do not go measurably beyond arrangements governing standard contractual relationships, and (2) the principles underlying treaty interpretation will, by and large, not apply in the modern context. For example, while underlying much of the approach to the older treaties is the notion that Aboriginal peoples were often

in relation to the lands set aside for the Aboriginal signatory, and so bypass the sorts of tests set out in *Gladstone* and *Delgamuukw*. By and large, modern treaties aim to achieve ‘certainty’ in relation to ‘legislative infringement’⁷⁷.

Taken as a whole, then, the decision in *Delgamuukw* would seem to describe forces which make it very difficult for Aboriginal peoples to maintain their spiritual connections to the land. These are powerful forces – *economic forces* – which the court accepts as inevitably and inexorably intruding on the worlds of Canada’s Aboriginal peoples. The court presents a simple resolution to the conflict between these forces and the traditional lives of Aboriginal peoples – Aboriginal surrender to the ‘inevitable’ and ‘inexorable’.

Aboriginal parties engaged in the process of modern treaty making *must*, then, extract from *Delgamuukw* the principles and doctrine that have some promise of leading to a strong and resilient legal relationship between the people and their land. The minimal requirements imposed on the Crown in its efforts to meet its fiduciary obligations to Aboriginal peoples must be well understood, and pressed into service as means by which the governments of Canada can be prodded into realizing that, without agreements that meet the needs of the Aboriginal parties, efforts to economically open up land subject to Aboriginal title will be continually ‘burdened’ (in a fairly literal sense of the term). Only by pressing the Crown in this manner can a ‘surrender’ be achieved which is by any stretch of the imagination honorable.

The key to this strategy lies in the duties the Crown must acknowledge in relation to the three aspects of Aboriginal title discussed by Lamer C.J.. Since the Crown is under a legal obligation to respect the right to exclusive use and occupation of the land in question, the right to choose the ends to which the land can be put, and the inescapable economic component of title, Aboriginal peoples engaged in negotiations must demand that this respect be paid, continually pressing the governments of Canada to recognize the highest degree of respect possible. If the negotiations are not working toward an agreement that builds on this respect, Aboriginal peoples must be prepared to challenge the positions of the governments in the courts, asking courts to consider the extent to which their claim to ownership – and the rights of ownership that may follow on a valid claim – have been disrespected by actions of the government(s).

unaware of the legal implications flowing from treaties grounded in Euro-Canadian culture, this would not hold in relation to modern treaties, reached over decades of concerted effort, with full opportunity to grasp the legal intricacies. Aboriginal peoples must be careful not to rely on these principles in relation to modern treaties.

The one major issue still present is that of the massive power imbalance present in the treaty process, and the possibility that this actualizes in agreements reached under compulsion. The Crown all too often seems to think that it can dictate not only the terms of modern treaties, but even the parameters of discussion. This is likely to come back to haunt the Canadian landscape.

⁷⁷ Again it should be kept in mind that jurisprudence on treaty rights will be radically different between pre-modern and modern treaties [see note 76]. There is a clear rationale underlying the principles structuring the courts’ treatment of pre-modern treaties, very little of which will apply to the modern context. Once again, though, it should be noted that the power imbalance remains, and this *may* act to preserve certain elements of the pre-modern treatment, in particular the existence of a fiduciary relationship. As we have just seen, however, the demands this fiduciary relationship places on Canadian governments have been significantly reduced. Furthermore, in practice the application of fiduciary doctrine will likely be narrower over modern treaties, as they are likely to be seen – however mistakenly – as *consensual, fully-informed arrangements*, the tendency being then to remove them from examination by fiduciary concepts.

III. Aboriginal Title and Land Provisions in the *Nisga'a* and *Yukon Agreements*

There are two dynamics at work in the movement in these Agreements from (a) Aboriginal claims and interests (and corresponding forces driving the Crown into an agreement) to (b) a set of defined land interests.

In the *Yukon Agreement* a modified 'traditional' approach is employed⁷⁸: the First Nation parties to the agreement, "in consideration of the promises, terms, conditions and provisos" to be found "in a Yukon First Nation's Final Agreement", "*cede, release and surrender* to Her Majesty the Queen in Right of Canada, all their Aboriginal claims, rights, titles, and interests, in and to" all land that will not form part of the core of the new 'Settlement Lands'⁷⁹, and any such claims, rights, etc., that might be "inconsistent or in conflict with any provision of a Settlement Agreement"⁸⁰.

That this agreement is not founded on mutual acceptance of each other's objectives is clear, for in the *Preamble* only the Yukon First Nations state that they "wish to retain ... the aboriginal rights, titles and interests they assert with respect to Settlement Land", while section 2.6.4 expresses the government's position on this matter: "Nothing in any Settlement Agreement shall be construed as an admission by the Government that Yukon First Nations or Yukon Indian People have any aboriginal rights, title or interests anywhere within the sovereignty or jurisdiction of Canada." The motive for the government is primarily 'certainty', expressed in the *Preamble* "with respect to the ownership and use of lands and other resources of the Yukon", and "with respect to [the] relationship [of the parties] with each other."⁸¹

The Settlement Lands exchanged for the surrender of Aboriginal rights are of three classes. Category A lands are held in a manner *equivalent to Fee Simple*, with mines and minerals being held in Fee Simple title⁸². Category B lands are equivalent to Category A lands, except that title to mines and minerals is withheld (excepting certain 'Specified Substances', such as sand and gravel)⁸³. Finally, Fee Simple Settlement land is equivalent to Category B lands, except that title is Fee Simple in nature⁸⁴.

The distinction between Category A and B Settlement lands and Fee Simple Settlement Lands is that

⁷⁸ The standard federal policy on land claims negotiations (flowing out of policies developed in the 1970's) required the complete extinguishment of all Aboriginal claims (through a surrender of such), in exchange for certain benefits, usually including reserve lands, certain defined rights to the use of other lands, cash and the provision of certain services. With a 1986 amendment to this policy it became possible for Aboriginal peoples to enter into an agreement without surrendering all Aboriginal rights – the Crown would allow certain Aboriginal rights to continue over certain lands, namely "specified reserve areas." [Canada, Department of Indian Affairs and Northern Development, *Comprehensive Land Claims Policy* (Ottawa: Supply and Services Canada, 1986)] The *Yukon Agreement* is one of the only agreements that fits under this alternative approach.

⁷⁹ Lands lying within either the Northwest Territories or British Columbia that might be subject to such claims, rights, etc., are excluded.

⁸⁰ *Yukon Agreement*, *supra* note 6, emphasis added.

⁸¹ *Yukon Agreement*, *supra* note 6, Preamble.

⁸² *Ibid.*, s. 5.4.1.1

⁸³ *Ibid.*, s. 5.4.1.2

⁸⁴ *Ibid.*, s. 5.4.1.3

between Settlement Land over which the Yukon First Nations and Yukon First Peoples retain a measure of their Aboriginal rights (including title) and Settlement Land over which title is held, but not in conjunction with a grudging acceptance by the government that *Aboriginal* rights might remain.

The presence of Aboriginal rights over Settlement Lands is, however, tenuous, as registration by the First Nation (in the Land Titles Office), expropriation by the federal government, or the granting of the fee simple title by the First Nation can trigger the cession, release and surrender of such⁸⁵. Furthermore, once any one of these alternatives has occurred, and surrender of Aboriginal rights executed, there can be no reversal – Settlement Land over which Aboriginal rights and title have been lost can be de-registered or re-acquired in full standing as held previously, with the exception that the cession, release and surrender of *Aboriginal* claims still stands⁸⁶. This is a one-way door.

The *Nisga'a Agreement* also employs a tri-level land classification scheme (for 'Nisga'a Lands')⁸⁷, but given a different conceptual approach to the movement from pre-agreement to post-agreement, the categories appear to operate quite differently. Rather than engage the surrender of Aboriginal rights in exchange for other defined rights, the *Nisga'a Agreement* sets out a process of 'modification', whereby "the aboriginal rights, including the aboriginal title, of the Nisga'a Nation ... are modified, and continue as modified, as set out in this Agreement."⁸⁸ In place of surrender and exchange the rights of the Nisga'a are *transformed*, where in particular "the aboriginal title of the Nisga'a Nation ... is modified and continues as the estates in fee simple to those areas identified in this Agreement."⁸⁹

This different approach allows for both the continuation of the language of Aboriginal rights, and the possibility of the expansion of the scope of the rights. The Agreement itself attempts to limit the general expansion beyond the boundaries prescribed therein, for:

If, despite this Agreement and the settlement legislation, the Nisga'a Nation has an aboriginal right, including aboriginal title, in Canada, that is other than ... the Nisga'a Section 35 rights as set out in this Agreement, the Nisga'a Nation releases that aboriginal right to Canada to the extent that the aboriginal right is other than ... the Nisga'a section 35 rights as set out in this Agreement.⁹⁰

Whether such a release can operate when the aboriginal rights that might trigger this provision are, quite

⁸⁵ Section 5.10.1, subsections 5.10.1.1, 5.10.1.2, and 5.10.1.3 set out the events which trigger the cession, release, and surrender of all "[A]boriginal claims, rights, titles and interests, in and to the Parcels described hereunder", and section 5.11.0 specifies that this land thereby ceases to be Settlement Land.

⁸⁶ Section 5.12.0 allows for the reacquisition of fee simple title, "except that the cession, release and surrender of any [A]boriginal claim, right, title or interest in respect of the land shall not be affected."

⁸⁷ *Nisga'a Lands* comprise approximately 1992 square kilometers of land in the lower Nass Valley. Outside these lands the Nisga'a also obtain Nisga'a Fee Simple Lands, consisting of Category A land (certain former Nisga'a Indian reserves and some lands adjacent to these, over which the Nisga'a enjoy fee simple title, including ownership of all mineral resources) and Category B land (certain other specified parcels, over which the Nisga'a enjoy fee simple title, without ownership of mineral resources). See *Nisga'a Agreement*, *supra* note 6, Ch. 3, paragraphs 1 - 3, 45 - 46, 51, 61 - 62, and 66.

⁸⁸ *Nisga'a Agreement*, *supra* note 6, Chapter 2 "General Provisions", paragraph 24.

⁸⁹ *Ibid.*, Chapter 2, paragraph 25.

⁹⁰ *Ibid.*, Chapter 2, paragraph 26.

clearly, unknown or as yet undefined, is not entirely clear⁹¹.

Regardless, the intended function of this sort of provision is clear. Irrespective of what courts may say in defining Aboriginal rights (and so, what the Supreme Court has said in *Delgamuukw*), the parties to this Agreement have stipulated that the rights of the Nisga'a, post-agreement shall be what the Agreement sets out. Anything else the courts may provide for is put to the side – or as this Agreement sets out, these rights are released to the Crown⁹².

In the *Yukon Agreement* there is no attempt to accommodate potentially as-yet-undefined Aboriginal rights, and so the door is open, even if only slightly, to future difficulties. At some future time a First Nation falling under this Agreement may find itself dissatisfied with the sorts of compromises it made in achieving 'certainty', especially in light of what it now knows are its communal Aboriginal rights, as recognized and affirmed in the Constitution.⁹³

Absent the sort of arrangement we find in the *Nisga'a Agreement*, in light of the manner by which Aboriginal rights, including title, can only but diminish over Yukon lands, and considering the uneven struggle the Yukon First Nations have had to wage to obtain the minimal protections they have secured, the *Yukon Agreement* seems antiquated. This sort of agreement has never been acceptable on moral or philosophical grounds⁹⁴, and now runs in the face of contemporary jurisprudence on Aboriginal title. The seeds are sown, by such a treatment of Aboriginal rights, for future conflict.

In *Delgamuukw*, as we have seen, control over land is one aspect of Aboriginal title. Once an Aboriginal people can show title it will, typically, have established that it enjoyed, and continues to enjoy, the right to control some measure of the use and enjoyment of the land, a power which extends to a degree of control, *as a landowner*, over outside interference with the use of these lands. Recall that in discussing legislative infringement of Aboriginal title Lamer C.J. noted that in meeting its fiduciary

⁹¹ While a typical release provision in other areas of the law might absolve one party of an unknown liability, likely to be compensated by economic means, the release in the *Nisga'a Agreement* purports to hand over rights whose very *nature* is unknown. Can one give away something of which one knows not what? What if certain of these rights are *inalienable* to one and all?

⁹² Note, as well, that the Agreement restricts challenges brought by the major parties to the treaty (the province, federal government and Nisga'a Nation) based on other notions of Aboriginal rights. See Chapter 2, paragraph 19.

⁹³ This is not to argue that there would necessarily be legal action flowing from this potential dissatisfaction. But, coupled with the sense that the Crown has too much control over the process (including the structure of the negotiations, right down to the topics 'open for discussion'), this may lead to significant and continuing unrest in the communities. As the modern treaty process continues to evolve, those in control of the process should seriously consider whether the outcomes will satisfy future generations. These will be the people looking back at the entire historical process, aware of the rights Aboriginal peoples early in the process *should have* been able to negotiate in light of.

Recognition of the potentiality for future enlightenment is undoubtedly one of the reasons behind the inclusion of the following clause in the *Inuvialuit Final Agreement* (hard won by the Inuvialuit negotiators): "Canada agrees that where restructuring of the public institutions of government is considered for the Western Arctic Region, the Inuvialuit shall not be treated less favourably than any other native group or native people with respect to the governmental powers and authority conferred on them." Section 4(3).

⁹⁴ See, in this regard, criticism of the Federal Comprehensive Claim Policy in the Report of the Royal Commission on Aboriginal Peoples, Vol. II, Part II; *Restructuring the Relationship* (Ottawa: Minister of Supply and Services Canada, 1996), at 535 - 549 (hereinafter *Report of the Royal Commission*).

obligations when considering infringing on this right to choose, the Crown is required to, at a minimum, consult with affected Aboriginal title-holders, and at a maximum, seek their consent.

Consider, however, the status of Category A and B land in the *Yukon Agreement*. Recall that these designated lands are those over which Aboriginal rights are, grudgingly and indirectly, acknowledged by the Crown. The Yukon First Nations will enjoy, *at most*, municipal powers over these lands. Prior third party interests in land continue past the implementation of the settlement, and continue to be in the hands of the government to manage and regulate. Third party interests in resources, those of the resource companies, are not threatened by the sorts of agreements that can be reached under the Umbrella Agreement, for leases and licenses are not something over which the Crown has relinquished control⁹⁵. Furthermore, while there are opportunities to be involved with wildlife management, fisheries management, and the like, they are all one and same in being advisory in nature (when falling under regional authority), or limited in power (when operating over Settlement Land)⁹⁶.

Next consider the protection accorded lands designated in the agreements as lands over which Aboriginal rights remain. In the *Nisga'a Agreement* these lands, *Nisga'a Lands*, are protected from loss of this status⁹⁷. While the Nisga'a Nation will come to enjoy the right to grant interests in their land, up to and including fee simple estates, the land so treated *remains* Nisga'a Land⁹⁸. The Nisga'a Nation will

⁹⁵ See section 5.6.2: "Subject to 6.3.6 [certain rights of access], Government shall continue to administer every Encumbering Right ['every licence, permit or other right, and every right, title or interest described in 5.4.2'] including granting renewals or replacements described in 5.4.2.3 ['any renewal or replacement of a right, title or interest ... less than the entire fee simple therein existing at the date the land became Settlement Land, ... or a licence, permit or other right ... issued by the Government for the use of land or other resources existing at the date the land became Settlement Land'] and new rights described in 5.4.2.4 ['any new licence, permit or other right in respect of, Petroleum ... and Mines and Minerals'], in the public interest and in accordance with the Legislation which would apply if Settlement Land were Crown Land."

⁹⁶ See, for example, section 5.5.0: *First Nation Management Powers*. Under this heading we find authorization for a Yukon First Nation to "enact bylaws for the use and occupation of its Settlement Land, ... develop and administer land management programs related to its Settlement Land, ... charge rent or other fees for the use and occupation of its Settlement Land, and ... establish a system to record interests in its Settlement Land."

⁹⁷ There are no provisions in the Nisga'a Agreement for the expropriation of *Nisga'a Lands* by the provincial government. They may consider expropriation of Category A or B land, but this is subject to the rules for such set out in the Agreement, rules which discourage expropriation. Furthermore, should the province expropriate the fee simple title it must provide for replacement lands which may then become Category A or B land. The federal government may expropriate any land owned by the Nisga'a Nation, but the rules spelled out in the Agreement are so strict as to make this an unlikely event. The section on *Federal Acquisition of Interests in Nisga'a Lands and Nisga'a Fee Simple Lands* begins with a statement of principle, acknowledging that the federal government recognizes "that it is of fundamental importance to maintain the size and integrity of *Nisga'a Lands* and *Nisga'a Fee Simple Lands*". See the *Nisga'a Agreement*, *supra* note 6, Ch. 3, paragraphs 55 - 72.

⁹⁸ *Nisga'a Agreement*, *supra* note 6, Chapter 3 ("Lands"), paragraphs 4 and 5:

4. In accordance with this Agreement, the Nisga'a Constitution, and Nisga'a Law, the Nisga'a Nation may:

dispose of the whole of its estate in fee simple in any parcel of Nisga'a Lands to any person;

even have the power to *add* to its Nisga'a Lands, acquiring land contiguous with its borders, so long as all relevant parties agree (the land-owner, the province, and the federal government)⁹⁹.

Contrast this situation with that found in the *Yukon Agreement*. The Yukon First Nations will be open to the loss of their land, land which, once registered, expropriated, or granted, becomes non-Aboriginal title land. While subsequently the land may be de-registered, released back to the First Nation, or its fee simple estate regained, its status as *Aboriginal* lands will never be recovered. Yukon First Nation Aboriginal lands can only be diminished in size. It is not clear how an agreement founded on the diminishment of Aboriginal rights can act in the interests of the Aboriginal signatories.

Strategies to avoid this sort of outcome in future negotiations must be developed and implemented. Doctrine in *Delgamuukw* suggests strategies, in particular the use of fiduciary doctrine to force the governments of Canada to respect Aboriginal interests in land outside a treaty. This is the sort of maneuver which can be brought to bear when the Crown comes to the negotiating table seeking the sort of 'surrender and diminish' agreement the Yukon First Nations have entered. Those Aboriginal peoples with ties to non-treaty lands retain their title-claims or rights potentially in perpetuity¹⁰⁰. This fact, coupled with the opportunities presented by the demand placed on the Crown to meet its fiduciary obligations, must be brought to bear when the Crown negotiators attempt to force Aboriginal peoples onto an assimilative path.

III. (i) A Return to the Aboriginal Perspective

As we noted in an earlier section, the Supreme Court has acknowledged the existence, though downplayed the importance, of the Aboriginal perspective¹⁰¹. Besides acting as one possible source of Aboriginal title, what this perspective shows us, the court has held, is the sort of 'special relation' that exists between an Aboriginal people and their traditional territory. It is this special relationship, recall, that must be preserved in the future, necessitating the inherent limit to Aboriginal title. Looking at the agreements from this perspective reveals some concerns about the agreements.

and from the whole of its estate in fee simple, or its interest, in any parcel of Nisga'a Lands, create, or dispose of any lesser estate or interest to any person ... without the consent of Canada or British Columbia.

5. A parcel of Nisga'a Lands does not cease to be Nisga'a Lands as a result of any change of ownership of an estate or interest in that parcel.

⁹⁹ *Ibid.*, Chapter 3 ("Lands"), paragraph 11:

If, at any time, the Nisga'a Nation, a Nisga'a Village, a Nisga'a Corporation or a Nisga'a citizen owns the estate in fee simple to a parcel of land that is contiguous with Nisga'a Lands, other than land referred to in Appendix B-1, B-2, or B-3 [lands already designated Nisga'a Lands], the Nisga'a Nation may, with the consent of the owner and the agreement of Canada and British Columbia, add the land to Nisga'a Lands. If the owner consents and Canada, British Columbia, and the Nisga'a Nation agree that the land may be added to Nisga'a Lands, the land will become Nisga'a Lands upon receipt by Canada and British Columbia of written notice in accordance with that agreement.

¹⁰⁰ One effect of the constitutionalization of Aboriginal rights is that unilateral extinguishment of these rights by governments of Canada is no longer possible. It may be that at some time in the future the artificial line separating post-1982 and pre-1982 situations will be removed.

¹⁰¹ See earlier discussion of the place of the Aboriginal perspective in *Delgamuukw*, s. II (iii).

In the *Yukon Agreement* we find that while “the parties to the Umbrella Final Agreement wish to recognize and protect a way of life that is based on an economic and spiritual relationship between Yukon Indian people and the land”, only the Yukon First Nations express an interest in wishing “to retain, subject to Settlement Agreements, the aboriginal rights, titles and interests they assert with respect to Settlement Land.”¹⁰² How, though, do the provisions in the Agreement operate to protect a way of life based on a spiritual relationship, while Aboriginal rights are down-played? It would seem that without a *full-blooded* concept of Aboriginal title¹⁰³ the status of the land will always be question, and the economic relationship will continue to eclipse the spiritual.

There is a similar concern with the Nisga’a Agreement. Although there is an attempt to provide a combination of land-owners rights and a protective shield from external intrusion¹⁰⁴ (two key elements that would have to go into a structure that could from *within Canada* work to protect the special relationship the Nisga’a have with their traditional territories), the ‘modification’ and ‘release’ of s.35(1) rights leads to some questions.

In the Agreement the modification process is presented as one which transforms pre-Agreement rights (the sort of rights the Supreme Court struggles to define) into Agreement-determined rights. The latter set of rights are spelled out, in relation to the land, in terms of fee simple title, “the largest estate known in law.”¹⁰⁵

But whether this can be thought of as a ‘modification’ is questionable. In a process of modification some of the properties of a thing alter, while others remain the same. The *same thing* exists after the modification, but with alterations in its make-up. Key to the application of this concept, then, is the notion that there are certain core or essential elements that go into making up the thing modified, a certain number of, or subset of which, *must* be preserved through the modification.

Can this be said of the process of ‘modification’ spelled out in the *Nisga’a Agreement*? The features of Aboriginal title were themselves unclear before the Agreement was reached (if we suppose, again, that it is the task of the court to determine these). Furthermore, the features of Aboriginal title that remain after the modification seem radically different, in many seemingly vital ways, from those of pre-Agreement Aboriginal title (given what the courts *have said*).

The question, then, is whether the ‘modification’ results in a concept of title which can function to protect those interests in land the Nisga’a Nation holds dear. Bear in mind that the Supreme Court has argued that since Aboriginal rights are rights specific to Aboriginal peoples they must issue from central elements of ‘Aboriginality’¹⁰⁶. If post-Agreement rights are modified beyond some point, one would seem to have to question their ‘Aboriginality’, regardless of what the parties to the Agreement might claim. Those parties seeking similar agreements will need to draw on the discussion in *Delgamuukw* which situated questions of Aboriginal title on the periphery of the ‘Aboriginality’ approach to Aboriginal rights. This is one place at which the ‘right to land’ foundation of Aboriginal title must be stressed.

¹⁰² *Yukon Agreement*, *supra* note 6, Preamble.

¹⁰³ This would not be the doctrine of Aboriginal title enunciated in *Delgamuukw*, for in light of the power of the Crown to infringe, and the inability of Aboriginal owners to freely use their land without establishing their claim, it suffers from anemia.

¹⁰⁴ This shield is formed by the fee simple status of Nisga’a Lands (lands held communally), the enhanced management powers over Nisga’a Lands, the transfer of control (at least at the administrative level) over third-party leases to the Nisga’a government, and expropriation provisions which severely limit provincial expropriation and come close to forbidding federal expropriation (see footnote ____).

¹⁰⁵ *Nisga’a Agreement*, *supra* note 6, Chapter 3 (“lands”), paragraph 3.

¹⁰⁶ *Van der Peet*, *supra* note 3, at _____

For both sorts of treaties, though, the central issue remains: will Aboriginal parties find that their interests in land are protected by the structures to which they have agreed? *Delgamuukw* offers some hope in this regard, if it can help Aboriginal peoples move toward agreements which offer the people a significant land-base while retaining the language of Aboriginal rights. With a satisfactory land-base, and treaties which are sufficiently open-ended to accommodate the reinvigoration of communal decision-making regarding land use policy, Aboriginal peoples may be able to construct new legal and political structures capable of protecting a truly Aboriginal form of title.

III. (ii) The Degree to Which *Delgamuukw* May Act to Protect Aboriginal Land Interests in Modern Treaties

If it is not entirely clear that modern treaties will protect the special connection to the land that informs Aboriginal title, why should an Aboriginal people enter the modern process? After all, the determination of Aboriginal title by the Supreme Court would seem to leave Aboriginal peoples with legal recognition of significant rights to their traditional territories. What compels an Aboriginal people to negotiate?

Kent McNeil provided two reasons for entering the process, even in light of the determination in *Delgamuukw*: to decide which Aboriginal peoples have title to what lands, and to remove the hindrance to development posed by a particular feature of Aboriginal title, its inalienability to all except the Crown¹⁰⁷. As we have seen, the *Nisga'a* and *Yukon Agreements* provide for the establishment of settlement lands, thus settling the first issue, and, in their respective ways¹⁰⁸, create environments for economic development, in exchange for the release to the Crown of most land over which Aboriginal title is claimed. Besides these benefits, without a Treaty the land rights of an Aboriginal people are subject to infringement, as these land rights are not strongly protected by the Constitution. A treaty minimizes this concern by spelling out respective spheres of power, reducing the possibility of provincial or federal intrusion. Furthermore, the rights codified in the treaty are considered 'treaty rights', recognized and affirmed under s. 35 (1) of the *Constitution Act, 1982*.

Still, however, the concern voiced in the last section remains – will Aboriginal interests in preserving Aboriginal ways of life be protected by future Agreements? The sphere of power carved out for Aboriginal peoples is never particularly large or powerful, and the prospect of economic development that drives much of the interest in reaching an agreement promises continued, and even expanded, exploitation of resources. Historically the expansion of resource exploitation has meant *both* the solidification of ways of thinking of the natural world which deny the spiritual connections that inform the Aboriginal perspective *and* the destruction of the natural world that the Aboriginal perspective decries.

What effect will the doctrine in *Delgamuukw* have on (i) the nature of modern treaties as assimilative measures, and (ii) the aspirations of Aboriginal peoples to retain an Aboriginal way of life? We can explore this question by examining the extent to which the modern treaty process synchronizes with the particular pronouncements in *Delgamuukw*.

¹⁰⁷ *Defining Aboriginal Title*, *supra* note 4, at 27 – 28.

¹⁰⁸ Just as there is a cash settlement as part of the *Nisga'a Agreement*, each Yukon First Nation signing an Agreement under the *Umbrella Agreement* receives a cash payment. Most relevant to future development, however, is the designation of Nisga'a Lands as held under fee simple title, and the provisions in the *Yukon Umbrella Agreement* that specify that Category A and B land is held in a form equivalent to fee simple. This facilitates the use of the land itself in raising capital and attracting investors.

IV. The Degree of Synchronization Between the Modern Treaty Process and *Delgamuukw*

IV. (i) Land Rights

As we have seen, by means of modern treaties Aboriginal peoples acquire land over which they are recognized as land-owners. Since under the doctrine developed in *Delgamuukw* an Aboriginal people can also establish land-owner status over those lands in relation to which it maintained exclusive use and occupation, from pre-treaty to post-treaty one form of land ownership over one parcel of land is exchanged for another form of land ownership over a related (though most definitely smaller) parcel of land.

Regardless of size, the two land masses would not seem to be equivalent in land-owner status, for while under Aboriginal title the land claimed may be put to a variety of uses, not all of which need be tied to traditional practices, the inherent limit to this title places possible restrictions on exploitation, restrictions which one might suppose are removed by a treaty.

The limit on the use of land by the Aboriginal party is defined by the historic special connection to this land, a connection which partially defines the nature of their Aboriginal title. A question lingers, however, even after surrender¹⁰⁹: does this limitation continue post-treaty? In both the *Yukon* and *Nisga'a Agreements* there are provisions which spell out the *continuation* of 'Aboriginal rights' over certain core lands defined by the treaties¹¹⁰. If these lands remain under a form of Aboriginal title, will the limit inherent to the notion of Aboriginal title continue? Can, for example, the Nisga'a pave over core *Nisga'a Land*, land that was once a traditional hunting ground?

The brief mention of surrender in *Delgamuukw* does not offer sufficient guidance, for Lamer C.J. only states that: "If [A]boriginal peoples wish to use their lands in a way that [A]boriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so."¹¹¹ This does not directly address the issue, namely whether a surrender/modification which attempts to achieve certainty, *and yet preserve some measure of Aboriginal title*, will remove this limitation on use.

The fundamental question that needs to be answered is whether 'surrender' (or 'modification') is evidence of the intent of the Aboriginal party to forsake their special connection to their traditional lands. If this is so, then the treaty process would seem to signal the end of all 'historic' limitations on all lands concerned, for the Aboriginal party in question has chosen to break its ties with the past, moving itself into the economically-driven world of land ownership. But if this is not so – and there are certainly reasons to think this is the case in many if not most treaty situations – then the reason for the limitation remains, and the limitation, it would seem, ought still to exist.

Why would one suppose that a treaty which contained a clear surrender (or modification) provision is not understood, by the Aboriginal party, to be a separation from past principles and practices? One need only look to the statements of intent leading into the agreements. As noted earlier, the Yukon First Nation signatories were clear in what they hoped to achieve by way of the treaty process – the establishment of a structure which would act to protect their traditional ways of life. Similarly, the Nisga'a state that they have entered into the final agreement in order to protect their traditional way of

¹⁰⁹ Keeping in mind that the *Nisga'a Agreement* might appear to some to fit the surrender/exchange model, though couched in different terms.

¹¹⁰ As noted earlier, the *Yukon Agreement* speaks of the surrender of Aboriginal rights, including title, to all lands *except* core Settlement Lands. See footnotes 78 - 81.

¹¹¹ *Delgamuukw*, *supra* note 2, at paragraph 131.

life¹¹². In modern treaties Aboriginal peoples hope to retain a measure of their Aboriginal rights¹¹³, evidence of their intent to maintain their Aboriginal status, a fact which accords with the reasoning behind imposing the inherent limit on their title.

Insofar as the doctrine in *Delgamuukw* is intended to work for the same end – the protection of Aboriginal ways of life – the inherent limit *should* continue to function, raising a limit on the uses to which even Aboriginal peoples with treaties can put their ‘core’ lands¹¹⁴. It would seem, then, that even clear surrender (or modification) provisions in the modern context would not necessarily remove the limit on title described in *Delgamuukw*. Post-treaty lands might still be under a form of Aboriginal title which carried over this element from pre-treaty title lands.

What this hints at, then, is a break between the doctrine in *Delgamuukw* and the modern treaty process. While modern treaties ostensibly aim to create a new set of legal rights, a set which replaces that which might have existed pre-treaty, the nature of Aboriginal rights and title may be such that these new rights will need to be carefully crafted if they are to truly achieve ‘certainty’.

IV. (ii) Degree of Synchronization: Questions of Jurisdiction

There are broad and complex questions surrounding the distribution of jurisdictional powers and authority both before and after modern treaties have been ratified. One can ask (i) whether, and if so to what extent, the provinces enjoy jurisdiction over lands which are subject to Aboriginal title, (ii) whether the provinces must – by law and not merely practical necessity – participate in the treaty-process, and (iii) whether a modern treaty can operate in a quasi-contract manner, exchanging constitutionally protected Aboriginal rights for treaty-defined rights and responsibilities subject to a newly created matrix of federal and provincial powers and duties.

These sorts of questions will be addressed together, under a general discussion of the extent to which the decision in *Delgamuukw* has something to say about issues of federal and provincial jurisdiction, remarks which in turn may have some effect on modern treaties. To a large degree the issue of federal and provincial jurisdiction was discussed in earlier sections, wherein the question of legitimate legislative infringement of Aboriginal title was addressed.

When the analysis of legitimate legislative infringement is combined with certain remarks from both *Delgamuukw* and other case-law a major – and apparently unresolved – question emerges, that of the status of a provincial government’s powers vis-a-vis Aboriginal title lands. In a latter section of the decision in *Delgamuukw*, the court examined the power of a province to extinguish Aboriginal rights

¹¹² See, for example, the *Nisga’a Agreement*, *supra* note 6, *preamble*:

WHEREAS the Parties acknowledge the ongoing importance to the Nisga’a Nation of the *Simgigat* and *Sigidimhaanak* (hereditary chiefs and matriarchs) continuing to tell their *Adaawak* (oral histories) relating to their *Ango’oskw* (family hunting, fishing, and gathering territories) in accordance with the *Ayuuk* (Nisga’a’ traditional laws and practices)

¹¹³ Again, see the mode of surrender in the *Yukon Agreement*, whereby over Category A and B lands a measure of Aboriginal rights are retained, and the mode of modification in the *Nisga’a Agreement*, whereby Aboriginal rights remain in a modified form over *Nisga’a Lands*. This desire to preserve Aboriginal rights over traditional hunting, fishing and trapping lands is evident, of course, in the older treaties as well. See Patrick Macklem, “the Impact of Treaty 9 on Natural Resource Development in Northern Ontario” in *Aboriginal and Treaty Rights in Canada*, *supra* note 5, at 97.

¹¹⁴ The reader might have surmised that, to some extent, I am making light of the inherent limit, and questioning the status of the process of ‘modification’ in the *Nisga’a Agreement*.

(including title), and found that, since (1) Aboriginal title lands are included under “Lands reserved for the Indians” in s. 91(24) of the *Constitution Act, 1867*¹¹⁵, and (2) this places these lands under *exclusive* federal jurisdiction, then (3) the provinces have not had the power, since Confederation, to extinguish Aboriginal title¹¹⁶. However, the reasoning in this section does not seem to harmonize with that employed in the discussion of legitimate legislative infringement. Nor does the discussion of legislative infringement seem to harmonize with jurisprudence on the power of the province vis-a-vis Aboriginal lands.

It has never been the case that the province could legislate in relation to Aboriginal reserve lands. Furthermore, the interest in Aboriginal reserve lands was held by the Supreme Court to be the same as the Aboriginal interest in Aboriginal title lands. It would seem, then, a mystery that the provinces could, as Lamer C.J. intimates, be in a position to authorize and control such activities as mining, forestry and agriculture over Aboriginal title lands (activities which fall under provincial jurisdiction, per s. 92 of the *Constitution Act, 1867*¹¹⁷).

A number of commentators have argued that the only way out of this confusion is for the court to re-address the situation in the future, and in the course of their re-assessment uphold the long-standing restriction on provincial power vis-a-vis Aboriginal lands¹¹⁸. The claim has even been made that Lamer C.J. “did not even ask, let alone answer, [the] question”¹¹⁹ of how the provinces could infringe Aboriginal title when this lies under exclusive federal jurisdiction.

Aboriginal peoples need not, however, view this situation as frightening or paralyzing. Rather it should be thought of as an opportunity, for in condoning the legitimacy of provincial infringement the Court has also enveloped any province engaged in infringing activity in a web of responsibilities and requirements. These are the linchpins upon which to base strategies designed to maximize negotiation strength. Should a province negotiate in a less than respectful manner, it is open to Aboriginal peoples to highlight these responsibilities and requirements, calling on the province to respect those elements of Aboriginal title which go into structuring the fiduciary obligations that *must* attach to this newfound provincial power to infringe. Has the province properly respected the Aboriginal right to choose the uses to which the land in question is to be put? Has the province properly respected the Aboriginal exclusive right to use and occupy the land in question? Has the province properly respected the Aboriginal interest in the economic component attached to the title to the land in question?

IV. (iii) Degree of Synchronization: *Delgamuukw* on Power Over Land

The fact that opportunities may be found in the Court’s indication that a province might enjoy the power to legislate in relation to Aboriginal lands does not address the myriad questions swirling around the relation between the provinces and Aboriginal peoples.

First, it should be borne in mind that while particular Aboriginal peoples may enjoy the right to the exclusive use and occupation of their title lands, this *in itself* affords them little more than peculiar ownership rights. Until jurisdictional matters are directly addressed by the Supreme Court, such powers remain squarely in the hands of the governments of Canada. While the ownership rights of Aboriginal

¹¹⁵ *The Constitution Act, supra* note 63.

¹¹⁶ *Delgamuukw, supra* note 2, at paragraph 176.

¹¹⁷ *The Constitution Act, 1867, supra* note 62.

¹¹⁸ See Kent McNeil, *Defining Aboriginal Title, supra* note 4, at 24-25; Kerry Wilkins, “Of Provinces and s. 35 Rights”, *supra* note 65.

¹¹⁹ *Defining Aboriginal Title, supra* note 4, at 24.

title-holders are constitutionally protected, this does not appear to play out in noteworthy protection for Aboriginal title lands. These lands are still subject to legislative enactments (including those of the provinces, if the remarks in *Delgamuukw* stand). What ‘constitutional protection’ seems to amount to, when all is said and done, is little more than recognition that Aboriginal interests in land have their source in the prior presence of Aboriginal peoples in Canada, and that this temporal priority might need to be ‘respected’. Mere temporal priority need not, however, manifest in *strong* forms of title, afforded a significant degree of constitutional protection, when it only seems to signal – in the mind of the Court – an historical piece of luck.

This brings us back to a question touched on earlier – why, if an Aboriginal people enjoy significant rights to their land, would they exchange these for treaty rights? Imagine an Aboriginal people, emboldened by the doctrine in *Delgamuukw*, undertaking to go out on its traditional territory to harvest trees, selling them to a local saw-mill. Is this not the sort of thing a *land-owner* is entitled to do? Why, then, would these people need to bother entering into a treaty, especially when this would likely mean the loss of just these sorts of rights over most of its traditional territory?

Let us imagine that this tree-harvesting was conducted in such a way that it would not interfere with the traditional uses of this land (say, as a hunting ground). Let us also imagine that the decision to take the trees was reached on the community level, not by a few individuals excited by the prospect of finally realizing some return on what they perceive as Aboriginal land. This would be to meet the major concerns expressed by the Supreme Court, and fit this activity within those apparently authorized under the form of title enjoyed by this Aboriginal group.

Here, however, are where ‘jurisdictional’ issues enter the scene. It has not been *established* that this piece of land is within the traditional territory of the people in question. As much as it may be known *within the community* that this is traditional land, it must be *shown* to the satisfaction of the *Canadian governments*, for these governments enjoy both jurisdiction and the underlying title to this land. The Aboriginal people would likely need to either litigate or negotiate to establish their claim. We have looked at the sorts of tests they would need to meet.

Furthermore, as was just noted, the Aboriginal people in question lack jurisdictional authority over this land. They must, then, follow whatever rules and regulations exist in relation to the harvesting and selling of timber, even if this should be done on ‘their’ land. Again, while the Aboriginal people in question may be *entitled* to do as they have done, they must still, under the doctrine of Aboriginal title, acknowledge the fact that they exist within Canada, and so are subject to the sovereignty of the Crown. To *exercise* their entitlement, then, requires that they engage with the representatives of the Crown, and obtain the proper authorization for the activities they wish to engage in, when these activities are regulated by one or another Crown entity.

In this regard, then, *Delgamuukw* can be said to underscore the need for an Aboriginal people to enter into a treaty with the governments of Canada. Without an agreement in place the power of an Aboriginal people to enjoy the fruits of their lands is severely restrained. With an agreement, however, these people may find themselves able – at the very least – to *act* in the role of land-owners, benefitting from the authorization to use their own land in certain specified ways, and perhaps having a hand in the management of their lands.

The second lesson to cull from this discussion is that arrived at earlier – Aboriginal peoples must be ready to adopt any number of strategies either flowing from, or suggested by, the doctrine in *Delgamuukw*, as they strive to achieve some measure of fairness in their dealings with the Crown. In some cases it may be appropriate tactics to go out into the woods and cut some timber, though title may not yet have been established to the satisfaction of the Crown, and proper regulations and the like will be blatantly disregarded. After all, *if* this land were shown to be under title held by these people, and *if* the Crown were acting honorably in this situation, cutting some trees might be completely appropriate. When such activity is viewed through the lens of *Delgamuukw*, however, it should be clear that it is likely not legally licensed.

In other cases (or even at a different stage of the same situation) it may be better tactics to refrain from

advancing what a community perceives as its land rights in this manner, and focus instead on calling into question the manner by which the governments of Canada are respecting the claims to territory the Aboriginal people assert. Again, this would be to call into play such *tools* as fiduciary doctrine.

IV. (iv) Degree of Synchronization: Proof of Title and Modern Agreements

As was just noted, proving Aboriginal title is essential to the exercise of the entitlements that it provides. Over the last twenty years a set of requirements for proving title in land claims situations has developed. We need to explore the degree to which the remarks on proof of Aboriginal title in *Delgamuukw* intersect with, or potentially alter, this established set of requirements.

Federal land claims policy has been tied, for much of the last twenty years, to a standard of proof that has evolved out of criteria for Aboriginal title claims set out in *Baker Lake*¹²⁰.

On the surface *Delgamuukw* might not appear to have a significant impact on these criteria – the requirements might seem to roughly match. The obvious difference between federal policy and doctrine in *Delgamuukw* would seem to be with the nature of the occupation to be shown. While *Delgamuukw* allows for proof of title not shown on the basis of traditional activities, the land claim policy, built on years of jurisprudence which focused on ‘aboriginality’, restricted proof of title to showing use and occupation based on traditional practices. In this regard, however, it is not clear that *Delgamuukw* would lead to any significant alterations in the modern treaty process, for, as Lamer C.J. noted¹²¹, in showing exclusive occupation and use an Aboriginal people would need to show just the sorts of traditional activities that would have gone into satisfying the standard federal policy requirements.

¹²⁰ *Baker Lake*, *supra* note 3. Federal policy requires that an Aboriginal people claiming title show that:

- It is, and was, an organized society.
- It has occupied the specific territory over which it asserts title from time immemorial
- The occupation of the territory is largely to the exclusion of other organized societies
- There is continuing use and occupancy of the land for traditional purposes
- Aboriginal title and rights to use of resources has not been dealt with by treaty

Until *Sparrow* [*supra* note 3], the federal government also required that Aboriginal title not be extinguished by other lawful means. *Sparrow* made it clear, however, that only legislative action which demonstrated a ‘clear and plain’ intent to extinguish the title in question would suffice. Furthermore, since the constitutionalization of Aboriginal rights, adverse legislative action is limited to ‘infringement’ – effectively limiting possible government acts of extinguishment to pre-1982 – measured with the *Sparrow/Gladstone* test. See *Van der Peet*, *supra* note 3.

As the *Royal Commission on Aboriginal Peoples* pointed out [*Report of the Royal Commission*, *supra* note 138, at 535 - 539], the general tenor of this policy is questionable, given that in *Simon* [R. v. Simon (1985) 2 S.C.R. 387] and *Bear Island* [Ontario (Attorney General) v. Bear Island Foundation (1991) 2 S.C.R. 570] the Court held that evidentiary tests which are impossible to meet without written evidence are to be avoided. This has been the set of hurdles, however, that Aboriginal peoples have had to get over.

¹²¹ This followed from the fact that occupancy could be grounded in both the common law and the Aboriginal perspective on land [*Delgamuukw*, *supra* note 2, para. 147]. Since “physical occupation is proof of possession at [common] law” [para. 149], title could be shown by demonstrating the ‘physical reality’ at the time of sovereignty. This would be to focus, then, on traditional activities, for an Aboriginal people would need to show a pattern of occupation which would suffice to ground title, a pattern of occupation which would, furthermore, have to show that “their connection with the piece of land ... was of central significance to their distinctive culture.” [para. 150. Here Lamer C.J. was quoting himself, from *Adams*, *supra* note 3, at para. 26].

Potential distinctions do emerge, however, when we return to the question of the grounding of occupation in both traditional Aboriginal systems of law and physical occupation. In the reasoning of the Supreme Court we find reference to the recognition of Aboriginal systems of law in relation to land title and land use. These Aboriginal legal systems can be considered, the court held, in order to assist in the establishment of Aboriginal title, in that such systems can bolster a peoples' claim to the *exclusive* control of a tract of land.

While the introduction of Aboriginal legal systems plays a minor role in the reasoning in *Delgamuukw*, the impact on treaty-making may be significant. While pre-*Delgamuukw* agreements were built on demonstrations of the exclusive *physical* occupation of traditional territories, in allowing that the source of Aboriginal title lies in both physical occupation and the 'Aboriginal perspective', the Supreme Court has at least made it feasible that an Aboriginal party attempt to demonstrate the exclusive *control* of their territories (through such mechanisms as trespass laws and laws governing land title and land use).

Unfortunately, however, while this implication for the provision of proof of Aboriginal title can be pulled out of *Delgamuukw*, there is nothing in this Supreme Court decision which forces the governments of Canada to modify their approaches to negotiating modern treaties in recognition of this *potential* approach to showing exclusivity and the implications which naturally flow. The governments of Canada can continue to demand nothing less than evidence of physical occupation based on traditional activities in support of a claim to Aboriginal title¹²². While the Supreme Court pulled in the notion of an Aboriginal perspective, and argued that this perspective is joined with physical occupation as a *source* of Aboriginal title, federal and provincial negotiators are free to disregard Aboriginal systems of law as they relate to land title and land use in favour of demonstrations of physical occupation. Besides the fact that the decision does not necessarily bind or control the actions of the federal and provincial governments, the decision itself made every attempt to introduce Aboriginal systems of law in ways which would not imply that these systems are relevant to the *content* of Aboriginal title.¹²³

IV. (v) Degree of Synchronization: Revenue-Sharing and Co-Management Arrangements

A long-standing concern with revenue-sharing provisions in modern treaties has been that they should be "seen more correctly as a way of spreading cash compensation over a longer period of time, rather than securing a significant continuing source of revenue for Aboriginal claimants."¹²⁴ Furthermore, federal policy on land claims agreements;

requires that any arrangement [concerning Aboriginal participation in managing lands and resources] recognize the overriding powers of non-Aboriginal governments. While numerous management boards and committees have been set up under the various comprehensive land claims agreements, these bodies remain advisory ... Non-Aboriginal governments retain full jurisdiction and final decision-making authority.¹²⁵

While there has been some movement on the revenue-sharing front, little has changed in regard to the Crown's position on co-management schemes. The *Yukon Agreement* accords the First Nation signatories

¹²² The Aboriginal people, in showing physical occupation, attempt to show the exclusion, by and large, of other Aboriginal peoples.

¹²³ See section II (iii).

¹²⁴ *Royal Commission on Aboriginal Peoples*, *supra* note 138, at 543.

¹²⁵ *Ibid.*, same page.

royalties for minerals and surface resources culled from their core lands, and promises a cut of ‘Crown royalties’ (monies from activities on Crown land, in relation to resources owned by the Crown) spread out over those Yukon First Nations entered into final agreements under the Umbrella Agreement¹²⁶. The *Nisga’a Agreement* follows a similar path, in that royalties and other fees in relation to renewable and non-renewable resources on core settlement lands fall into the hands of the Nisga’a Nation¹²⁷. For example, as the Nisga’a Nation passes through a ten year transition process, it gradually acquires a significant share of timber harvesting on Nisga’a Lands¹²⁸. In effect, then, both the Yukon First Nations and Nisga’a Nation obtain the sorts of benefits befalling private land-owners in possession of mineral rights and renewable resources.

These various arrangements would seem to ensure, to the extent that as land-owners the First Nations can manage the resources on and under their lands, a continuing source of income¹²⁹. However, *control* of the process of exploitation remains largely in the hands of the federal and provincial governments¹³⁰.

Once again, this fits with the doctrine propounded in *Delgamuukw*. The expanded role revenue-sharing agreements appear to play accords with the sort of title recognized by the Court. In looking at legislative infringement, and the nature of, and means of discharging, the Crown’s fiduciary duty, it was noted that in impacting on the ‘inescapable economic component’ of Aboriginal title the Crown may have to compensate the title-holders¹³¹. Modern treaties recognize this form of compensation, and provide

¹²⁶ *Yukon Agreement*, supra note 6. See, for example, ‘objectives’ listed in 22.1.1.1, 22.1.1.2, and 22.1.1.3. For ‘Crown Royalty Sharing’, see 23.2.0. For provisions regarding rents and such on Settlement Lands, see 5.5.1.3 and 5.6.3 to 5.6.6. Note that the Yukon First Nations will only own materials such as forest resources on core Settlement Lands [17.2.1], while they are limited to use of Crown land resources for ‘traditional’ purposes [17.3.1.1 to 17.3.1.3].

¹²⁷ *Nisga’a Agreement*, supra note 6, Ch. 3, paragraph 20: “Nisga’a Lisims Government has the exclusive authority to determine, collect, and administer any fees, rents, royalties, or other charges in respect of mineral resources on or under Nisga’a Lands.”

¹²⁸ *Ibid.*

¹²⁹ There are some odd provisions in the Agreements. For example, while the Yukon First Nations come to enjoy a cut of ‘Crown royalties’, they can only do so to the extent that these monies would not afford Yukon First Peoples in general an income greater than that enjoyed by the average Canadian. Furthermore, this potentially substantial source of income is held out as a large carrot, for only those First Nations which reach agreements under the Umbrella Agreement are entitled to a share of these monies. See *Yukon Agreement*, supra note 6, 23.2.2.

¹³⁰ See, *Yukon Agreement*, supra note 6, at 5.6.0 [‘Administration by Government’], and in particular 5.6.2 [“... Government shall continue to administer every Encumbering Right (these comprise a long list of ‘exceptions and reservations’ to the rights and titles granted Yukon First Peoples over their Settlement Lands – i.e. rights, titles, interests, licences, use-permits, rights-of-way, easements, reservations, exceptions, restrictions, and special conditions laid out in 5.4.2.1 to 5.4.2.10) including granting renewals or replacements described in 5.4.2.3 and new rights described in 5.4.2.4, *in the public interest* and in accordance with the Legislation which would apply if Settlement Land were Crown Land” (emphasis added)]. Note once again the provisions which provide for an accounting for rents, royalties, and the like collected by the Government over Settlement Land [5.6.3 – 5.6.6], and 5.6.7, wherein the Government attempts to release itself from “any fiduciary obligation to a Yukon First Nation for the exercise of any discretionary or other power in relation to the administration of any Encumbering Right”]; *Nisga’a Agreement*, supra note 6, ____

¹³¹ See sections II (vi) (a) and (b).

Aboriginal peoples with some share of the monies garnered from use of their traditional lands.

Co-management agreements reflect the form of *land control* that Aboriginal peoples have been accorded by the courts. As land-owners possessing a peculiar form of title, Aboriginal peoples are due – in most situations – no more than a *say* in how their lands are to be used. Should the Crown undertake to permit or operate resource exploitation on Aboriginal title lands, they must respectfully acknowledge the prior presence of Aboriginal peoples. This may mean having to consult with these land owners to ascertain and consider their interests in how the land is to be used. As the only recognized sovereign power, however, the Crown is free to authorize or undertake the resource exploitation regardless of the particular nature of the consultations, so long as they have been conducted in ‘good faith’¹³². Only in certain situations would consent of the land-owner be required. Consent would only seem required, according to the doctrine of ‘degree of scrutiny’ drawn up in *Gladstone*, when the Aboriginal peoples in question have something on the order of an absolute right to choose the ends to which the land will be put¹³³. This would assuredly, in light of decades of colonization, be a rare situation.

Modern treaties, by and large, recognize the sorts of land-owner rights detailed in *Delgamuukw*. Co-management agreements do not place Aboriginal peoples on an equal footing with the Crown, for the Crown continues to be the only sovereign power recognized by the courts of *Canada in Canada*. Aboriginal peoples are accorded the sorts of decision-making powers appropriate to a local sub-population *within* Canadian society. They certainly do not enjoy final decision-making authority, especially in relation to matters that might impact on the larger local or regional economy¹³⁴.

Examining revenue-sharing and co-management provisions does not, however, touch on all aspects of the doctrine of Aboriginal title developed in *Delgamuukw*. Recall that the third aspect of Aboriginal title which goes into structuring the Crown’s fiduciary duties, and the means by which they can be satisfactorily discharged, is the right to the ‘*exclusive use and occupation*’ of Aboriginal title lands¹³⁵. This aspect, according to the Court, can be accommodated by the Crown through efforts to involve Aboriginal title-holders in local resource exploitation operations.

The sorts of agreements currently being negotiated already aim for just such accommodation. Within both the *Yukon* and *Nisga’a Agreements*, for example, are provisions which speak of encouraging the development of more Yukon First Peoples and Nisga’a involvement in local resource exploitation¹³⁶. Modern treaties, as instruments designed to integrate Aboriginal peoples into the economically-driven Canadian society, already point in this direction. The question raised earlier emerges again – can modern treaties be reached which balance the spiritual with the economic?

¹³² That is, assuming that the proper manifestation of the Crown makes these decisions.

¹³³ See sections II (vi) (a) and (b).

¹³⁴ See, for example, the *Yukon Agreement*, *supra* note 6, 2.6.2.1 [“subject to 2.6.2.2 to 2.6.2.5 (provisions concerning inconsistency or conflict between legislation, laws and provisions emanating from various sources), all federal, territorial and municipal Law shall apply to Yukon Indian People, Yukon First Nations and Settlement Land”], and 11.6.0 [‘Approval Process for Land Use Plans’: herein we find that on a Regional level the Government, after consultation with affected First Nation, makes decisions on land use plans, while Yukon First Nations, after consultation with Government, makes decisions on land use plans in relation to Settlement Lands. In this regard it is interesting to note how ‘consult’ and ‘consultation’ are defined in the Agreement: after discussing procedural matters, the definition requires that there be “full and fair consideration by the party obliged to consult of any views presented”. This does not require acquiescence, no matter the importance of the views to the First Nations parties, and vice versa]; and the *Nisga’a Agreement*, *supra* note 6, at ____

¹³⁵ *Delgamuukw*, *supra* note 3, at paragraphs 166 – 167.

¹³⁶ See the *Nisga’a Agreement*, *supra* note 6, ch. ____

Here Aboriginal peoples must be prepared to confront the Court in its understanding of the nature of the ‘right to land’ inherent in Aboriginal title. While it may be difficult to argue for a broadening of the range of situations in which Aboriginal consent would be required for legislative action, there must be a broadening of the range of situations within which governments of Canada must reach an agreement with Aboriginal peoples on the use of lands in question before moving on. To speak of enjoying an *exclusive* right to the use and occupation of Aboriginal lands *must* imply more of a ‘pay-out’ than simply having the right to be involved in local resource operations. The right to choose the uses to which the land will be put is logically bound up with the exclusive right to use and occupy the land¹³⁷, and it is this single joint right which must be employed in pushing for modern treaties which go beyond ‘advisory councils’ and operational involvement to true partnerships in land policy institutions and land use administration.

V. Conclusion: The Key Role *Delgamuukw* Plays in Relation to the Modern Treaty Process

There would seem to be no *conflict* between the doctrine of Aboriginal title developed by the Supreme Court and the modern treaty land provisions – if anything one would have to say that the decision in *Delgamuukw* seems designed to entice those Aboriginal peoples with claims to non-treaty lands to enter the treaty process. By holding out to Aboriginal peoples rights to their lands which they must exert considerable effort to enjoy, the doctrine of Aboriginal title promises significant material gains for Aboriginal communities, but gains by and large realizable on the condition that they enter agreements with the governments of Canada. Absent a treaty an Aboriginal people might be capable of demonstrating Aboriginal title over a large expanse of ‘traditional territory’, but threats against their traditional ways of life would continue unabated, and the people would always find themselves frustrated in their attempts to slow the advance of resource exploitation. Treaty negotiations are presented by both the Supreme Court and governments of Canada as salvation for Aboriginal peoples – should they forsake the past, and move into partnerships with forestry operations, mining interests, and the like, they can retake ‘control’ over their traditional territories.

These agreements continue, however, whether through surrender or modification, to eliminate or diminish the Aboriginal rights – including title – of the Aboriginal signatories. The ‘control’ they gain comes at the price of the historic rights to hunt, fish, and live in harmony with all the land and its spirits. Aboriginal parties *must*, then, take careful stock of the doctrine and principles expounded in *Delgamuukw*, and deploy their analysis to develop strategies that can move the modern treaty process away from the standard deflationary model toward a process which can at least hold out some promise for future generations.

While core doctrine and principles have been explored in this paper, a further tool in the drive to reform the modern treaty process involves knowing what the ‘wins’ and ‘losses’ are for the various parties, and how the governments of Canada benefit from decisions like *Delgamuukw*. Only then can Aboriginal parties be cognizant of the *purpose* of *Delgamuukw*, a prerequisite to ever being in a position to truly work with this decision to effect substantial change.

With modern treaties it can be difficult to identify any thing of any sort that the governments of Canada ‘give away’. They provide cash payments, but (i) these only go to providing the very sorts of services that they ought to provide regardless, if they are in fact the governments of all the peoples of Canada, and (ii) they are in amounts that are insignificant in light of the wealth generated by generations of colonization and exploitation¹³⁸.

¹³⁷ See Kent McNeil, ____

¹³⁸ Of course this cash payment is also partial payment for historic and future infringement of ownership rights, one which in every case is woefully inadequate compensation for decades – even centuries – of exploitation in the past, and untold years of exploitation in the future.

Furthermore, through a combination of taxation schemes and the transfer of service provision to the community level, the governments of Canada replace a system of ‘hand-outs’ with a system which will – at least the hope is – pay for itself through the local tax base (royalties and fees attach to the system at this point). The governments of Canada gain, on the other hand, the release of the ‘burden’ of Aboriginal title and rights over most of the land not yet covered by the treaty, thereby freeing up this land to investment and development. Meanwhile, the burden that remains is converted to, or confined within, powers befitting a municipality.

On the other hand, Aboriginal peoples give away or lose (1) most of their traditional territories, (2) the strength of their claims to title and rights, and (3) the struggle to regain their dignities and status as sovereign peoples entrusted with the stewardship of lands by the Creator. They ‘gain’ (a) some form of definite title to core lands, (b) continuation of service provisions (hopefully to at least minimally acceptable levels, though funding will shift), and (c) the ability to join in the greater Canadian economy. It can be argued that nothing is gained that the people did not enjoy, in principle, as entitlements, before entering an Agreement.

The key loss, again, is a *claim* to sovereign status. By accepting the terms of an Agreement, an Aboriginal people could be seen as *contracting* into Canada. It might be argued that they ‘voluntarily’ agree to end a struggle begun by their grandfathers and grandmothers.

This is a fairly tricky point, for modern treaties do not treat Aboriginal peoples entering them as people *outside* Canadian society, in need of an agreement to enter. Rather they treat Aboriginal signatories as exchanging rights they have *within Canada* for other defined rights. This is, however, to advance one perspective on the modern treaty process, one that Aboriginal peoples *need not accept*. Prior to entering a treaty, an Aboriginal people should be, and are, free to think of themselves as *non-consensual parties* to the Canadian contract. This should be perfectly acceptable on all sides, for informed consent is a liberal tenet for legitimate immersion in the Canadian landscape. A treaty should be regarded by all sides, then, as the natural path *into* the Canadian state¹³⁹.

Whether non-treaty Aboriginal peoples are thought of as people within Canada in need of a satisfactory internal agreement to solidify their place in the Canadian state, or as peoples just outside the Canadian periphery, in need of a contract to legitimate and structure their inclusion in the Canadian state, the modern treaty provides Canada a key justificatory tool, one that serves a vital purpose in the contemporary liberal democratic world. It is the modern treaty which brings about a solidification of the Canadian/Aboriginal relationship, a solidification which presents Canada, to the eyes of the world, as a free and democratic state.

Of course not just any modern treaty will present Canada in the light by which it wishes to be seen. To accomplish this most essential task, the modern treaty must at the very least appear to be fair and honorable. There must be the sense that no ‘sharp dealings’ and coercive tactics have gone into the process and the result.

This is where a decision like *Delgamuukw* comes on the scene, and it is at this point that Aboriginal peoples not yet in a treaty relationship with the governments of Canada must realize their greatest benefits from this ruling. The decision plays a key role for the governments of Canada, providing the *justification* that stamps with approval the modern treaty process. While the language going into the treaties typically suggests that the governments of Canada are primarily seeking ‘certainty’ in relation to land ownership and Canadian-Aboriginal relationships, what the governments of Canada *want to be seen doing* is dealing with the ‘Indian Problem’ in a fair and just manner. The sense that they are acting honorably and fairly is

¹³⁹ The other argument for the contemporary inclusion of non-treaty Aboriginal peoples into the Canadian state (that they are properly included, for in accepting their place in the state, and the benefits thereby bestowed, Aboriginal peoples have tacitly consented to their own inclusion) is specious at best, given the failure to ask non-treaty Aboriginal peoples whether they would assent to such a political arrangement. One cannot *assume* that they have accepted their place in the Canadian state.

provided by decisions like *Delgamuukw*, decisions which hold that Aboriginal peoples are *legally entitled* to little more than the sorts of benefits they can bargain for in the modern process.

Key to all this is the realization of *justification*, the attainment of which relieves the governments of Canada of the age-old “Indian Problem”. The ‘Indian Problem’ does not go away with the signing of modern treaties – it is removed on the condition that such agreements honorably and fairly accommodate (or, to be more precise, *are seen as* honorably and fairly accommodating) the interests of the Aboriginal signatories. *Delgamuukw* comes upon the scene as jurisprudence *sanctifying* the entire process, so that the governments of Canada can be seen as discharging their responsibilities as democratic and liberal institutions.

Aboriginal peoples engaged in treaty negotiations must forever keep this central function of *Delgamuukw* in mind. If and when the governments of Canada stray from the dictates of the ruling the challenges that are mounted must emphasize the need for the governments to meet the minimal demands if they are to be seen as ruling in a free and democratic fashion. In this context of the Canadian/Aboriginal dynamic this requires that the governments of Canada meet two central commitments – to respect the land interests of the Aboriginal parties, those communities which predate the existence of the Crown on Canadian soil, and to respect the separation of Aboriginal communities until they decide to freely enter into an agreement with the Crown.

If, then, an Aboriginal people feel compelled to participate in the modern treaty process, they must work especially hard to bring into the process those doctrine and principles from *Delgamuukw* that can, properly ‘strategized’, drive the governments of Canada into moving – however small the distance – toward respecting the deep connection these peoples have had, and continue to have, to their lands. However concentrated the interest in reaching a modern treaty may become, the power these people enjoy – that power completely in their hands – must be savored and deployed most carefully.