

# Aboriginal Title and the Supreme Court: What's Happening?

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On May 29, 1998, Joshua Bernard, a Mi'kmaq from the Eel Ground Reserve in New Brunswick, was charged with unlawful possession of twenty-three spruce logs that had been cut by another member of his community on lands the province claimed as Crown lands.<sup>1</sup> Similarly, Stephen Frederick Marshall and thirty-four other Mi'kmaq Indians were charged with unlawfully cutting timber on Crown lands between November 1998 and March 1999 in five counties in mainland Nova Scotia and three counties on Cape Breton Island.<sup>2</sup> In each case, the Crown in right of the province alleged that the cutting took place without lawful authorization. The accused admitted all elements of the offences, but argued that they did not require authorization from the Crown because, as Mi'kmaq, they had rights to harvest the logs for the purpose of sale. They based those rights on their Aboriginal title to the land where the cutting had taken place, and on a treaty right to harvest resources in order to gain a moderate livelihood. They also relied on *Belcher's Proclamation of 1762*<sup>3</sup> and the *Royal Proclamation of 1763*.<sup>4</sup>

These cases were consolidated on appeal before the Supreme Court of Canada as *R. v. Marshall*; *R. v. Bernard*.<sup>5</sup> In judgments

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<sup>1</sup> The charges were laid under s. 67(1)(c) of the *Crown Lands and Forests Act*, S.N.B. 1980, c. C-38.1.

<sup>2</sup> These charges were laid under s. 29 of the *Crown Lands Act*, R.S.N.S. 1989, c. 114.

<sup>3</sup> A copy of *Belcher's Proclamation of 1762*, issued on May 4, 1762, by Jonathan Belcher, Lt. Governor of Nova Scotia, is available at the Nova Scotia Archives, Mi'kmaq Holdings, Papers of the Colonial Office, CO 217, vol. 19, no. 27-28, or available for electronic viewing at "The Maritime Treaties," online: Canada in the Making <<http://www.schoolnet.ca/autochtone/treaties/maritim8-e.html>>.

<sup>4</sup> Issued on October 7, 1763, by George III, and reproduced in R.S.C. 1985, App. II, No. 1 [*Royal Proclamation*].

<sup>5</sup> [2005] 2 S.C.R. 220, 255 D.L.R. (4th) 1, 2005 SCC 43 [*Marshall/Bernard*].

concurring in result but differing markedly in approach, McLachlin C.J. and LeBel J. reversed decisions favourable to the accused made by the New Brunswick and Nova Scotia Courts of Appeal, and restored the convictions entered by the trial judges. This decision is of vital significance, in part because the Court ruled on the validity of an Aboriginal title claim for the first time. Previously, in *Delgamuukw v. British Columbia*,<sup>6</sup> the Court had laid down the parameters for Aboriginal title claims, but sent the matter back to trial without coming to a decision on the merits (so far the case has not been retried). In *Marshall/Bernard*, although McLachlin C.J. and LeBel J. both purported to apply the principles established in *Delgamuukw*, their interpretations of that case and their understandings of those principles vary substantially. I therefore think it essential to critically compare the *Marshall/Bernard* judgments and assess their consistency with the decision in *Delgamuukw*.

In this article, I am going to focus on the way the *Marshall/Bernard* case dealt with the issue of Aboriginal title. In doing so, I do not mean to discount the importance of the treaty issue or the Court's analysis of *Belcher's Proclamation of 1762* and the *Royal Proclamation*. In the limited space available, I simply will not be able to deal with those matters.

I will start by providing a brief introductory background to the issue of Aboriginal title in Canada, leading up to the *Delgamuukw* decision. I will then examine that decision and attempt to explain the principles established by it in relation to proof of Aboriginal title in particular. I will then analyze the judgments of McLachlin C.J. and LeBel J. in *Marshall/Bernard*, and provide an assessment of their consistency with the *Delgamuukw* principles.

## **I. ABORIGINAL TITLE IN CANADA BEFORE *DELGAMUUKW***

The land rights of the Aboriginal peoples of Canada were acknowledged as a matter of both policy and law by the *Royal Proclamation*, which reserved as the hunting grounds of the Indian nations all lands possessed by them that had not been ceded to the British Crown.<sup>7</sup> The *Royal Proclamation* also established a process for the surrender of Indian lands to the Crown by treaty. This process was followed until the 1920s, when Canada discontinued the practice of entering into new treaties with Indian nations for acquisition of their lands. The practice was revived in the 1970s, when Canada implemented a comprehensive land claims policy for the settlement of Aboriginal

<sup>6</sup> [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 [*Delgamuukw*].

<sup>7</sup> See Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as affected by the Crown's acquisition of their territories* (D. Phil. Thesis, Oxford University, 1979) (Saskatoon: Native Law Centre of Canada, 1979) [Slattery, *Land Rights*].

title claims.<sup>8</sup> In the early 1990s, the Province of British Columbia, which had previously refused to acknowledge that the Aboriginal peoples had any land rights,<sup>9</sup> finally recognized the necessity of negotiating treaties and, in concert with the federal government and First Nations in the province, established the British Columbia Treaty Commission to facilitate the negotiation of land claims.<sup>10</sup>

Aboriginal title has also been recognized judicially since the 1880s, when the Privy Council in *St. Catherine's Milling and Lumber Company v. The Queen*<sup>11</sup> appears to have accepted that the Saulteaux Tribe in northwestern Ontario had, in the words of Lord Watson, "a personal and usufructuary right"<sup>12</sup> to the lands possessed by them at the time they entered into Treaty 3 with the Crown in right of Canada in 1873.<sup>13</sup> Although the Privy Council apparently regarded the *Royal Proclamation* as the source of Aboriginal title in that instance, the Supreme Court of Canada in *Calder v. Attorney-General of British Columbia*<sup>14</sup> acknowledged that the *Royal Proclamation* is not the only source of Aboriginal title. Rather, in a passage that has been relied upon in subsequent Supreme Court decisions,<sup>15</sup> Judson J. observed:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right".<sup>16</sup>

This passage also reveals Judson J.'s discomfort with Lord Watson's description of Aboriginal title as a "usufructuary right," the

<sup>8</sup> See *Living Treaties: Lasting Agreements, Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1985) at 12-13.

<sup>9</sup> See Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990). There was, however, a brief period of treaty-making on Vancouver Island in the 1850s, and Treaty 8 (1899) extends to the northeast corner of the province: see especially 18-20, 65-67.

<sup>10</sup> See Christopher McKee, *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future* (Vancouver: UBC Press, 1996), especially at 32-42.

<sup>11</sup> (1888), 14 App. Cas. 46 [*St. Catherine's Milling*].

<sup>12</sup> *Ibid.* at 54.

<sup>13</sup> *Ibid.*

<sup>14</sup> [1973] S.C.R. 313, 34 D.L.R. (3d) 145 [*Calder* cited to S.C.R.].

<sup>15</sup> See *e.g. R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at para. 33 [*Van der Peet*].

<sup>16</sup> *Calder*, *supra* note 14 at 328.

inadequacy of which the Supreme Court has continued to acknowledge. In *Guerin v. The Queen*,<sup>17</sup> Dickson J. (as he then was) said that although descriptions of Aboriginal title as “a personal and usufructuary right” and as a “beneficial interest” each contain “a core of truth,” neither accurately portrays the “*sui generis* interest” Indians have in their traditionally occupied lands.<sup>18</sup> Dickson J. also accepted Duff J.’s clarification in *Attorney-General for Quebec v. Attorney-General for Canada*<sup>19</sup> that the characterization of Aboriginal title as “personal” refers to the fact that it is inalienable, other than by surrender to the Crown.<sup>20</sup> Summing up, he observed:

The nature of the Indians’ interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians’ behalf when the interest is surrendered.<sup>21</sup>

Despite Dickson J.’s cautionary warning that “[a]ny description of Indian title which goes beyond these two features is both unnecessary and potentially misleading,”<sup>22</sup> the Supreme Court felt obliged to provide a more complete definition of Aboriginal title when faced with a direct claim thereto by the Gitksan and Wet’suwet’en nations in *Delgamuukw*.<sup>23</sup> In addition, the Court explained how Aboriginal title can be proven, situated it within exclusive federal jurisdiction for constitutional division-of-powers purposes,<sup>24</sup> and explained the effect of constitutional recognition of it as an Aboriginal right by s. 35(1) of the *Constitution Act, 1982*.<sup>25</sup> While declining to rule or even provide direct guidance on the additional claim to a right of self-government, I think the Court’s views on the source and content of Aboriginal title may shed significant light on this matter as well.

<sup>17</sup> [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [*Guerin* cited to S.C.R.].

<sup>18</sup> *Ibid.* at 382.

<sup>19</sup> [1921] 1 A.C. 401 at 408, 56 D.L.R. 373 [cited to A.C.].

<sup>20</sup> *Guerin*, *supra* note 17 at 382.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Supra* note 6.

<sup>24</sup> This is due to s. 91(24) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, which assigns to the Parliament of Canada exclusive jurisdiction over “Indians, and Lands reserved for the Indians” [*Constitution Act, 1867*]. In *Delgamuukw*, the Supreme Court held that Aboriginal title lands are “Lands reserved for the Indians” within the meaning of this provision: *ibid.* at paras. 174-76.

<sup>25</sup> Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 35(1) provides: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

## II. ABORIGINAL TITLE IN *DELGAMUUKW v. BRITISH COLUMBIA*

While not deciding whether the Gitksan and Wet'suwet'en nations actually have Aboriginal title over the lands claimed by them in British Columbia, in *Delgamuukw* the Supreme Court did provide extensive guidance to trial judges on how to deal with an Aboriginal title claim.

On the meaning of Aboriginal title, Lamer C.J., writing the principal judgment,<sup>26</sup> accepted Dickson J.'s characterization of Aboriginal title in *Guerin* as *sui generis*, and went on to explain how it differs from a common law fee simple estate. First, however, he made perfectly clear that Aboriginal title is a property right, rather than "a licence to use and occupy the land [that] cannot compete on an equal footing with other proprietary interests".<sup>27</sup> Moreover, he rejected the Crown's argument that the content of Aboriginal title is limited to traditional uses of the land. Instead, he stated:

Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title.<sup>28</sup>

Consequently, Aboriginal title encompasses mineral rights and rights to oil and gas, even if exploitation of those resources was not a traditional use of the land.<sup>29</sup> Aboriginal titleholders will not, however, be able to make use of those resources if their exploitation destroys the value of the land for traditional uses:

For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may

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<sup>26</sup> La Forest J. delivered a concurring judgment for himself and L'Heureux-Dubé J.

<sup>27</sup> *Delgamuukw*, *supra* note 6 at para. 113, affirming the Court's pronouncement on this issue in *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 at 677, 53 D.L.R. (4th) 487 [cited to S.C.R.].

<sup>28</sup> *Delgamuukw*, *ibid.* at para. 111.

<sup>29</sup> *Ibid.* at para. 122.

not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it).<sup>30</sup>

This inherent limit on Aboriginal title is one of the *sui generis* aspects that distinguish it from a fee simple estate. Connected to this is another unique aspect, namely the title's inalienability, other than by surrender to the Crown. Lamer C.J. explained that inalienability is, "in part, a function of the common law principle that settlers in colonies must derive their title from Crown grant and, therefore, cannot acquire title through purchase from aboriginal inhabitants".<sup>31</sup> Like the inherent limit, inalienability also has a protective purpose, namely preserving the unique relationship that Aboriginal communities have with their lands.<sup>32</sup> However, neither the inherent limit nor inalienability prevents destruction of that relationship by surrender of Aboriginal title to the Crown,<sup>33</sup> though in that context the Crown is under stringent fiduciary obligations.<sup>34</sup>

Another *sui generis* aspect of Aboriginal title is its communal nature. Lamer C.J. said in *Delgamuukw* that "Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community."<sup>35</sup> So unlike other property rights that are held by either living persons or corporations, Aboriginal title is vested in collective bodies that evidently have the legal personality necessary to hold property in their own right. Moreover, the decision-making authority Aboriginal communities have in regard to their Aboriginal title lands is governmental in nature, as was held by Williamson J. in *Campbell v. British Columbia (Attorney General)*.<sup>36</sup> Aboriginal title therefore has a jurisdictional quality that distinguishes it from land titles held by private persons

<sup>30</sup> *Ibid.* at para. 128. This inherent limit on Aboriginal title, though undoubtedly well-intentioned, is paternalistic and could seriously impair worthwhile economic development: see "The Post-*Delgamuukw* Nature and Content of Aboriginal Title" ["Post-*Delgamuukw*"], in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre of Canada, 2001) 102 at 116-22 [*Emerging Justice?*]. Note too that the limitation is on *use*, not *ownership*, of natural resources. So just because an Aboriginal nation cannot use certain resources does not mean they belong to and can be exploited by the Crown, as that would be completely contrary to the express purpose of the inherent limit, which is to preserve the land for future generations: see *Delgamuukw*, *supra* note 6 at paras. 125-32.

<sup>31</sup> *Delgamuukw*, *ibid.* at para. 129.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* at para. 131.

<sup>34</sup> See *Guerin*, *supra* note 17; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, 130 D.L.R. (4th) 193.

<sup>35</sup> *Supra* note 6 at para. 115.

<sup>36</sup> (2000), 189 D.L.R. (4th) 333, 2000 BCSC 1123 at paras. 134-38 [*Campbell*].

and corporations.<sup>37</sup> This also helps to explain why it is inalienable, other than by surrender to the Crown, because only another government can acquire a title that is jurisdictional as well as proprietary.<sup>38</sup>

The last *sui generis* aspect of Aboriginal title noted by Lamer C.J. in *Delgamuukw* is its source. Rejecting the *Royal Proclamation* as the source, he said “it is now clear that although aboriginal title was recognized by the *Proclamation*, it arises from the prior occupation of Canada by aboriginal peoples”.<sup>39</sup> The relevance of this occupation is twofold. First, at common law “the fact of physical occupation is proof of possession at law, which in turn will ground title to the land”.<sup>40</sup> But Aboriginal title is unique in this regard because “it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward”.<sup>41</sup> Secondly, prior occupation is relevant because Aboriginal peoples had their own systems of law that governed their relationship with the land prior to British sovereignty. Relying on *Roberts v. Canada*,<sup>42</sup> where the Supreme Court held unanimously that “aboriginal title pre-dated colonization by the British and survived British claims of sovereignty,”<sup>43</sup> Lamer C.J. said this suggests “a second source for aboriginal title—the relationship between common law and pre-existing systems of aboriginal law”.<sup>44</sup>

Expanding on this relationship between common law and Aboriginal law, Lamer C.J. commented on the arguments of counsel on the source of Aboriginal title:

The respondents argue, in essence, that aboriginal title arises from the physical reality at the time of sovereignty, whereas the Gitksan effectively take the position that aboriginal title arises from and should reflect the pattern of land holdings under aboriginal law. However, as I have explained above, the source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited

<sup>37</sup> For more detailed discussion, see “Post-*Delgamuukw*”, *supra* note 30 at 122-27.

<sup>38</sup> See Kent McNeil, “Self-Government and the Inalienability of Aboriginal Title” (2002) 47 McGill L.J. 473, where it is also argued (at 501-502) that Aboriginal title should be transferable to other Aboriginal communities, a position supported by La Forest J. in *Delgamuukw*, *supra* note 6 at para. 198.

<sup>39</sup> *Delgamuukw*, *ibid.* at para. 114.

<sup>40</sup> *Ibid.* at para. 149.

<sup>41</sup> *Ibid.* at para. 114 [emphasis in original].

<sup>42</sup> [1989] 1 S.C.R. 322, 57 D.L.R. (4th) 197 [cited to S.C.R.].

<sup>43</sup> *Ibid.* at 340.

<sup>44</sup> *Delgamuukw*, *supra* note 6 at para. 114.

to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy.<sup>45</sup>

Relying on the view he had expressed in *Van der Peet* that account must be taken of the “aboriginal perspective while at the same time taking into account the perspective of the common law,”<sup>46</sup> the Chief Justice continued:

I also held that the aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples.<sup>47</sup>

He also posited a “general principle that the common law should develop to recognize aboriginal rights (and title, when necessary) as they were recognized by either *de facto* practice or by the aboriginal system of governance”.<sup>48</sup>

How, then, does Aboriginal law function as a source of Aboriginal title? One possibility would be through application of what is known as the doctrine of continuity, whereby pre-existing rights under local law continue after Crown acquisition of sovereignty over a territory.<sup>49</sup> If this doctrine were to apply, Aboriginal title would arise from and be defined by Aboriginal law.<sup>50</sup> Clearly, this is not what Lamer C.J.

<sup>45</sup> *Ibid.* at para. 147.

<sup>46</sup> *Ibid.* at para. 148, referring to *Van der Peet*, *supra* note 15 at para. 50.

<sup>47</sup> *Ibid.* at para. 148, referring to *Van der Peet*, *supra* note 15 at para. 41.

<sup>48</sup> *Ibid.* at para. 159.

<sup>49</sup> See Slattery, *Land Rights*, *supra* note 7 at 50-59; Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), especially at 171-79 [McNeil, *Common Law*]; Mark Walters, “British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*” (1992) 17 Queen’s L.J. 350, especially at 407-409; Mark Walters, “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982” (1999) 44 McGill L.J. 711 [Walters, “Golden Thread”]; Russel Lawrence Barsh, “Indigenous Rights and the *Lex Loci* in British Imperial Law” in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing, 2004) 91.

<sup>50</sup> This is the approach to Aboriginal land rights that has been applied in Australia and New Zealand: see *Mabo v. Queensland* (1992), 175 C.L.R. 1, 1992 HCA 23; *Western Australia v. Ward* (2002), 191 A.L.R. 1, 2002 HCA 28; *Members of the Yorta Yorta Aboriginal Community v. Victoria* (2002), 194 A.L.R. 538, 2002 HCA 58; *Attorney-General v. Ngati Apa*, [2003] 3 N.Z.L.R. 643, 2003 NZCA 236. For critical commentary on the Australian approach, see Kent McNeil, “Legal Rights and Legislative Wrongs: Maori Claims to the Foreshore and Seabed” [“Maori Claims”], in Claire Charters and Andrew Erueti, eds., *Maori Property Rights in the Foreshore and Seabed: The Latest Frontier* (Wellington: Victoria University of Wellington Press) [forthcoming], and “The Relevance of Traditional Laws and Customs to the Existence and Content of Native Title at Common Law” in *Emerging Justice?*, *supra* note 30 at 416.

had in mind. In his lengthy discussion of Aboriginal title at common law,<sup>51</sup> he never mentioned the doctrine of continuity *per se*, nor did he suggest that the content of Aboriginal title depends on Aboriginal law. On the contrary, in describing Aboriginal title and its *sui generis* features, he evidently regarded it as a generic property right, the substance of which does not vary from one Aboriginal nation to the next.<sup>52</sup> Instead of regarding Aboriginal law as a source of Aboriginal title that defines its content, the Chief Justice appears to have viewed Aboriginal law as a means for establishing the occupation of land that gives rise to this generic title.

He commenced his discussion of proof of title with this summary:

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 occupation, and (iii) at sovereignty, that occupation must have been exclusive.<sup>53</sup>

Commenting on the arguments of counsel on this matter, he observed:

There was a consensus among the parties on appeal that proof of historic occupation was required to make out a claim to aboriginal title. However, the parties disagreed on how that occupancy could be proved. The respondents assert that in order to establish aboriginal title, the occupation must be the physical occupation of the land in question. The appellant Gitksan nation argue, by contrast, that aboriginal title may be established, at least in part, by reference to aboriginal law.<sup>54</sup>

He then related these positions to the debate over the source of Aboriginal title discussed above, and appears to have concluded that

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<sup>51</sup> *Delgamuukw*, *supra* note 6 at paras. 112-69.

<sup>52</sup> See Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can. Bar Rev. 196 at 211-15. This conclusion is supported further by the fact that Lamer C.J. discussed the inherent limit, which can vary from one Aboriginal nation to the next, under a separate heading, following his discussion of the content of Aboriginal title: *Delgamuukw*, *ibid.* at paras. 116-32. Recall as well that the inherent limit is a restriction on the uses Aboriginal peoples can make of their lands, not a limitation on the content of Aboriginal title: see *supra* note 30.

<sup>53</sup> *Delgamuukw*, *supra* note 6 at para. 143.

<sup>54</sup> *Ibid.* at para. 146.

occupation can be established by proof either of physical occupation or Aboriginal law, or a combination of the two. Where physical occupation is relied upon, it

may be established 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....In considering whether occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed".<sup>55</sup>

On the other hand,

if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.<sup>56</sup>

Aboriginal law can also be relied upon to show that the occupation was exclusive. After noting that "proof of exclusivity must rely on both the perspective of the common law and the aboriginal perspective,"<sup>57</sup> and warning that "[e]xclusivity is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of aboriginal title with caution,"<sup>58</sup> Lamer C.J. observed:

A consideration of the aboriginal perspective may also lead to the conclusion that trespass by other aboriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the aboriginal group asserting title. For example, the aboriginal group asserting the claim to aboriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the

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<sup>55</sup> *Ibid.* at para. 149, quoting from Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 758.

<sup>56</sup> *Delgamuukw*, *supra* note 6 at para. 148.

<sup>57</sup> *Ibid.* at para. 156.

<sup>58</sup> *Ibid.*

finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the aboriginal nations in question, those treaties would also form part of the aboriginal perspective.<sup>59</sup>

But does Aboriginal law cease to be relevant once Aboriginal title has been established by proof of exclusive occupation at the time of Crown assertion of sovereignty? Lamer C.J. did not address this question directly. We do know, however, that Aboriginal law does not determine the content of Aboriginal title. But we also know that Aboriginal title is communal, and that the title-holding community has decision-making authority over it, authority that Williamson J. regarded as governmental in *Campbell*.<sup>60</sup> This must include authority to make laws in relation to land that would be applicable within the community. So in situations where a title-holding community already had laws governing such things as land tenure and use, as Lamer C.J. envisaged in *Delgamuukw*,<sup>61</sup> one would expect those laws to retain their validity and continue to govern those matters until the community decided, through the exercise of its decision-making authority, to change them.

In addition to this jurisprudential perspective, there are practical reasons why Aboriginal laws in relation to land would have had to remain in force in Aboriginal communities after Crown sovereignty. Regarding the Aboriginal title claims of the Gitksan and Wet'suwet'en nations, the lower courts found, and the parties did not contest on appeal, "that British sovereignty over British Columbia was conclusively established by the Oregon Boundary Treaty of 1846".<sup>62</sup> At that time, however, there was no official British presence in the Gitksan and Wet'suwet'en territories, apart from a few Hudson's Bay Company traders.<sup>63</sup> As demonstrated by extensive evidence at trial in

<sup>59</sup> *Ibid.* at para. 157.

<sup>60</sup> *Supra* note 36.

<sup>61</sup> See the quotation accompanying note 56, *supra*.

<sup>62</sup> *Delgamuukw*, *supra* note 6 at para. 145.

<sup>63</sup> A few European explorers had ventured past the continental divide in the late eighteenth and early nineteenth centuries, after which the Hudson's Bay Company established forts on the northwest coast of what is now British Columbia. As the forts were established, local Indians congregated around them in an attempt to control the trade emanating from the forts, acting as middlemen between other Indians and the company traders. The Gitksan were in contact with Europeans during the first decade of the nineteenth century, but white settlement did not encroach upon their territory until the late 1860s. See Marjorie M. Halpin & Margaret Seguin, "Tsimshian Peoples: Southern Tsimshian, Coast Tsimshian, Nishga, and Gitksan" in Wayne Suttles, ed., *Handbook of North American Indians*, vol. 7 *Northwest Coast* (Washington: Smithsonian Institution, 1990) 267 at 281; Robin Fisher, *Contact & Conflict: Indian-European Relations in British Columbia, 1774-1890* (Vancouver: University of British Columbia Press, 1977) at 26-33.

*Delgamuukw*,<sup>64</sup> the Gitksan and Wet'suwet'en had complex systems of law governing land holding within their territories. As a practical matter, those laws must have remained in effect after Crown sovereignty because there were no other laws that could have applied.<sup>65</sup>

Extension of Canadian authority over the Gitksan and Wet'suwet'en territories probably occurred gradually, most notably after the 1876 *Indian Act*<sup>66</sup> was applied to them. But the provisions of that Act relating to lands applied only to Indian reserves, amounting to a tiny fraction of the lands over which the Gitksan and Wet'suwet'en assert Aboriginal title. Moreover, the Aboriginal title lands of both those nations should not have been subject to provincial land laws because Aboriginal title has been under exclusive federal jurisdiction since 1867.<sup>67</sup> So even after the extension of Canadian jurisdiction to their territories, the only laws generally available to govern internal land holding in relation to Aboriginal title lands outside of reserves would have been Gitksan and Wet'suwet'en laws.

Lamer C.J. stated in *Delgamuukw* that, "from a theoretical standpoint, aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law".<sup>68</sup> In my opinion, this relationship is an on-going one. It began with Crown sovereignty when the common law was received, and continues to this day. The common law's role is to define and protect Aboriginal title as against the Crown and third parties. This is why Aboriginal title does not vary from one Aboriginal nation to the next, apart from differences in restrictions on use imposed by the inherent limit. While Aboriginal law is relevant to prove pre-sovereignty occupation,

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<sup>64</sup> *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185, [1991] 3 W.W.R. 97 (B.C.S.C.) [*Delgamuukw*, B.C.S.C.].

<sup>65</sup> See "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" in *Emerging Justice?*, *supra* note 30 at 90-92 ["Aboriginal Rights"], where this matter of a legal vacuum is discussed in relation to the inherent right of self-government.

<sup>66</sup> S.C. 1876, 39 Vict., c. 18.

<sup>67</sup> See *Constitution Act, 1867*, *supra* note 24. For discussion, see Nigel Bankes, "Delgamuukw, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 U.B.C. L. Rev. 317; Kerry Wilkins, "Of Provinces and Section 35 Rights" (1999) 22 Dal. L.J. 185, and "Negative Capability: Of Provinces and Lands Reserved for the Indians" (2002) 1 Indigenous L.J. 57; Kent McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask. L. Rev. 431 (also in *Emerging Justice?*, *supra* note 30 at 249), and "Aboriginal Rights, Resource Development, and the Source of the Provincial Duty to Consult in *Haida Nation and Taku River*" (2005) 29 Sup. Ct. L. Rev. (2d) 447 ["Provincial Duty to Consult"].

<sup>68</sup> *Delgamuukw*, *supra* note 6 at para. 145.

it plays no role in the definition of Aboriginal title.<sup>69</sup> But after sovereignty, it continues to apply internally to govern landholding within Aboriginal territories, and is modifiable by Aboriginal communities in the exercise of their decision-making authority.<sup>70</sup>

Lamer C.J.'s decision in *Delgamuukw* can therefore be understood as positing a legal regime for Aboriginal title lands that includes an important on-going role for Aboriginal law and community authority. Unlike fee simple lands, Aboriginal title lands are vested in communities that have laws pre-dating Crown sovereignty. Such communities have the legal personality necessary for them to have real property rights that are defined and protected externally by the common law, but that are governed internally by continuing Aboriginal law. Moreover, Aboriginal law is not frozen at the time of sovereignty. As Williamson J. recognized in *Campbell*, Aboriginal communities have decision-making authority that is governmental in nature, the exercise of which enables them to change their internal land laws.<sup>71</sup> Aboriginal title is therefore more than a proprietary interest. It has a jurisdictional quality that removes it from common law estates in land and makes it truly *sui generis*.<sup>72</sup>

Let us now turn to *Marshall/Bernard*, and assess the Supreme Court's approach to Aboriginal title claims in that case in light of our analysis of Lamer C.J.'s judgment in *Delgamuukw*.

### III. ABORIGINAL TITLE IN MARSHALL/BERNARD

In the leading judgment in *Marshall/Bernard*, McLachlin C.J. succinctly set out what she called the "central issues" on appeal:

Can members of the Mi'kmaq people in Nova Scotia and New Brunswick engage in commercial logging on Crown lands without authorization, contrary to statutory regulation? More precisely, do they have treaty rights or aboriginal title entitling them to do so?<sup>73</sup>

In my respectful opinion, these opening questions beg a fundamental question that the Court should have considered, namely are the sites where the cutting took place Crown lands or Aboriginal title lands?

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<sup>69</sup> In addition to being in accord with Lamer C.J.'s judgment in *Delgamuukw*, this conclusion is beneficial to Aboriginal title holders because, in some instances, it probably means that the content of their title is more inclusive than it would be if defined by their own systems of law: see the Australian decisions cited *supra* note 50.

<sup>70</sup> See "Aboriginal Rights", *supra* note 65, especially at 92-95.

<sup>71</sup> *Supra* note 36.

<sup>72</sup> See "Post-*Delgamuukw*", *supra* note 30 at 122-27.

<sup>73</sup> *Marshall/Bernard*, *supra* note 5 at para. 1.

We know from *Delgamuukw* that “aboriginal title encompasses the right to exclusive use and occupation,”<sup>74</sup> and includes standing timber.<sup>75</sup> The Crown has the underlying title to Aboriginal title lands,<sup>76</sup> but this underlying title does not include a beneficial interest in natural resources such as timber as long as Aboriginal title exists.<sup>77</sup>

Nor does the legislation under which the accused were charged in *Marshall/Bernard* assist the Crown in this regard. The New Brunswick *Crown Lands and Forests Act* defines “Crown Lands” as “all or any part of the lands vested in the Crown that are under the administration and control of the Minister...”<sup>78</sup> Similarly, the Nova Scotia *Crown Lands Act* defines “Crown lands” as “all or any part of land under the administration and control of the Minister”.<sup>79</sup> Given that lands subject to Aboriginal title are vested in the Aboriginal titleholders, and are under the jurisdiction of Parliament<sup>80</sup> rather than under the administration and control of a provincial Minister, those lands are outside the definition of “Crown lands” in the provincial legislation. So according to both the concept of Aboriginal title formulated in *Delgamuukw* and the relevant legislation, the lands in question had to be either Crown lands or Aboriginal title lands—they could not be both in any meaningful beneficial sense.<sup>81</sup> With respect, McLachlin C.J. nonetheless seems to have thought that they could be both, thereby revealing a fundamental misunderstanding of the legal meaning of Aboriginal title, as described in *Delgamuukw*.

I think this misunderstanding arises from assuming the Crown’s underlying title has a beneficial value, in the sense that it entitles the Crown to some immediate beneficial interest. This is not so. Section 109 of the *Constitution Act, 1867* provides:

All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New

<sup>74</sup> *Delgamuukw*, *supra* note 6 at para. 117, Lamer C.J.

<sup>75</sup> See *supra* notes 27-29 and accompanying text.

<sup>76</sup> *Delgamuukw*, *supra* note 6 at para. 145.

<sup>77</sup> *St. Catherine’s Milling*, *supra* note 11 at 59. See also *Delgamuukw*, *ibid.* at para. 175. For discussion, see Hamar Foster, “Aboriginal Title and the Provincial Obligation to Respect It: Is *Delgamuukw v. British Columbia* ‘Invented Law’?” (1998) 56:2 *The Advocate* 221.

<sup>78</sup> *Supra* note 1, s. 1. “Minister” is defined in s. 1 as the “Minister of Natural Resources” and includes any person designated by the Minister to act on the Minister’s behalf.

<sup>79</sup> *Supra* note 2, s. 3. “Minister” is defined in s. 3 as the “Minister of Lands and Forests”.

<sup>80</sup> See *Constitution Act, 1867*, *supra* note 24.

<sup>81</sup> For discussion of this issue in the context of Aboriginal title in British Columbia, see “Provincial Duty to Consult”, *supra* note 67 at 458-60. As pointed out in that article, not only do provincial statutes relating to Crown lands generally not apply to Aboriginal title lands as a matter of definition, they probably cannot do so for constitutional division-of-powers reasons. See also the other articles cited *supra* note 67.

Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.<sup>82</sup>

In *St. Catherine's Milling*, the Privy Council held that Aboriginal title is an "interest other than that of the Province"<sup>83</sup> within the meaning of this provision, and this was affirmed by Lamer C.J. in *Delgamuukw*.<sup>84</sup> The nature of the underlying title the provincial Crown has by virtue of s. 109 is therefore determined negatively: it amounts to whatever interest remains after the Aboriginal title that burdens it has been subtracted. This is the way s. 109 operates where any interests in land are concerned, as they are all burdens on the Crown's underlying title. For example, if burdened by a fee simple estate, the Crown's underlying title does not amount to any present beneficial interest,<sup>85</sup> but rather is a mere right to have the lands go back to the Crown by escheat if the fee simple comes to an end.<sup>86</sup> Like a fee simple, Aboriginal title amounts to a right of exclusive use and possession of potentially infinite duration that includes natural resources. In neither case does the Crown have a present beneficial interest.<sup>87</sup>

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<sup>82</sup> *Supra* note 24, s. 109.

<sup>83</sup> *Supra* note 11 at 58.

<sup>84</sup> *Supra* note 6 at para. 175. See also *Haida Nation v. British Columbia (Minister of Forests)*, [2003] 3 S.C.R. 511, 245 D.L.R. (4th) 33, 2004 SCC 73 at para. 59, McLachlin C.J.

<sup>85</sup> Apart from precious minerals, which at common law belong to the Crown by prerogative right: see *Case of Mines* (1568), 1 Plow. 310 at 336 (Ex. Ch.); *Attorney-General of British Columbia v. Attorney-General of Canada* (1889), 14 App. Cas. 295 at 302 (P.C.).

<sup>86</sup> See *Attorney-General of Ontario v. Mercer* (1883), 8 App. Cas. 767 (P.C.).

<sup>87</sup> Note that the mistaken view that the Crown has a present beneficial interest in Aboriginal title lands may be at least partially due to Lord Watson's statement in *St. Catherine's Milling*, *supra* note 11 at 58, that the Provincial "Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden". But his Lordship declined to specify the nature of the Aboriginal interest, other than to describe it vaguely as "a personal and usufructuary right," a description the Supreme Court of Canada has found to be not particularly helpful: see text accompanying notes 12-21, *supra*. In light of the all-encompassing nature of Aboriginal title as defined by Lamer C.J. in *Delgamuukw* (see text accompanying notes 27-29, *supra*), I think it is now clear that the Crown's underlying title to Aboriginal title lands is no more than a right equivalent to the right to escheat that the Crown has in relation to fee simple lands. See also *Marshall/Bernard*, *supra* note 5 at para. 135, where LeBel J., while finding the concept of a usufructuary right to be useful in the context of Aboriginal title, nonetheless stated: "A usufructuary title to all unsurrendered lands is understood to protect aboriginal peoples in the absolute use and enjoyment of their lands" [emphasis added].

While McLachlin C.J.'s apparent misapprehension (that Aboriginal title lands could also be Crown lands for the purposes of the relevant legislation) did not directly affect the outcome in the case, in my view it reveals a lack of understanding of the concept of Aboriginal title expressed in *Delgamuukw* that carried over into the matter of proof of title in *Marshall/Bernard*. In relation to this, the Chief Justice stated that "issues arise as to the standard of occupation required to prove title, including the related issues of exclusivity of occupation, application of this requirement to nomadic peoples, and continuity".<sup>88</sup> But before turning directly to those issues, she said:

Two concepts central to determining aboriginal rights must be considered....The first is the requirement that both aboriginal and European common law perspectives must be considered. The second relates to the variety of aboriginal rights that may be affirmed.<sup>89</sup>

She then elaborated on the ways in which the Aboriginal and European perspectives relate to proof of Aboriginal rights, including title:

The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right. The question is whether the aboriginal practice at the time of assertion of European sovereignty (not, unlike treaties, when a document was signed) translates into a modern legal right, and if so, what right? This exercise involves both aboriginal and European perspectives. The Court must consider the pre-sovereignty practice from the perspective of the aboriginal people. But in translating it to a common law right, the Court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it. This exercise in translating aboriginal practices to modern rights must not be conducted in a formalistic or narrow way. The Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the common law right. The question is

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<sup>88</sup> *Marshall/Bernard*, *supra* note 5 at para. 40. The issue of continuity, while not discussed in this article, has been addressed elsewhere: see Kent McNeil, "Continuity of Aboriginal Rights" in Wilkins, *supra* note 49 at 127, and, in relation to McLachlin C.J.'s comments on continuity in *Marshall/Bernard*, "Maori Claims", *supra* note 50.

<sup>89</sup> *Marshall/Bernard*, *supra* note 5 at para. 45.

whether the practice corresponds to the core concepts of the legal right claimed.<sup>90</sup>

Two aspects of McLachlin C.J.'s approach to this matter strike me as remarkable. The first is her reliance on "Aboriginal practices," the context in which she brings Aboriginal perspectives into the analysis:

Thus, to insist that the pre-sovereignty practices correspond in some broad sense to the modern right claimed, is not to ignore the aboriginal perspective. The aboriginal perspective grounds the analysis and imbues its every step. It must be considered in evaluating the practice at issue, and a generous approach must be taken in matching it to the appropriate modern right.<sup>91</sup>

Moreover, as discussed below, she related Aboriginal practices, and hence Aboriginal perspectives, to the *physical* occupation of land that Lamer C.J. in *Delgamuukw* characterized as the *common law* way of establishing Aboriginal title.<sup>92</sup> Missing from her analysis is any mention of the fact that Lamer C.J. said as well that the Aboriginal perspective can also be gleaned from Aboriginal law, and that the relationship between Aboriginal law and the common law can be regarded as a second source of Aboriginal title.<sup>93</sup>

The second aspect of this part of McLachlin C.J.'s judgment that I find remarkable is the way it seems to conflate the test for proof of Aboriginal title in *Delgamuukw* with the test for proving other Aboriginal rights in *Van der Peet*.<sup>94</sup> In *Van der Peet*, Lamer C.J. held that Aboriginal rights are based on practices, customs or traditions integral to distinctive Aboriginal cultures at the time of contact with Europeans.<sup>95</sup> Unlike Aboriginal title, which we have seen is a generic right not defined by Aboriginal practices, customs or traditions, other Aboriginal rights are so defined and do vary because their nature is determined by the pre-contact practices, customs or traditions of a particular Aboriginal group. And yet McLachlin C.J. said in *Marshall/Bernard* that the task of the courts in Aboriginal title cases is

<sup>90</sup> *Ibid.* at para. 48. For critical commentary on this aspect of McLachlin C.J.'s decision, see Paul L.A.H. Chartrand, "R. v. Marshall; R. v. Bernard: The Return of the Native..." U.N.B.L.J. [forthcoming].

<sup>91</sup> *Marshall/Bernard*, *supra* note 5 at para. 50.

<sup>92</sup> *Delgamuukw*, *supra* note 6 at para. 149. See text accompanying note 55, *supra*, where a passage from *Delgamuukw* relied upon by McLachlin C.J. in *Marshall/Bernard*, *supra* note 5 at para. 49, is quoted.

<sup>93</sup> *Delgamuukw*, *supra* note 6 at paras. 146-48. See text accompanying notes 43-48, 54-59, *supra*.

<sup>94</sup> *Supra* note 15.

<sup>95</sup> *Ibid.*, especially at para. 46.

to “examine the pre-sovereignty Aboriginal practice and translate that practice into a modern right”.<sup>96</sup> She elaborated as follows:

Different aboriginal practices correspond to different modern rights....One of these rights is aboriginal title to land. It is established by aboriginal practices that indicate possession similar to that associated with title at common law. In matching common law property rules to aboriginal practice we must be sensitive to the context-specific nature of common law title, as well as the aboriginal perspective. The common law recognizes that possession sufficient to ground title is a matter of fact, depending on all the circumstances, in particular the nature of the land and the manner in which the land is commonly enjoyed.<sup>97</sup>

Therefore, for Aboriginal title to be established, it appears to be McLachlin C.J.’s view that Aboriginal practices in relation to land have to amount to the kind of exclusive occupation that would ground title at common law. While she stressed the importance of Aboriginal perspectives in evaluating Aboriginal practices, the Chief Justice did not explicitly consider Aboriginal law in her analysis. Relying on Lamer C.J.’s judgment in *Delgamuukw*, she said that, “[t]o establish title, claimants must prove ‘exclusive’ pre-sovereignty ‘occupation’ of the land by their forebears”.<sup>98</sup> She continued:

“Occupation” means “physical occupation”. This “may be established 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”: *Delgamuukw*, per Lamer C.J., at para. 149.<sup>99</sup>

But as we have seen, for Lamer C.J. proof of *physical* occupation is only *one* way of establishing Aboriginal title; in addition, the requisite occupation can be proven through Aboriginal systems of law.<sup>100</sup> Ignoring this aspect of his judgment,<sup>101</sup> McLachlin C.J. moved on immediately to discuss the requirement of exclusivity of occupation. Relying again on *Delgamuukw*, she said that “[e]xclusive

<sup>96</sup> *Marshall/Bernard*, *supra* note 5 at para. 51.

<sup>97</sup> *Ibid.* at paras. 53-54.

<sup>98</sup> *Ibid.* at para. 55, citing *Delgamuukw*, *supra* note 6 at para. 143.

<sup>99</sup> *Marshall/Bernard*, *supra* note 5 at para. 56.

<sup>100</sup> See text accompanying notes 54-56, *supra*.

<sup>101</sup> This is all the more surprising in light of her concurrence in his judgment in *Delgamuukw*, *supra* note 6 at para. 209.

occupation means ‘the intention and capacity to retain exclusive control’”.<sup>102</sup> She elaborated as follows:

The right to control the land and, if necessary, to exclude others from using it is basic to the notion of title at common law. In European-based systems, this right is assumed by dint of law. Determining whether it was present in a pre-sovereignty aboriginal society, however, can pose difficulties. Often, no right to exclude arises by convention or law. So one must look to evidence.<sup>103</sup>

While McLachlin C.J. did acknowledge in this passage that Aboriginal societies might have a right to exclude by virtue of their own laws, she seems to have regarded this as either unlikely or unprovable in most instances. So she again emphasized the need for factual evidence, this time of control. Recognizing that such evidence might also be hard to come by, especially as “the people may have been peaceful and have chosen to exercise their control by sharing rather than exclusion,”<sup>104</sup> she concluded:

It follows that evidence of acts of exclusion is not required to establish aboriginal title. All that is required is demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so. The fact that history, insofar as it can be ascertained, discloses no adverse claimants may support this inference. This is what is meant by the requirement of aboriginal title that the lands have been occupied in an exclusive manner.<sup>105</sup>

Again, McLachlin C.J.’s approach to exclusivity can be contrasted with that of Lamer C.J. in *Delgamuukw*, where he explicitly endorsed the use of Aboriginal law to prove exclusivity.<sup>106</sup>

In her discussion of whether “nomadic and semi-nomadic peoples” can have Aboriginal title, McLachlin C.J. once again stressed physical occupation:

Whether a nomadic people enjoyed sufficient “physical possession” to give them title to the land, is a question of

<sup>102</sup> *Marshall/Bernard*, *supra* note 5 at para. 57, citing *Delgamuukw*, *supra* note 6 at para. 156.

<sup>103</sup> *Ibid.* at para. 64.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.* at para. 65.

<sup>106</sup> See text accompanying notes 58-59, *supra*.

fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used. Not every nomadic passage or use will ground title to land...On the other hand, *Delgamuukw* contemplates that “physical occupation” sufficient to ground title to land may be established by “regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources” (para. 149). In each case, the question is whether a degree of physical occupation or use equivalent to common law title has been made out.<sup>107</sup>

She did not discuss the fact that the Aboriginal people may have had laws restraining others from entering or using lands within their territory without permission, and that the existence of those laws would be evidence of their control even when they were not physically present on the lands.<sup>108</sup>

Turning to the application of the legal test for proof of Aboriginal title, McLachlin C.J. found that the trial judges had applied the right test and arrived at the correct result when they found that Aboriginal title had not been established to the lands where the timber had been cut. She said, “[i]n each case, they required proof of sufficiently regular and exclusive use of the cutting sites by Mi’kmaq people at the time of assertion of sovereignty.”<sup>109</sup> She found this approach to be in keeping with the law of Aboriginal title, unlike the less strict test for occupation applied in the Court of Appeal by Cromwell J.A. in *R. v. Marshall (S.F.)*<sup>110</sup> and Daigle J.A. in *R. v. Bernard (J.)*.<sup>111</sup> Instead of requiring proof of physical occupation of the specific cutting sites at the relevant time, those judges took what might be described as a territorial approach. After extensive discussion of both the common law

<sup>107</sup> *Marshall/Bernard*, *supra* note 5 at para. 66, quoting *Delgamuukw*, *supra* note 6 at para. 149.

<sup>108</sup> Compare the quotation from *Delgamuukw* accompanying note 59, *supra*, where Aboriginal laws of this sort were contemplated and regarded as relevant by Lamer C.J. For a discussion of Aboriginal title claims by so-called nomadic peoples, see Brian J. Burke, “Left Out in the Cold: The Problem with Aboriginal Title Under Section 35(1) of the *Constitution Act, 1982* for Historically Nomadic Aboriginal Peoples” (2000) 38 Osgoode Hall L.J. 1. For American case law on the Aboriginal title of nomadic peoples, see *United States v. Kagama*, 118 U.S. 375 at 381, 6 S. Ct. 1109 (1886) [cited to U.S.]; *Cramer v. United States*, 261 U.S. 219 at 227, 43 S. Ct. 342 (1923) [cited to U.S.]; *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 at 338-40, 65 S. Ct. 690 (1945) [*Shoshone Indians* cited to U.S.]; *Tee-Hit-Ton Indians v. United States*, 120 F.Supp. 202 at 204 (Ct. Cl. 1954), *aff’d* 348 U.S. 272 at 285-88, 75 S. Ct. 313 (1955) [cited to U.S.].

<sup>109</sup> *Marshall/Bernard*, *supra* note 5 at para. 72.

<sup>110</sup> (2003), 218 N.S.R. (2d) 78, [2004] 1 C.N.L.R. 211, 2003 NSCA 105 [*Marshall*].

<sup>111</sup> (2003), 262 N.B.R. (2d) 1, 230 D.L.R. (4th) 57, 2003 NBCA 55 [*Bernard*].

and Mi'kmaq perspectives on occupation, property, and territoriality, Cromwell J.A. summarized what he regarded as the correct position:

The test as expressed in *Delgamuukw* is whether the claimant has established exclusive occupation at sovereignty of the lands claimed. The question, in my opinion, is not whether exclusive occupation of the cutting sites was established, but whether exclusive occupation of a reasonably defined territory which includes the cutting sites, was established. Insistence on proof of acts of occupation of the specific cutting sites within that territory is, in my opinion, not consistent with either the common law or the aboriginal perspective on occupation.<sup>112</sup>

Similarly, in *Bernard*, Daigle J.A. regarded the Aboriginal title claim of the Mi'kmaq as a claim to territory rather than as a claim to specific sites:

It should be remembered, as pointed out earlier, that the appellant's claim in this case is for aboriginal title of the traditional Mi'kmaq territory, the Northwest Miramichi watershed, encompassing therein the Sevogle area [where the cutting took place]. The claim before the trial judge is not one for a site-specific right or activity that at the time of contact was exercised in the Sevogle area by the Mi'kmaq. The proof of a site-specific activity is part of the *Van der Peet* test for aboriginal rights. That test does not apply here because to ground aboriginal title the appellant's claim is clearly asserted on the basis of pre-sovereignty occupation of the Mi'kmaq traditional territory and is founded on evidence aimed at proving such occupation. It is true that to be exempt from the legislation under which he is charged and have the benefit of a valid defence, the appellant must demonstrate that the place where the offence was committed is located within the Mi'kmaq territory over which aboriginal title is asserted. That can be done by showing that the territorial scope of the claimed area includes the locus of the offence, the Sevogle area. There is no requirement in the law that site-specific harvesting rights be established precisely with regard to the Sevogle area because it is alleged that the offence occurred there.<sup>113</sup>

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<sup>112</sup> *Marshall*, *supra* note 110 at para. 183.

<sup>113</sup> *Bernard*, *supra* note 111 at para. 85.

By endorsing the trial judges' requirement of proof of occupation of the specific cutting sites, McLachlin C.J. appears to have rejected the territorial approach of the Court of Appeal judges,<sup>114</sup> and, as suggested above,<sup>115</sup> conflated the tests for proof of Aboriginal title and other Aboriginal rights in a way Daigle J.A. in particular was anxious to avoid. In my opinion, however, the territorial approach is more in keeping with the unique character of Aboriginal title, combining as it does proprietary and jurisdictional elements.<sup>116</sup> With respect, I think McLachlin C.J.'s proprietary approach fails to take sufficient account of the *sui generis* aspects of Aboriginal title described by Lamer C.J. in *Delgamuukw*, in particular its communal nature and the decision-making authority that is vested in the Aboriginal titleholders.<sup>117</sup> Aboriginal title more closely resembles the kind of interest and authority a governmental entity has over a territory than it does the kind of property right an individual or corporation has over a parcel of land.<sup>118</sup>

Although the decision in *Marshall/Bernard* was unanimous in result, LeBel J., in a judgment concurred in by Fish J., expressed views on the source and proof of Aboriginal title that differed substantially from those of McLachlin C.J. Justice Le Bel was particularly concerned that the Chief Justice's approach was "too narrowly focused on common law concepts relating to property interests"<sup>119</sup> and might preclude proof of Aboriginal title by nomadic or semi-nomadic peoples.<sup>120</sup>

<sup>114</sup> Compare the American approach to proof of Aboriginal title, which is clearly territorial. In *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 62 S. Ct. 248 at 345 (1941) [cited to U.S.], Douglas J., for a unanimous Supreme Court, stated in relation to the title claim of the Walapais Indians: "Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had 'Indian title' which, unless extinguished, survived the railroad grant of 1866." This case was cited by Lamer C.J. in *Delgamuukw*, *supra* note 6 at para. 158, in the context of exclusive occupation and joint Aboriginal title. See also *Shoshone Indians*, *supra* note 108 at 338-39; *Tlingit and Haida Indians of Alaska v. United States*, 182 Ct. Cl. 130, 389 F.2d. 778 at 785-86 (1968) [cited to F.2d.]. In *United States v. Seminole Indians*, 180 Ct. Cl. 375 at 385-86 (1967), Collins J. said "the Government leans far too heavily in the direction of equating 'occupancy' (or capacity to occupy) with *actual* possession, whereas the key to Indian title lies in evaluating the manner of land-use over a period of time. Physical control or dominion over the land is the dispositive criterion" [emphasis in original].

<sup>115</sup> See text accompanying notes 94-97, *supra*.

<sup>116</sup> See *supra* notes 68-72 and accompanying text.

<sup>117</sup> See *supra* notes 35-38 and accompanying text.

<sup>118</sup> See "Post-*Delgamuukw*", *supra* note 30 at 124-25.

<sup>119</sup> *Marshall/Bernard*, *supra* note 5 at para. 110.

<sup>120</sup> *Ibid.* at para. 126.

Relying on passages from Lamer C.J.'s judgment in *Delgamuukw* that emphasized the *sui generis* qualities of Aboriginal title, the relevance of Aboriginal law as a source of Aboriginal title, and the need to "give equal consideration to the aboriginal and common law perspectives,"<sup>121</sup> LeBel J. stated that

aboriginal conceptions of territoriality, land-use and property should be used to modify and adapt the traditional common law concepts of property in order to develop an occupancy standard that incorporates both the aboriginal and common law approaches. Otherwise, we might be implicitly accepting the position that aboriginal peoples had no rights in land prior to the assertion of Crown sovereignty because their views of property or land use do not fit within Euro-centric conceptions of property rights.<sup>122</sup>

After acknowledging the difficulty of introducing "aboriginal conceptions of property and ownership into the modern property law concepts of the civil law and common law systems," he continued: "Aboriginal title has been recognized by the common law and is in part defined by the common law, but it is grounded in aboriginal customary laws relating to land. The interest is proprietary in nature and is derived from inter-traditional notions of ownership."<sup>123</sup>

LeBel J. also took direct aim at McLachlin C.J.'s use of Aboriginal perspectives in a limited way to assess Aboriginal practices in relation to land:

The role of the aboriginal perspective cannot be simply to help in the interpretation of aboriginal practices in order to assess whether they conform to common law concepts of title. The aboriginal perspective shapes the very concept of aboriginal title. "Aboriginal law should not just be received as evidence that Aboriginal peoples did something in the past on a piece of land. It is more than evidence: it is actually law. And so, there should be some way to bring to the decision-making process those laws that arise from the standards of the indigenous people before the court."<sup>124</sup>

This passage suggests as well that Aboriginal law is more than evidence of occupation and use of land. Law involves the exercise of jurisdiction,

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<sup>121</sup> *Ibid.* at para. 129. (See also para. 139.)

<sup>122</sup> *Ibid.* at para. 127.

<sup>123</sup> *Ibid.* at para. 128.

<sup>124</sup> *Ibid.* at para. 130, quoting from John Borrows, "Creating an Indigenous Legal Community" (2005) 50 McGill L.J. 153 at 173. (See also *ibid.* at para. 136.)

and when that law is in relation to land the jurisdiction is territorial.<sup>125</sup> It is conceptually different from the site-specific physical occupation that the trial judges required and that McLachlin C.J. accepted as the appropriate standard. Disagreeing with the Chief Justice, LeBel J. said “[o]ccupation should therefore be proved by evidence not of regular and intensive use of the land but of the traditions and culture of the group that connect it with the land”.<sup>126</sup> For him, those traditions include “aboriginal conceptions of territoriality”.<sup>127</sup>

LeBel J.’s approach, taking into account as it does Aboriginal law and conceptions of territoriality, is thus much closer to that of Cromwell J.A. and Daigle J.A. in the Courts of Appeal.<sup>128</sup> Commenting positively on Cromwell J.A.’s approach, he said:

He attempted to take the different patterns of First Nations land use into consideration in order to effect a legal transposition of the native perspective and experience into the structures of the law of property. He stayed within the framework of this part of the law while remaining faithful to the tradition of flexibility of the common law, which should allow it to bridge gaps between sharply distinct cultural perspectives on the relationship of different peoples with their land.<sup>129</sup>

But LeBel J. ultimately dismissed the Aboriginal title claim because he found that the factual record lacked the necessary evidentiary foundation. He nonetheless did not regard this as “a final determination of the issue of aboriginal title rights in Nova Scotia or New Brunswick. A final determination should be made only where there is an adequate evidentiary foundation that fully examines the relevant legal and historical record.”<sup>130</sup> Concluding on this note, LeBel J. observed that the evidentiary problems may have arisen from the fact that the Aboriginal title claims were raised in the context of summary conviction proceedings for violations of provincial statutes, rather than in the more appropriate context of civil actions. He said “the criminal process

<sup>125</sup> See *Minquiers and Ecrehos Case*, 1953 I.C.J. Rep. 47, where the International Court of Justice considered conflicting French and British claims to territorial sovereignty based on occupation of islands in the English Channel. Regarding the evidence of occupation presented by Britain, the Court said at 65: “Of the manifold facts invoked by the United Kingdom Government, the Court attaches, in particular, probative value to the acts which relate to the exercise of jurisdiction and local administration and to legislation.”

<sup>126</sup> *Marshall/Bernard*, *supra* note 5 at para. 140.

<sup>127</sup> *Ibid.* at para. 127. See text accompanying note 122, *supra*.

<sup>128</sup> See text accompanying notes 110-13, *supra*.

<sup>129</sup> *Marshall/Bernard*, *supra* note 5 at para. 130.

<sup>130</sup> *Ibid.* at para. 141.

is inadequate and inappropriate for dealing with such claims,"<sup>131</sup> especially given the impact they may have on "competing rights and interests of a number of parties who may have a right to be heard at all stages of the process".<sup>132</sup> He suggested that a way of dealing with this would be "to seek a temporary stay of the charges so that the aboriginal claim can be properly litigated in the civil courts".<sup>133</sup>

#### IV. CONCLUSIONS

Prior to *Delgamuukw*, the source of Aboriginal title in Canadian law remained uncertain. Aboriginal law and the common law had each been proposed as viable, alternative sources, but the Supreme Court had not yet pronounced on the matter.<sup>134</sup> If Aboriginal law was relied upon, the doctrine of continuity would apply, and so Aboriginal title would be derived from, and be defined by, the pre-existing laws of the Aboriginal people in question.<sup>135</sup> If the common law was relied upon, Aboriginal title would depend on occupation of lands by Aboriginal peoples at the time of Crown acquisition of sovereignty and the legal effect given to occupation by the common law.<sup>136</sup> Chief Justice Lamer's decision in *Delgamuukw* amounts to an innovative combination of these two approaches: occupation of land at the time of Crown sovereignty is the standard giving rise to Aboriginal title, but Aboriginal law as well as physical presence and use can be utilized to prove the requisite occupation. The resulting title is a common law rather than an Aboriginal law title, but it is unlike any previously-known common law interest in land because it has several *sui generis* aspects, specifically pre-sovereignty source, inalienability, communal nature, and inherent limit.<sup>137</sup>

In my respectful opinion, Chief Justice McLachlin's approach to Aboriginal title is a disappointing retreat from the innovative aspects of Lamer C.J.'s decision in *Delgamuukw*. For her, the legal effect given to physical occupation by the common law is the source of Aboriginal title, while Aboriginal law seems to be of little relevance. But this common law approach is only one way of asserting Aboriginal land rights. What if Aboriginal claimants chose instead to pursue a claim based on their own laws and the doctrine of continuity, rather than on the basis of common law Aboriginal title? Like the land rights

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<sup>131</sup> *Ibid.* at para. 143.

<sup>132</sup> *Ibid.* at para. 142.

<sup>133</sup> *Ibid.* at para. 144. For insightful commentary on this aspect of LeBel J.'s judgment, see Shin Imai, "The Adjudication of Historical Evidence: A Comment and an Elaboration on a Proposal by Justice LeBel" U.N.B.L.J. [forthcoming].

<sup>134</sup> See McNeil, *Common Law*, *supra* note 49, especially at 193-96, 274-90.

<sup>135</sup> See *supra* notes 49-50 and accompanying text.

<sup>136</sup> See McNeil, *Common Law*, *supra* note 49, especially at 196-208.

<sup>137</sup> See *supra* notes 26-44 and accompanying text.

the French had under their own laws prior to the Crown's acquisition of sovereignty in Canada,<sup>138</sup> those rights should have continued thereafter.<sup>139</sup> Moreover, neither *Delgamuukw* nor *Marshall/Bernard* contains any suggestion that they would not have done so.<sup>140</sup> In fact, McLachlin J. herself, dissenting in *Van der Peet* before she became Chief Justice, recognized the doctrine of continuity as a "golden thread" running through the long history of relations between the Crown and Aboriginal peoples:

This much is clear: The Crown, upon discovering and occupying a "new" territory, recognized the law and custom of the aboriginal societies it found and the rights in the lands they traditionally occupied that these supported....It follows that the Crown in Canada must be taken as having accepted existing native laws and customs and the interests in the land and waters they gave rise to, even though they found no counterpart in the law of England. In so far as an aboriginal people under internal law or custom had used the land and its waters in the past, so it must be regarded as having the continuing right to use them, absent extinguishment or treaty.<sup>141</sup>

Although Lamer C.J. for the majority in *Van der Peet* took a different approach to Aboriginal rights, applying what has become known as the "integral to the distinctive culture test,"<sup>142</sup> his judgment would

<sup>138</sup> See *Drulard v. Welsh* (1906), 11 O.L.R. 647 (Ont. Div. Ct.), rev'd on other grounds (1907), 14 O.L.R. 54 (Ont. C.A.); *Corinthe v. Le Séminaire de Saint-Sulpice* (1911), 21 R.J.Q. 316, 4 C.N.L.C. 67 at 321-24 [cited to R.J.Q.] aff'd [1912] A.C. 872, 5 D.L.R. 263 (P.C.); and discussion in Slattey, *Land Rights*, *supra* note 7 at 167-74.

<sup>139</sup> For discussion of the application of the doctrine of continuity to Aboriginal rights, see Michael Halewood, *Common Law Aboriginal Knowledge Protection Rights: Recognizing the Rights of Aboriginal Peoples in Canada to Prohibit the Use and Dissemination of Elements of their Knowledge* (D. Jur. Dissertation, Osgoode Hall Law School, 2005) at 200-44 [unpublished]; Walters, "Golden Thread", *supra* note 49; Barsh, *supra* note 49.

<sup>140</sup> Note that the *Delgamuukw* case was originally presented at trial as a claim based on land rights under Aboriginal law (see *Delgamuukw, B.C.S.C.*, *supra* note 64), but by the time the case reached the Supreme Court of Canada the claim had been modified to one based on Aboriginal title: see *Delgamuukw*, *supra* note 6 at paras. 7, 73, Lamer C.J.

<sup>141</sup> *Van der Peet*, *supra* note 15 at paras. 268-69, 261. For commentary, see Walters, "Golden Thread", *supra* note 49. See also *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 199 D.L.R. (4th) 385, 2001 SCC 33 at para. 10, where McLachlin C.J., delivering the leading judgment, said that "aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights". This passage was quoted by LeBel J. in *Marshall/Bernard*, *supra* note 5 at para. 133.

<sup>142</sup> See text accompanying note 95, *supra*.

not seem to preclude the application of the doctrine of continuity in a properly pleaded case where Aboriginal law is explicitly relied on to establish an Aboriginal right, including a right to land.<sup>143</sup>

But in-between the common law approach McLachlin C.J. took in *Marshall/Bernard*, and the Aboriginal law approach she espoused in *Van der Peet*, is the *Delgamuukw* approach that combines elements of both. While her deviation from the *Delgamuukw* approach was revealed by her colleague LeBel J., her reasons for deviating from it are unclear, especially in light of the fact that she concurred with Chief Justice Lamer's decision in *Delgamuukw* and purported to follow that decision in *Marshall/Bernard*.

In my opinion, the *Delgamuukw* approach is superior to both a strict common law approach and a strict Aboriginal law approach because it acknowledges the unique qualities of Aboriginal title and provides jurisdictional space for self-government.<sup>144</sup> The pre-Crown sovereignty source of Aboriginal title in collective occupation of lands by Aboriginal peoples, the title's inalienability, its communal nature, and the governmental authority that Aboriginal communities have over it all reveal that it cannot be conceptualized as a mere property right. Instead, it is in the nature of a territorial right that has both proprietary and jurisdictional elements.<sup>145</sup> The *Delgamuukw* approach also allows for the application of both the common law and Aboriginal systems of law post-Crown sovereignty: the common law applies externally to define and protect the rights of the Aboriginal titleholders *vis-à-vis* the Crown and others, whereas Aboriginal law applies internally to define rights and obligations with respect to the land within the Aboriginal territory. Moreover, the decision-making authority of the Aboriginal community that was acknowledged in

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<sup>143</sup> This should be especially so where the Aboriginal law was integral to the distinctive culture of the people in question because it would then qualify as a practice, custom or tradition within the scope of the test: see *Delgamuukw*, *supra* note 6 at para. 148, where Lamer C.J. stated that he had held in *Van der Peet* "that the aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples". See also *Casimel v. Insurance Corp. of British Columbia* (1993), 106 D.L.R. (4th) 720, [1994] 2 C.N.L.R. 22 (B.C.C.A.) [cited to D.L.R.], where the British Columbia Court of Appeal, in a unanimous, pre-*Van der Peet* decision, held that an adoption under customary law "was an integral part of the distinctive culture of the Stellaquo Band of the Carrier People" (per Lambert J.A., *ibid.* at 733).

<sup>144</sup> See *supra* notes 35-38 and accompanying text. My own thinking on this has moved beyond the views expressed in my book, *Common Law Aboriginal Title*, *supra* note 49, published in 1989, which did not envisage the combined approach developed in *Delgamuukw* and did not take account of the connection between land rights and self-government.

<sup>145</sup> See "Post-*Delgamuukw*", *supra* note 30, and "Aboriginal Rights", *supra* note 65.

*Campbell*<sup>146</sup> to be governmental in nature provides them with the jurisdiction to modify their internal laws to meet their changing needs and priorities.

Does McLachlin C.J.'s majority decision in *Marshall/Bernard* mean that the combined common law/Aboriginal law approach that Lamer C.J. espoused in *Delgamuukw* has been replaced by a strict common law approach? I do not think so. First of all, McLachlin C.J. purported to follow *Delgamuukw*, and did not explicitly reject any part of it. Moreover, the evidence of Aboriginal law in *Marshall/Bernard* was not particularly strong, leading even LeBel J. to dismiss the Aboriginal title claim on the facts, despite his acceptance of the relevance of Aboriginal law to such claims.<sup>147</sup> In future cases, therefore, I think it will be important for Aboriginal title claimants to present strong evidence of the existence and application of Aboriginal law in relation to land, in addition to evidence of physical occupation, particularly where they are asserting title over their traditional territory rather than over specific sites. In the face of such evidence, which was largely absent from the factual record in *Marshall/Bernard*, one would expect the Supreme Court to either follow *Delgamuukw* and accept the relevance of such evidence, or retreat from that decision and explicitly modify the law. I do not think the Court would be able to ignore direct evidence of Aboriginal land laws and purport to abide by the *Delgamuukw* decision at the same time.

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<sup>146</sup> *Supra* note 36.

<sup>147</sup> Compare Cromwell J.A.'s judgment in *Marshall*, *supra* note 110 at paras. 145-52, where some limited evidence of Aboriginal perspectives on land tenure and use was reviewed and relied upon. See also *Bernard*, *supra* note 111, especially at paras. 104-12.