COMMENT

Delgamuukw: Back to Court?

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I. THE CHALLENGE

"LET US FACE IT, we are all here to stay."[1] Lamer C.J.C.'s last words in *Delgamuukw*, the Supreme Court's aboriginal title decision, referred to a pressing Canadian challenge. How do we ensure the peaceful, positive, and permanent coexistence of one million First Peoples and twenty-nine million newcomers? The words also involved some questions about means. How should we address this challenge? Through negotiated settlements? Court decisions? Other ways? *Delgamuukw*—and these questions about means—are the subject of this comment.

The Supreme Court says it favours negotiated settlements that are anchored in the law, especially in s. 35(1) of the *Constitution Act, 1982*.[2] The Court sees this provision as a "solid constitutional base upon which subsequent negotiations can take place."[3] It suggests that courts have a supporting role here, developing the law and furthering the political negotiation process.[4] The Court

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1 *Delgamuukw et al.* v. *The Queen in right of British Columbia et al.*, [1997] 3 S.C.R. 1010 at para. 186 [hereinafter *Delgamuukw*]. Variation of (1993), 104 D.L.R. (4th) 470 (B.C. C.A.)), which varied (1991), 79 D.L.R. (4th) 185 (B.C. S.C.).

2 *Constitution Act, 1982*, s.35 being schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

3 *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1105 [hereinafter *Sparrow*], quoted in *Delgamuukw*, *supra* note 1, at para. 186.

4 This process needs all the help it can get. Progress in the comprehensive land claims negotiation process has been painfully slow. Since 1975, the year of the *James Bay and Northern Quebec Agreement*, ten modern land claims agreements have been signed and ratified. In British Columbia, over 50 land claims—including the claim of the Gitksan and Wet'suet'en—have yet to be resolved. In that province, only the Nisga'a claim is near settlement. A *Nisga'a Final Agreement* was signed on 4 August 1998 ... after 25 years of negotiation. By early spring, 1999, the Agreement had been ratified by the Nisga'a, awaited ratification by the British Columbia and federal legislatures, and was subject to a constitutional

tried to play this role in *Delgamuukw*, by clarifying and strengthening aboriginal title.

Did the Supreme Court succeed? To try to answer this question, I will look first at the litigation in *Delgamuukw*, and then at the main questions addressed by the Supreme Court of Canada.[5]

II. THE LITIGATION

DELGAMUUKW STARTED WITH A MAJOR loss for the claimants. In the Supreme Court of British Columbia, representatives of about 7 000 Gitksan and Wet'suwet'en people claimed full ownership, self-government, and other aboriginal rights, over 22 000 square miles of west central British Columbia. The trial judge, McEachern C.J.B.C., rejected the ownership and self-government claims.[6] He declared that the claimants had aboriginal rights of occupation and use, but that these had been extinguished by the Crown prior to British Columbia's entry into Confederation.[7] In coming to his conclusion, the trial judge assigned a limited role to aboriginal oral evidence.[8] McEachern C.J.B.C. did say the Crown owed the aboriginal people a fiduciary duty to let them use certain lands in the territory. But this was a pale concession. He limited the use to unoccupied Crown lands and subjected it to laws of general application and adverse Crown needs:[9]

> The Gitksan and Wet'suwet'en fared better in the British Columbia Court of Appeal.[10] A majority[11] did reject the claim to full ownership because of lack of evidence of exclusive oc-

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challenge by members of the official opposition in the British Columbia Leglislative Assembly: *Campbell* v. *British Columbia* (A.G.) (22 January 1999), Vancouver A982738 (B.C. S.C.). For the current state of the negotiation process in British Columbia, see Government of British Columbia, *Present Status of B.C.T.C.* (British Columbia Treaty Consultation Process), <http://aaf.gov.bc.ca/aaf/treaty.status.htm>.

5 I will not attempt to address all the significant issues that are raised by this complex decision, or even all aspects of the five highlighted here. In particular, I will leave the broader cultural, economic, and social implications of *Delgamuukw* to others.

6 *Ibid.* at 454–55 and 473–75.

7 *Delgamuukw* v. *British Columbia* (1991), 79 D.L.R. (4th) 185 (S.C.), parts 14 and 15 [hereinafter *Delgamuukw (trial)*].

8 *Ibid.* at parts 7, 8, and 17.

9 *Ibid.* at 487–90.

10 *Delgamuukw* v. *British Columbia* (1993), 104 D.L.R. (4th) 470 (B.C. C.A.)) [hereinafter *Delgamuukw (appeal)*]. The Gitksan and Wet'suwet'en appealed all of the British Columbia Supreme Court's decision except the fiduciary ruling.

cupation and clear boundaries. Moreover, the majority said that any aboriginal self-government—in the sense of sovereign legislative powers—had been ended by British sovereignty or by the exhaustive division of legislative powers in the *Constitution Act, 1867*.[12] However, the majority upheld the claimed aboriginal rights of occupation and use of land and said that these rights had not been extinguished. Lambert and Hutcheon JJ.A., dissenting in part, agreed with the majority in regard to rights of occupation and use. However, they went on to accept the claim to ownership and to aboriginal self-government (which Hutcheon J.A. regarded as a non-sovereign right of internal regulation).[13]

At the Supreme Court of Canada, the Gitksan and Wet'suwet'en won a major victory. The highest Court took a liberal approach to admission and weight of oral aboriginal evidence, gave strong, exclusive content to aboriginal title, added to the requirements for its justifiable infringement, and denied provincial governments the capacity to extinguish aboriginal rights.[14] The Supreme Court addressed five main sets of questions:

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[11] Macfarlane J.A., Taggart JJ.A. concurring; and Wallace J.A. For a more detailed summary of these judgments, see D.W. Elliott, *Law and Aboriginal Peoples of Canada*, 3rd ed. (North York, Ontario: Captus Press, 1997) at 72–73.

[12] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, s.91, reprinted in R.S.C. 1985, App. II, No. 5.

[13] Lambert and Hutcheon JJ.A., dissenting, felt that a right to self-government was protected as an aboriginal right by s. 35(1) of the *Constitution Act, 1982*. Lambert J.A. said aboriginal self-government relates to internal aboriginal affairs, it does not involve "ultimate legislative power" and does not prevail over provincial law "in all circumstances": *Delgamuukw (appeal)*, *supra* note 10 at 727–28. He stated that aboriginal self-government survived both sovereignty and the division of powers in the *Constitution Act, 1867*: *ibid.* at 727–30). Hutcheon J.A. suggested that aboriginal self-government is subject to otherwise valid federal and provincial laws: *ibid.* at 761–64.

[14] As Sopinka J. had died earlier in the autumn, the decision was rendered by a six-judge court. The most extensive reasons were by Lamer C.J.C., who spoke on behalf of four judges. La Forest J. delivered concurring reasons for himself and L'Heureux-Dubé. La Forest J. agreed with Lamer C.J.C.'s conclusion and with many of the Chief Justice's reasons. La Forest J. disagreed, however, with Lamer C.J.C. in four main respects. First, La Forest J. said the fact that the claimants sought a declaration of aboriginal title but tried to prove complete control constituted an additional defect in the pleadings: *supra* note 1 at para. 189. Second, La Forest thought aboriginal title should not be defined more precisely than Dickson J. (as he then was) had described it in *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335 at 381–82: *supra* note 1 at para. 190. Third, La Forest J. disagreed with the use of statutes to help define aboriginal title (*supra* note 1 at para. 192). Fourth, La Forest J. felt aboriginal title could be proven by reference to the principles derived from the criteria formulated in *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*] for particular aboriginal rights, rather than through a separate test: *supra* note 1 at paras. 193–99. McLachlin J. agreed with the Chief Justice, and said "I add that I am also in substantial agreement with the comments of Justice La Forest": *supra* note 1at para. 209. Apart from his reluctance to endorse the detailed exposition of the content of aboriginal title, La Forest J.'s points of disagreement with Lamer C.J.C. were not fundamental. This commentary will focus on the reasons of the Chief Justice.

(i) could the Gitksan and Wet'suwet'en's claims be changed informally in the course of the court proceedings;

(ii) what evidentiary value should be given to oral aboriginal histories in aboriginal rights cases? And, where should appellate courts interfere with trial judge's findings of fact;

(iii) what is the general nature, content, and status of aboriginal title? What is its content? How is it related to aboriginal rights? What is the general nature of aboriginal rights? What is required to prove aboriginal title? How is it protected under s. 35(1) of the *Constitution Act, 1982*?[15] What justification principles apply to infringement of s. 35(1) aboriginal title;

(iv) what is required to argue a claim of guaranteed aboriginal self-government rights';

(v) could a province extinguish aboriginal rights after its entry into Confederation, either on its own authority or through the operation of s. 88 of the Indian Act?[16]

III. CHANGING CLAIMS

DESPITE ITS TECHNICAL APPEARANCE, this first issue in *Delgamuukw* was more than mere formality. It had a direct connection with the subject matter. Although changing claims is not unique to aboriginal litigation, it is likely to recur in this area of law.

When the Gitksan and Wet'suwet'en appealed the British Columbia Supreme Court's decision, they made two sets of changes to their claims. First, they changed their original claims of ownership and jurisdiction into claims of aboriginal title and self-government, respectively.[17] Second, they replaced the original individual claims by 51 Gitksan and Wet'suwet'en chiefs and houses[18]

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[15] *Supra* note 2

[16] *Indian Act*, R.S.C. 1985 c.I–5.

[17] The claimants made this change to their pleadings at the Supreme Court of Canada. In the British Columbia Court of Appeal, Gitksan and Wet'suet'en had changed the original ownership and jurisdiction claims into a global claim of aboriginal rights, said to include proprietary ownership, and self-government over land, resources, and people. The majority judges rejected this formulation, saying the claim should be limited to ownership, jurisdiction (which they understood to mean self-government), and other aboriginal rights, not aboriginal rights in a global sense. Without expressly limiting the claimants' "global" formulation, Lambert J.A. took a somewhat similar approach in the B.C. C.A.

[18] The Gitksan and Wet'suwet'en claimed a total of 133 individual territories.

with a collective claim by each of the Gitksan and Wet'suwet'en nations.[19] Neither change had been made by formal amendment to the pleadings. Should the changes be permitted informally?

The Supreme Court allowed the first set of changes, but not the second. In the first case, said Lamer C.J.,[20] the trial judge had already allowed the change before the end of the trial. He had done this in an area where the law was uncertain, and the respondent governments had not contested the change by way of appeal. However, the second set of changes was another matter. Here no change had been allowed during the trial. Although the boundaries of the two nations' new claims coincided with those of the 51 chiefs' original claims, no evidence or argument had been addressed to the latter at trial. To allow this change could deprive the respondents of the opportunity to respond to the new claim. Thus the case must be sent back to trial. As a result, all the Court's reasons on substantive issues, from aboriginal title to s. 35(1) of the *Constitution Act, 1982*, were technically *obiter dicta*.

There may have been no reasonable alternative to this frustrating result. As Lamer C.J.C. suggested, if a claim is changed near the end of the trial, the other parties may be denied the opportunity to respond effectively to the new claim. The later the change, the greater the risk. The first changes came well before the trial's end. At this time the respondents could still adjust their own presentation of evidence and argument. The second set of changes followed the evidence and argument. They were too late.

A second possible distinction between the two sets of changes[21] is less convincing. Lamer C.J.C. said the first set could be justified in part because of the legal uncertainty about aboriginal title and self-government. Yet the law about the second set of changes—the law about the parties and rules of evidence ap-

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[19] These two territories occupied the same area as the 133 individual territories. Thus the external boundaries of the individual territories and those of the two collective territories were identical.

[20] Lamer C.J.C. gave the main majority reasons for the Supreme Court: note 14.

[21] Two other possible distinctions can be mentioned briefly here. Failure to appeal: Lamer C.J.C. stressed that although the first set of changes could have been appealed, this had not been done. It could be inferred, therefore, that the respondents had not felt seriously prejudiced by it. Although Lamer C.J.C. did not say so specifically, the second set of changes were sought too late to have been appealed, so no such inference was possible. Net effect of change: The smaller the change, the more likely one would expect it to be permitted. Since two new territorial claims covered the same area as the 51 original claims, the claimants argued that the second set of changes made no net difference to the case, and should be allowed. Although Lamer C.J.C. conceded that this argument carried "considerable weight": *Delgamuukw*, *supra* note 1 at para. 76, he said it did not address the fact that the new collective claims had not been in issue at trial. Thus Lamer C.J.C. appears to have been willing to have assumed that this set of changes could have made *some* difference to the form of the evidence and argument at trial.

propriate to aboriginal title claims—was far from certain itself. Uncertainty clouded all aspects of this area of law.

Legal uncertainty not only helps to justify changes of claim, but it makes them more likely. It requires appellate courts to choose between denials of hearings and costly and time-consuming referrals back to trial. One way to end this cycle is to provide a major clarification of the evidentiary and substantive law of aboriginal title and aboriginal rights. Did the Court provide this in *Delgamuukw*?

IV. ABORIGINAL EVIDENCE[22]

THE RULES OF EVIDENCE are as crucial to the outcome of litigation as is the substantive law. In *Delgamuukw*, the Court has tried to build a bridge between the standard rules of evidence and aboriginal evidence[23] in aboriginal claims cases.[24] As will be seen, the bridge needs more work.

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[22] The issue of aboriginal oral evidence was related to the question as to where an appellate court should interfere with a trial judge's findings of fact. In *Delgamuukw*, the Supreme Court of Canada affirmed the general principle that an appellate court should normally defer to a trial judge's findings of fact, especially those based on the testimony and credibility of the witnesses, and on the law the trial judge applied to the facts: *supra* note 1 at paras. 78 and 79. However, the Court said appellate intervention is justified "by the failure of a trial court to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when, first, applying the rules of evidence and, second, interpreting the evidence before it" (para. 80). Given the potential scope of this exception—and the way the Supreme Court applied it in *Delgamuukw*— is there much room for judicial deference in aboriginal claims litigation? In light of the rapidly evolving nature of the case law on aboriginal rights, a fact acknowledged by the Court in *Delgamuukw* (at para. 79), the scope of this exception is likely to generate an abundance of appeals in this area.

[23] On aboriginal evidence, see M. Asch, "Errors in Delgamuukw: An Anthropological Perspective" in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw* v. *The Queen* (Lantzville: Oolichan Books and the Institute for Research on Public Policy, 1992) at 221; M. Storrow & M. Bryant, "Litigating Aboriginal Rights Cases" in F. Cassidy, ed., *ibid.* at 178; G. Sherrott, "The Court's Treatment of the Evidence in *Delgamuukw* v. B.C." (1992) 56 Sask. L. Rev. 441; J. Fortune, "Construing *Delgamuukw*: Legal Arguments, Historical Argumentation, and the Philosophy of History" (1993) 51 U.T. Fac. L. Rev. 80; M. Asch & C. Bell, "Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of *Delgamuukw*" (1994) 10 Queen's L.J. 503; and B.J. Gover & M.L. Macaulay, "'Snow Houses Leave No Ruins': Unique Evidence Issues in Aboriginal and Treaty Rights Cases" (1996) 60 Sask. L. Rev. 47. Note that McEachern C.J.B.C.'s decision in *Delgamuukw (trial)* pre-dated *Smith*, *infra* note 27 and *B.(K.G.)*, *infra* note 26.

[24] This development builds on an earlier series of decisions stressing the need to accommodate oral aboriginal evidence in the context of aboriginal treaty cases: see *R.* v. *Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.) at 232; *Simon* v. *The Queen*, [1985] 1 S.C.R. 387 at 408; and *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1068, all referred to in *Delgamuukw*, *supra* note 1 at para. 87.

The 51 hereditary chiefs claimed traditional occupation and use of 133 contiguous but discrete territories, each separated by internal boundaries. To demonstrate this, and to show the significance of this land to their cultures, the claimants relied heavily on oral or partly oral evidence. This included collective oral histories (the *adaawk* of the Gitksan and the *kungax* of the Wet'suet'en), personal and family histories, and chiefs' territorial affidavits of declarations by deceased persons.

A. Collective Oral Histories

The *adaawk* and *kungax* were hearsay evidence, which is not generally admissible in courts. [25] The problem with hearsay is that it cannot be directly tested in court. In court a witness must testify under oath, his or her credibility can be assessed at first hand, and all statements can be tested directly by cross-examination.[26] On the other hand, the hearsay rule has several exceptions and can be relaxed in appropriate situations. Recently the Supreme Court of Canada has said that both the exceptions and the relaxation are subject to the two guiding principles of necessity and reliability.[27] Generally speaking, the hearsay rule is not applied where: the evidence would not be available otherwise (a situation of necessity) and there are alternative safeguards to ensure reliability.[28] One exception that meets these principles is "reputation" evidence.[29] This includes statements made by deceased persons about public or general rights.[30]

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[25] Hearsay evidence is an out-of-court statement or other communication made as proof of an assertion of fact contained in it: see J. Sopinka et al., *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 156. The common law "rule" against hearsay is that hearsay evidence is generally inadmissible. Compare the description in *Subramanniam* v. *Public Prosecutor*, [1956] 1 W.L.R. 965 at 970 (P.C.), cited in R. v. *Smith* [1992] 2 S.C.R. 915 at 924; and M.N. Howard, P. Crane, & D.A. Hochberg, *Phipson on Evidence*, 14th ed. (London: Sweet & Maxwell, 1990) at 557 [hereinafter *Phipson on Evidence*]; S. Schiff, *Evidence in the Litigation Process*, vol. 1, 4th ed. (Scarborough, Ont.: Carswell, 1993) at 322.

[26] As noted, for example, in R. v. *B.(K.G.)*, [1993] 1 S.C.R. 740.

[27] See *e.g.* R. v. *Khan*, [1990] 2 S.C.R. 531; R. v. *Smith*, *supra* note 25, R. v. *B.(K.G.)*, *supra* note 26, and R. v. *Rockey*, [1996] 3 S.C.R. 829 at para. 17. The movement in the *Khan*, *Smith*, and *B.(K.G.)* trilogy from the "categorical" to the "principled" approach to hearsay rule exceptions is summarized in the first part of P. McCrea, "Judicial Law-Making: The Development of the Principled Exception to the Hearsay Rule—Implications for Preliminary Hearsay Recantations" (1998) 61 Sask. L. Rev. 199. Note that McEachern C.J.B.C.'s decision in *Delgamuukw(trial)* pre-dated *Smith* and *B.(K.G.)*.

[28] *Ibid.*

[29] See generally *Phipson on Evidence*, *supra* note 25 at 736.

[30] These statements meet the necessity requirement because the dead cannot give further evidence. They meet the alternative safeguards requirement because public or general rights are subject to testing by the community as a whole.

Stressing that there was no other way to prove the claimants' history,[31] McEachern C.J.B.C. admitted the *adaawk* and *kungax* as reputation evidence.[32] However, he concluded that they could be given little weight, and that he could use them only to confirm other evidence of the 51 individual territories.[33] This was mainly because the *adaawk* and *kungax* (*i*) lacked sufficient detail about the territories and their internal boundaries,[34] (*ii*) were part belief as well as fact,[35] and (*iii*) lacked sufficiently large and diverse verifying groups.[36] McEachern C.J.B.C. went on to conclude that the evidence was insufficient to prove these individual territories.[37]

How did the Supreme Court of Canada respond to these concerns? Lamer C.J.C. said that imprecision and small verifying groups are characteristic of all oral histories. Thus, the trial judge's refusal to give them independent weight

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[31] *Delgamuukw (trial)*, *supra* note 7 at 258. Note that in *R. v. Smith*: *supra* note 27, the Supreme Court seemed to require a stricter test of necessity than this. In *Smith*, the Court said necessity referred to the situations where the evidence would be unavailable otherwise to prove the fact in issue. The Supreme Court of Canada said necessity did not mean "necessary to [a party's] case": 933. In a separate ruling on evidence, McEachern C.J.B.C. held that the telling and re-telling of oral history at public gatherings helped qualify the *adaawk* and *kungax* as general reputation evidence, *Uukw v. British Columbia* (1987), 15 B.C.L.R. (2d) 326 (S.C.).

[32] *Delgamuukw (trial)*, *supra* note 7 at 258. McEachern C.J.B.C. considered questions of evidence generally in Part 7 of his decision, and in the following separate rulings: *Uukw v. British Columbia* (1987), 15 B.C.L.R. (2d) 326 (B.C. S.C.) [oral histories]; *Delgamuukw v. British Columbia* (1988), 32 B.C.L.R. (2d) 152 (B.C. S.C.) [opinion evidence]; *Delgamuukw v. British Columbia* (1988), 32 B.C.L.R. (2d) 156 (B.C. S.C.) [legal professional privilege]; *Delgamuukw v. British Columbia* (1989), 38 B.C.L.R. (2d) 165 (B.C. S.C.) [historical documents and opinions]; *Delgamuukw v. British Columbia* (1989), 38 B.C.L.R. (2d) 176 (B.C. S.C.) [learned treatises].

[33] *Delgamuukw (trial)*, *supra* note 7 at 281. McEachern C.J.B.C. said "I do not find [the *adaawk* and kungax] helpful as evidence of use of specific territories at particular times in the past": *ibid.* at 260.

[34] *Ibid.* at 259–60.

[35] Which was a concern McEachern C.J.B.C. had with much of the oral evidence: *ibid.* at 243–48.

[36] *Ibid.* at 259. McEachern C.J.B.C. also expressed concern at the claimants' attempts to support the *adaawk* and *kungax* by reference to anthropological accounts—which he found unreliable—and to historical accounts—which he said provided little to support pre-contact events: *ibid.* at 260.

[37] *Ibid.* at 505 and 515. However, McEachern C.J.B.C. said the evidence—mainly the archaeological, linguistic, and (in part) historical and aboriginal genealogical evidence—did establish an aboriginal presence in the area, "for a long, long time before sovereignty": *ibid.* at *282*. Moreover, he concluded that inferences from this evidence and the aboriginal territorial affidavits established aboriginal rights in two territories comprising much of the area of the 133 territories originally claimed: *ibid.* at 522–23.

would systematically undervalue all aboriginal oral histories and would disregard the problem of finding alternative forms of proof. This, in turn, violated the instruction in *Van der Peet* to interpret aboriginal peoples' evidence "in light of the difficulties inherent in adjudicating aboriginal claims."[38]

B. Personal and Family Histories

McEachern C.J.B.C. also admitted the personal and family histories in regard to the internal boundaries,[39] but only as proof of land use within the past 100 years. He referred to anthropologists' concerns about oral recollection beyond this time. The Supreme Court addressed these concerns only indirectly. Lamer C.J. said that requiring definitive evidence of pre-contact aboriginal activities on the territory in question was expecting too much. The evidence might still be useful to demonstrate pre-sovereignty occupation, if not to establish it conclusively.[40]

C. Chiefs' Territorial Affidavits

For the most part, McEachern C.J.B.C. refused to admit the claimant chiefs' territorial affidavits as independent evidence of the internal boundaries. He held that *in regard to these particular boundaries*, the affidavits did not fit the reputation exception to the rule against hearsay. In the first place, reputation requires general knowledge.[41] Outside the communities in which the affidavits were made, there was little evidence of knowledge of their content. Much of this content could not be regarded as general knowledge because it was disputed. Moreover, because they had been prepared in conjunction with the claims process, the affidavits lacked objectivity. There was an additional, "much more serious problem".[42] In McEachern C.J.B.C.'s view, the evidence about the 133 territories and their internal boundaries contained too many inconsistencies to be credible.

The Supreme Court's first response to the affidavit concerns was to say that requiring general knowledge of aboriginal oral histories ignores their local nature. As for controversy, Lamer C.J.C said that aboriginal rights claims "are almost always disputed and contested."[43] If the claims were uncontroversial, they would not need to be decided by the courts. In Lamer C.J.C.'s view the claims

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38 *Delgamuukw*, *supra* note 1 at para. 98, referring to *Van der Peet*, *supra* note 14 at para. 68.

39 Also under the reputation evidence exception to the hearsay rule: see *Delgamuukw (trial)*, *supra* note 7 at 255.

40 *Delgamuukw*, *supra* note 1 at para. 101.

41 *Phipson on Evidence*, *supra* note 29 at 736.

42 *Ibid.* at 507.

43 *Delgamuukw*, *supra* note 1 at para. 106.

process was slow because British Columbia had refused to recognise aboriginal title. Why should the claimants be penalised because of action (or *in*action) beyond their control? Lamer C.J.C. noted that aboriginal communities must discuss their oral history to have it qualify as reputation. If this history were discounted because of its proximity to the claims process, aboriginal people could never use it to establish their claims in court. Perhaps because he regarded it as going to weight, not admissibility, Lamer C.J.C. did not deal directly with the trial judge's concerns about inconsistency.

D. Beyond Hearsay Exceptions

Thus, the Supreme Court rejected most of the trial judge's concerns about the oral aboriginal evidence. The Court says in *Delgamuukw* that aboriginal oral histories are admissible as proof of aboriginal rights claims and should not be denied independent evidentiary weight on the grounds given by the trial judge.[44] The Court supports the use of personal and family histories. It will recognise affidavits of declarations by deceased persons, whether or not these were prepared as part of documentation for aboriginal claims.[45] In the Court's view, this approach is necessary to take proper account of: (*i*) the aboriginal perspective as well as Canadian legal and constitutional constraints, and (*ii*) the special evidentiary difficulties involved in proving rights which pre-date written records.

Although the Court makes a strong case for admitting and considering oral aboriginal evidence on grounds of necessity, it says almost nothing about the other key aspect of evidence. What about reliability—reliability in a sense that can be effectively assessed by courts? The Court concedes that aboriginal oral evidence presents "challenges"[46] because it is subjective in parts, cannot always be tested in court, lacks detail, is disputed and controversial, and is generally too local to be broadly verified. Yet, when the trial judge expresses concerns about how these features affect reliability, the Court responds with arguments about necessity.

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[44] *Delgamuukw*, *supra* note 1 at para. 98. Although the trial judge said that his concerns about the evidentiary reliability of the *adaawk* and *kungax* affected their evidentiary weight rather than their admissibility, the Supreme Court stressed the general implications of these concerns, and appeared to treat this question as essentially one of admissibility: *ibid.* The confusion is partly because some of the same factors that are relevant to establishing a threshold of admissibility (such as the size of the verifying group) may also be relevant to the issue of evidentiary weight; partly because of the Supreme Court's tendency to respond to the trial judge's reliability concerns with arguments about necessity; and partly because of the Supreme Court's failure to note that the trial judge's concerns were mainly about the evidentiary reliability of the *adaawk* and *kungax* in relation to the 133 specific territories claimed. See *e.g. Delgamuukw (trial)*, *supra* note 7 at 259–60.

[45] *Delgamuukw*, *supra* note 1 at paras. 99–107.

[46] *Delgamuukw*, *supra* note 1 at para. 87.

Moreover, how can an appellate court find a "palpable and overriding error"[47] without prescribing tangible standards in the first place? Where the hearsay rule is relaxed, there should be alternative safeguards to help replace those normally protected by the rule: physical presence, oath, and cross-examination.[48] Also, trial judges need a more systematic and balanced conceptual framework for considering oral aboriginal evidence. Aboriginal hearsay evidence should be admissible where there is a threshold level of both necessity *and* reliability. There should be a recognised set of criteria for assessing its weight.

For determining necessity, the threshold should not be set high. All that need be asked is: "could this evidence be the only way to prove the claim?" For the reliability threshold, there should be some external[49] assurance of the reliability of the evidence.[50] This assurance might be provided by indicators such as the corroboration and consistency of the evidence, and the relative impartiality and expertise of the sources.[51]

Although the job of assessing the weight of evidence has a broader focus, it includes the same reliability indicators that are relevant to admissibility. For assessing the weight of evidence, the goal is to determine if it is sufficiently reliable and relevant to support the claim made. Before this can be done, it will be necessary to determine the strength of the external assurances of reliability. The assessment of the weight of the evidence will be tied closely to the level of the claim. The more specific, wide-ranging, or exclusive the claim, the higher the level of external assurances required, and *vice versa*.

Because most aboriginal claims are rooted in pre-historical situations, the answer to the necessity question will normally be yes. Moreover, because of the communal nature of aboriginal claims, the telling and re-telling of most aborigi-

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47 *Delgamuukw*, *supra* note 1 at para. 78

48 The Supreme Court has said in other cases that to receive a hearsay statement, it is necessary to show circumstances "which substantially negate" the possibility that the evidence was not reliable: *Smith*, supra note 27 at 933; or "some other fact or circumstance which compensates for, or stands in the stead of the oath, presence, and cross-examination": *B.(K.G.)*, *supra* note 26 at 791, that would normally be available in open court. In *B.(K.G.)* at 788–96, the Supreme Court provided illustrations of the kind of "substitute *indicia* of trustworthiness [that] might suffice to permit reception of prior inconsistent statements, bearing in mind that the question of reliability is a matter for the trial judge, to be decided on the particular circumstances of the case." Similar guidance is needed for aboriginal oral evidence.

49 External to the party submitting the evidence.

50 See *e.g.* the Supreme Court's *Smith* and *B.(K.G.)* decisions, *supra* note 48.

51 This is an illustrative, rather than exhaustive, list, drawn from the general considerations that appear to animate some of the main existing hearsay exceptions, such as the reputation exception: see *e.g.*, *Phipson on Evidence*, supra note 29 at 736.

nal oral evidence,[52] and the role of trained elders as sources,[53] there will likely be some external assurance of reliability.[54] The real challenge comes with the weighing of the evidence. Generally speaking, the wider the supporting and verifying group, the more consistent the oral evidence, the greater its correlation with other forms of evidence, and the deeper its exposure to criticism and debate, the stronger the likelihood of its reliability.[55] Similarly, the more impartial[56] and expert the sources, the stronger their reliability. The overall weight of the evidence required will be inversely proportional to the level of the claim made. A claim to non-shared exclusive occupation of many highly specific territories will require stronger evidence than a claim to use or shared use rights to a less sharply defined area, and *vice versa*.[57]

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[52] J. Fortune, "Construing Delgamuukw: Legal Arguments, Historical Argumentation, and the Philosophy of History", (1993) 51 U.T. Fac. L. Rev. 80 at 93; *Uukw* v. *British Columbia* (1987), 15 B.C.L.R. (2d) 326 (S.C.).

[53] See M. Jackson et al., "The Address of the Gitksan and Wet'suwet'en Hereditary Chiefs to Chief Justice McEachern of the Supreme Court of British Columbia" (1988) 1 C.N.L.R. 17 at 35–36, stressing the specialised training and study necessary before elders become experts in maintaining an aboriginal peoples' oral traditions.

[54] For these and other positive assurances of reliability typical in aboriginal oral traditions, see also C. McLeod, "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past" (1992) 30 Alta. L. Rev. 1276; and Gover & Macaulay, *supra* note 23. Not all commentators agree on the significance of all the factors: see, for example, the cautions raised in M. Pylypchuk, "The Value of Aboriginal Records as Legal Evidence in Canada: An Examination of Sources" (1991) 32 Archivaria 51 at 54-55; M.J. Kaplan, "Proof and Extinguishment of Aboriginal Title to Indian Lands" (1979) 41 A.L.R. Fed. 425 at 436; and Dr. B. Trigger, "Time and Traditions: Essays in Archaeological Interpretation" in P. Drucker, *Cultures of the North Pacific Coast* (San Francisco: Chandler, 1965) at 246. At the reliability threshold, however, the question is simply whether there is *some* external assurance of reliability in the case at hand. The challenge of tallying up the force of the assurances and counter-arguments in the case comes later, when the weight of the evidence is assessed.

[55] These are not the only possible *indicia* of the reliability of the evidence itself. But they seem consistent with the spirit of past exceptions to the hearsay rule, and can be applied to the context of oral aboriginal evidence. Together with the *indicia* of the reliability of the sources (suggested below), they could help provide trial judges with a starting point.

[56] Clearly, absolute impartiality is unattainable. The fact that evidence was produced in the midst of a claim may not carry as much weight as evidence generated in other circumstances—it may gain more credibility from other factors. For example, evidence from elders is likely to carry more weight than evidence generated by members of a claims litigation or negotiating committee.

[57] The trial judge's own approach pointed in this direction. McEachern C.J.B.C. indicated in his conclusion that the claimants had established traditional use in a portion of the general area in question was based more on avoiding the risk of "unfairness" than on an inference

Under this approach, there would be no advance assumption that oral aboriginal evidence is automatically more or less reliable than conventional forms. This evidence is certainly different, and may well require a distinctive approach, but its weight would depend on the circumstances of the individual claim.

But is assessing the evidence in support of an aboriginal claim really a suitable job for courts at all? In the longer term, it might be better to commit this initial responsibility to an independent administrative tribunal. Such a body could be staffed by anthropologists, archaeologists, aboriginal elders,[58] similar specialists, and lawyers. It would have some flexibility to go beyond the adversarial constraints of a judicial trial. A decision by this tribunal could be protected by a strong privative clause, ensuring that it need not and could not be reviewed by ordinary courts except for patent unreasonableness, gross procedural unfairness, or constitutional defects.

An aboriginal claims fact-finding tribunal would operate within the general law of aboriginal rights. If the tribunal decided that the evidence supported a particular claim, courts could determine the application of the legal rules of extinguishment, infringement, and justification, and could award appropriate legal remedies. Alternatively, and preferably, claimants and governments might try to settle the claim by negotiation.

V. Aboriginal Title

Before *Delgamuukw*, the law of aboriginal title and aboriginal rights resembled a framework dwelling in a half-built community. Courts had described aboriginal title as a right based on traditional occupation. They had done little to identify its specific characteristics,[59] or to explain its relationship to the broader community of aboriginal rights.[60] Aboriginal rights had been developed sub-

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from the evidence: *supra* note 7 at 522). However, his most serious evidentiary concerns were with the evidence offered in support of the 133 highly detailed territorial claims.

58 Other than elders from the aboriginal community making a claim in a particular case.

59 The Supreme Court had described aboriginal title as a right to "occupy and possess certain lands": *Guerin*, *supra* note 14 at 382. It had done little to define the nature and extent of this occupation and possession. Was it exclusive? Was it proprietary? Had it any limits other than a bar on alienation? See generally Elliott, *supra* note 11, c. 3, 4, 7, and 8.

60 The Court characterised aboriginal title as "a sub-category of aboriginal rights which deals solely with claims of rights to land": *Van der Peet*, *supra* note 14 at para 74, see also para. 34. Although the Court had indicated that aboriginal rights are not necessarily derivative of aboriginal title, it had not said if aboriginal title must be derivative of particular aboriginal rights. Indeed, in *Van der Peet* the Court had formulated an aboriginal rights identification test that focussed on particular aboriginal rights. Was aboriginal title simply the sum of the individual aboriginal rights which could be proven in a given location? How would the claimants show that occupation of an area was "integral" to their culture? To prove abo-

stantially in recent years, but there were unfinished elements here too. In *Delgamuukw*, the Supreme Court has accomplished a substantial piece of conceptual construction, clarifying key aspects of aboriginal title and rights.[61] As will be seen, several important questions remain to be answered.

The pre-*Delgamuukw* situation fuelled a wide-ranging dispute in the case itself. The parties supported very different notions of aboriginal title and its relationship to the aboriginal rights in s. 35(1) of the *Constitution Act, 1982*. The Gitksan and Wet'suet'en argued that aboriginal title amounts to an inalienable fee simple, constitutionalised by s. 35(1) of the *Constitution Act, 1982*. The respondents argued that s. 35(1) merely constitutionalises the right to occupy and use land—perhaps exclusively—for the purpose of engaging in particular s. 35(1) aboriginal rights. For them, aboriginal title is wholly dependent on the identification of other specific aboriginal rights.[62]

A. General Features

Lamer C.J. rejected both positions. He said common law aboriginal title is *sui generis*, neither a fee simple on one hand nor a non-proprietary interest on the other. Moreover, aboriginal title is more than the sum of other specific aboriginal rights. The Chief Justice described aboriginal title as an inalienable, communally-held interest in land which arises from both prior occupation and the pre-existing aboriginal law which accompanied this occupation. Lamer C.J. said aboriginal title allows exclusive use and occupation of land for a variety of purposes. However, there is an important qualification. The uses of the land must not be irreconcilable with the nature of the aboriginal group's traditional and ongoing attachment to it.[63]

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riginal title, must claimants establish exclusive use? If so, where did this fit into the *Van der Peet* test? See generally *Elliott*, *ibid.* at 73–91.

61 Lamer C.J.C. acknowledges academic works at several points in this part of his reasons. The following appear to have been especially influential in contributing to the Court's views on aboriginal title: K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989); K. McNeil, "The Meaning of Aboriginal Title" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) 135; B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-83) 8 Queen's L.J. 232; B. Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983); and B. Slattery, "Understanding Aboriginal Rights" (1987) 64 Can. Bar Rev. 727.

62 The respondents' position was almost the converse of the unsuccessful argument in *R. v. Adams*, [1996] 3 S.C.R. 101 [hereinafter *Adams*], that aboriginal rights are dependent on aboriginal title.

63 *Delgamuukw*, *supra* note 1 at para. 128. For Lamer C.J.C., this restriction applies both to the use and the disposition of the land. On use, he said:

B. Exclusivity

Both the exclusivity of aboriginal title and its land qualification are significant. With exclusivity, aboriginal title holders have a potentially powerful means of protecting their lands from outside interference. To give effect to it, courts will have to allocate legal boundaries and priorities between constitutionally protected aboriginal title and other exclusive property rights.

Exclusivity raises special questions about overlapping aboriginal title claims. In his trial judgment in *Delgamuukw*, for example, McEachern C.J.B.C. noted that claims to the Gitksan-Wet'suwet'en claim area had also been made by the Tsimshian, Nisga'a, Kitwankool, Tahltan/Stikine, Tsetsaut, Kaska-Dene, and Carrier-Sekanni peoples.[64] He said that the latter's claim extended to over half the area claimed by the Wet'suwet'en.[65] How would these claims relate to Gitksan and Wet'suwet'en aboriginal title?

At the Supreme Court, Lamer C.J.C. and La Forest J. contemplated the possibility of "shared exclusivity" or "joint occupancy" between one or more nations of aboriginal people.[66] Despite this, Lamer C.J.C. urged other aboriginal peoples with overlapping claims in the Gitksan-Wet'suwet'en area to intervene in any new litigation.[67] If they did not, would any aboriginal title established by the Gitksan and Wet'suwet'en be immune to future shared-exclusivity claims? Would it preclude shared aboriginal rights other than aboriginal title?

Certainly the combination of exclusivity and overlapping aboriginal claims lends weight to the need to articulate alternative criteria of reliability for oral aboriginal evidence.[68] This may be as important for aboriginal peoples themselves as it is for the Crown.

> 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 not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot.)": *ibid.*

On disposition, he said: "It is for this reason also that lands held by virtue of aboriginal title may not be alienated. Alienation would bring to an end the entitlement of the aboriginal people to occupy the land and would terminate their relationship with it": *ibid* at para. 129. This, however, did not preclude "the possibility of surrender to the Crown in exchange for valuable consideration": *ibid* at para. 139.

64 *Delgamuukw (trial)*, *supra* note 7 at 522 and 505.

65 *Ibid.* at 519.

66 *Delgamuukw*, *supra* note 1 at paras. 158 and 196, respectively.

67 *Ibid.* at 185.

68 See part IV. D, above, for more on this topic.

C. Land Attachment Qualification

According to Lamer C.J.C., the land attachment qualification to aboriginal title is necessary to preserve the continuity of a community's title—to the present and into the future.[69] The Chief Justice provided two examples of how the qualification would operate. If aboriginal title was established with specific reference to hunting, aboriginal title holders could not destroy the value of the land for hunting "(*e.g.*, by strip mining it)."[70] Alternatively, if the title related especially to the land's ceremonial or cultural significance, the aboriginal community could not destroy that value "(*e.g.*, ... perhaps by turning it into a parking lot)."[71] If the community did want to use the land in a manner irreconcilable with their special attachment to it, they would have to surrender the land to the Crown, "in exchange for valuable consideration."[72]

Lamer C.J.C. stressed that this restriction does not limit aboriginal title holders to their traditional practices. As long as the land's special value to the aboriginal title is not destroyed, title holders are allowed "a full range of uses of the land."[73] On the other hand, when the land attachment qualification is added to the constitutional entrenchment and general inalienability of aboriginal title, the result is a property right with higher legal status but narrower general content than the full fee simple.

What kind of uses short of strip mining and parking lots would destroy the land's special value? This will depend on the nature of that special value in individual cases, and on what is regarded as constituting destruction. The answer to these issues will require more litigation.[74]

D. Identification

If aboriginal title has distinctive content, should this affect the way courts try to identify it? Lamer C.J.C. said it should. The test for identifying particular aboriginal rights had been formulated in 1996, in *R. v. Van der Peet*.[75] It required that a particular practice, custom, or tradition claimed to be an aboriginal right must have been:

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69 *Delgamuukw*, *supra* note 1 at paras. 126–27.

70 *Delgamuukw*, *supra* note 1 at para. 128.

71 *Ibid.* at para. 129.

72 *Ibid.* at para. 131. Note, however, that here Lamer C.J.C. seemed to contemplate a conversion of aboriginal title to non-aboriginal title, not an absolute surrender.

73 *Ibid.* at para. 132.

74 On the uncertainty likely here, see W.F. Flanagan, "Piercing the Veil of Real Property: *Delgamuukw* v. *British Columbia*" (1998) 24 Queen's L.J. 279 at paras. 47–54.

75 See *Van der Peet*, *supra* note 14, paras. 44–74 and D.W. Elliott, "Fifty Dollars of Fish: A Comment on *Van der Peet*" (1997) 35 Alta. L. Rev. 759 at 761–62.

(*i*) exercised prior to European contact;

(*ii*) integral at that time "to the distinctive culture of the aboriginal group claiming the right";[76] and,

(*iii*) exercised with sufficient continuity between pre-contact and present times.

In *Delgamuukw* Lamer C.J. said that to prove aboriginal title to land:

(*i*) the land must have been occupied[77] prior to sovereignty;

(*ii*) the occupation must have been exclusive at sovereignty; and

(*iii*) if present occupation is relied on as proof of pre-sovereignty occupation, there must be continuity between present and pre-sovereignty occupation.[78]

Lamer C.J.C. justified these modifications on pragmatic and theoretical grounds.[79] He said that occupation of land is always central to aboriginal culture. Hence aboriginal title does not require explicit proof of the "integral to the distinctive culture" criterion in *Van der Peet*.[80] Next, since exclusivity is important to the content of aboriginal title, proof of aboriginal title requires evidence of exclusive occupation.[81] Finally, for identifying aboriginal title, the time of sovereignty is preferable to contact because aboriginal title is a burden on the title of the Crown, whose own title did not arise until it asserted sovereignty;[82] since occupation of land is itself of central significance to aboriginal culture, it is irrelevant to ask if it might have resulted from European contact; and the date of sovereignty can be established more precisely than the date of contact.

These are all sound reasons, but why not try to consolidate the new identification test with the *Van der Peet* test?[83] This should be possible, without losing

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[76] *Van der Peet*, *supra* note 14 at para. 51.

[77] Lamer C.J.C. said that proof of occupancy could be shown either by physical evidence of occupation (as the respondents argued) or by evidence of recognition of occupation in aboriginal laws (as the claimants argued): *supra* note 1 at para. 147.

[78] See generally *Delgamuukw*, *supra* note 1 at para. 143.

[79] For a thorough analysis supporting similar modifications, see K. McNeil, "Aboriginal Title and Aboriginal Rights: What's The Connection?" (1997) 36 Alta. L. Rev. 117.

[80] *Delgamuukw*, *supra* note 1 at para. 151.

[81] Lamer C.J.C. stressed that this need not preclude shared exclusive occupation: *ibid* at para. 158.

[82] *Ibid.*

[83] In his separate majority judgment, La Forest J. took one possible approach to consolidation. He identified aboriginal title by reference to four factors he regarded as key to the *Van der Peet* test: precision, specificity, continuity, and centrality: *Delgamuukw*, *supra* note 1 at para.

the distinctive requirements for aboriginal title. One version, which uses tradition to include a practice or custom, would be as follows:

> To prove aboriginal title or a particular aboriginal right, respectively, a claimant must demonstrate exclusive occupation at sovereignty, or a particular tradition integral to the claimant group's distinctive culture at contact, and must show continuity of the occupancy or tradition to the present.

An additional identification requirement may arise at a later stage. If the use of aboriginal title land cannot be reconciled with an aboriginal community's traditional special attachment to that land, title holders may have to identify the special purpose or purposes of their particular occupation.

E. Constitutional Status

Does the distinctive content of aboriginal title affect its status under s. 35(1) of the *Constitution Act, 1982*? Lamer C.J.C.'s answer was no. Although aboriginal title may have special features, it has been constitutionalised by s. 35(1) as fully as other aboriginal rights.[84] Moreover, this section did not create aboriginal rights; it gave special status to aboriginal rights existing as of April 17, 1982.[85] Hence the common law relationship between aboriginal title and other aboriginal rights applies to s. 35(1) rights. This makes sense. It would be peculiar if s. 35(1) constitutionalised all forms of common law aboriginal right except one of the most central forms of all. Thus aboriginal title—including the right to exclusive occupation—is protected constitutionally against all unjustified infringement by governments.

F. Aboriginal Title and Other Aboriginal Rights

Beyond the Court's imaginative exposition of aboriginal title and aboriginal rights, one basic question needs more attention. What substantive features, if any, has aboriginal title in common with other aboriginal rights? In other words,

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193. But these are very general criteria, and La Forest found it necessary to qualify them. Despite them, for example, La Forest J. conceded that: (*i*) title boundaries need not be drawn in great detail, (*ii*) for title, sovereignty is more relevant than contact, (*iii*) occupation is evidence of centrality, and (*iv*) occupation must be exclusive, although this need not preclude shared exclusive occupation: *ibid.* at paras. 193–99.

84 *Delgamuukw*, *supra* note 1 at para. 133. The Court had already indicated in *Van der Peet* that aboriginal title is a component of both common law and s. 35(1) aboriginal rights: *Van der Peet*, *supra* note 14 at para. 33. There was no reason why the special content of aboriginal title should affect its status.

85 *Delgamuukw*, *supra* note 1 at para. 133. Lamer C.J.C. also said that common law aboriginal rights are not exhaustive of the content of s. 35(1), and referred to *R.* v. *Côté*, [1996] 3 S.C.R. 139 at para. 136 [hereinafter *Côté*]. This probably means that aboriginal rights which are defeated by a common law or similar technicality (not extinguishment) are still protected by s. 35(1) if they meet the requirements of the *Van der Peet* or *Delgamuukw* identification tests.

are aboriginal rights open-ended concepts, unified simply by whatever was considered central to traditional aboriginal cultures, or are they linked by a common substantive theme?[86] The first alternative allows flexibility and invites judicial discretion. The second may facilitate coherence and a more restrained role for courts.

Before *Delgamuukw*, the Supreme Court had not clearly chosen either alternative. In *Van der Peet* the Court had said that cultural importance and land are both relevant to aboriginal rights.[87] On the other hand, the *Van der Peet* identification test seemed to use only the former.[88] In *Delgamuukw*, Lamer C.J. said that s. 35(1) aboriginal rights "fall along a spectrum with respect to their degree of connection with the land."[89] At one end, he said, is aboriginal title. This is the exclusive right to the land itself, derived from exclusive occupation at sovereignty. In the middle are traditions which still fall short of aboriginal title, but are intimately linked to a particular piece of land. At the other end are traditions[90] that are integral to the claimant group's distinctive aboriginal culture.[91] These may involve occupation and use of land which is not sufficient to support a claim of aboriginal title.[92]

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86 These questions were complicated by the fact that common law aboriginal rights were constitutionalised in 1982 by s. 35(1) of the *Constitution Act, 1982*. The Court had suggested in *Van der Peet* that aboriginal title is a component of both common law and s. 35(1) aboriginal rights: *Van der Peet*, *supra* note 14 at 33. However, in *Côté*, *supra* note 85 at para. 52, the Court indicated that aboriginal rights which might not be recognized at common law could still be recognized for the purposes of s. 35(1) if they satisfied the requirements of the *Van der Peet* test. Were the answers to these questions the same for common law and s. 35(1) aboriginal rights?

87 It said aboriginal rights are based on "the prior occupation of North America by distinctive aboriginal societies": *Van der Peet*, *supra* note 14 at para. 35.

88 As noted above, the *Van der Peet* test required that an alleged right be "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right": *Van der Peet*, *supra* note 14 at para. 46. On its own, then, it seemed open-ended. *Adams*, *supra* note 62, and *Côté*, *supra* note 85, were also ambiguous in this respect. When the Court spoke of the content of aboriginal rights in these decisions, it did so solely by reference to their relationship to land: *Adams* at para. 30 and *Côté*, *supra* note 86 at para. 39. Yet the wording in both cases left open the possibility that the Court also contemplated aboriginal rights wholly unrelated to land. See further, *Elliot*, supra note 11 at 80–81.

89 *Delgamuukw*, *supra* note 1 at para. 138.

90 This also embraces practices and customs, see *infra* note 92.

91 *Delgamuukw*, *supra* note 1 at para. 138.

92 Or, one might add, of a site-specific aboriginal right.) Lamer C.J.C.'s full "spectrum" discussion is as follows:

> The picture which emerges from *Adams* is that the aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their

Has the Court finally said that all s. 35(1) rights, including those which are neither aboriginal title nor site-specific,[93] involve some occupation and use of land? The Court has now moved beyond the apparently open-ended *Van der Peet* test. It has formulated a general framework for all particular aboriginal rights and aboriginal title: a varying link with land. Once, again, though, the Court has stopped short of making the link explicit.[94] Next time, perhaps?

VI. JUSTIFICATION

FOR THE MAIN ISSUES above, the Supreme Court has been engaged in a conceptual building process. Although there has been significant development, there is arguably room for more: more precision, more elaboration of concepts, criteria, and safeguards, and more connections between concepts. However, more is not always better.

A. Goals

Government can only infringe aboriginal and treaty rights that are protected under s. 35(1) of the *Constitution Act, 1982* if its infringement is justified. The concept of justification and the related concept of infringement[95] are capable of

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> degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the *occupation and use of the land* where the activity is taking place is not *sufficient to support a claim of title to the land* (*Adams, supra* note 88 at para. 26 [emphasis in original]).

Nevertheless, those activities receive constitutional protection. 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 aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity": *Delgamuukw, supra* note 1 at para. 138.

93 The passage quoted, above note 92, appears to suggest that all aboriginal rights have some connection with land, even though at one end of the spectrum that connection may be too indirect to support a claim of aboriginal title or even a claim to a site-specific activity.

94 The suggestion that there is such a link seems at first to clash with Lamer C.J.C.'s discussion of s. 91(24) of the *Constitution Act, 1867*. Here he says that "[aboriginal rights] also encompass practices, customs and traditions which are not tied to land ... .": *Delgamuukw, supra* note 1 at para 178. But the "tie" to which Lamer C.J.C. refers here is the special tie of rights that are site-specific or "relate" or are "in relation to" land in the strict sense of the division of federal/provincial legislative jurisdiction: *ibid.* at para. 176. Rights that lack this special tie might still have a more general substantive link with land.

95 For the general test for infringement, see *Sparrow, supra* note 3 at 1111–12. For important post-*Sparrow* discussions of infringement, see *R. v. Badger*, [1996] 1 S.C.R 771 at paras. 75–98 [hereinafter *Badger*]; *R. v. Nikal*, [1996] 1 S.C.R. 1013 at para. 86–108 [hereinafter *Nikal*] ; *R. v. Gladstone*, [1996] 2 S.C.R 723 at paras. 39–53[hereinafter *Gladstone*]; and *Ad-*

serving at least four goals. First, they can provide courts with criteria to consider when trying to reconcile government actions with aboriginal and treaty rights. Second, the concepts can provide remedies where rights have been unjustly infringed in individual cases. Third, the concepts can inform governments of general standards to follow in the future. Fourth, to the extent that they facilitate imposed judicial solutions in specific cases, the concepts may encourage governments to pursue longer-term negotiated solutions. The Court's reformulation of justification in *Delgamuukw* will contribute to the first goal above, and it may help with the second. How far it advances the other goals is more debatable.

B. Pre-*Delgamuukw* Law

Before addressing the issue of justification and aboriginal title, Lamer C.J. provided a general review of pre-*Delgamuukw* justification law. He said that in order to justify an infringement of a s. 35(1) right, government must demonstrate:

(*i*) a "compelling and substantial" legislative objective,[96] such as:

(*a*) conservation of natural resources such as fisheries;

(*b*) "the pursuit of economic and regional fairness";[97] and

(*c*) the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups".[98]

(*ii*) compliance with the special fiduciary relationship between the Crown and aboriginal peoples, which for the purposes of justification, may require measures such as the following:

(*a*) consulting with the affected aboriginal group;

(*b*) giving priority to the protected aboriginal right;

(*c*) ensuring minimum possible infringement to achieve the desired objective; and

(*d*) providing fair compensation for expropriation.

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ams, *supra* note 88 at paras. 52–55. Arguably, infringement and justification are two sides of the same coin, so that it would have been useful to consider the two concepts together. As well, it would have been helpful to examine the ruling in *Badger* at para. 89 that there is a boundary between (*i*) restriction short of infringement (whether justified or not) at least for reasonable provision for safety, and (*ii*) infringement (whether justified or not).

96 *Delgamuukw*, *supra* note 1 at para. 161. The phrase is from *Sparrow*, *supra* note 3 at 1075 and 1113.

97 *Delgamuukw*, *supra* note 1 at para. 161, referring to *Gladstone*, *supra* note 95 at para. 75.

98 *Ibid.*

Lamer C.J.C. then said that the particular measure required and the degree of scrutiny needed will depend on the individual context, especially the nature of the aboriginal right in question.[99] This statement builds on the comment in *Gladstone* that the requirements of the fiduciary duty depend on the particular context.[100] In *Gladstone*, the Court applied the varying standard approach to the justification measure of priority;[101] in *Delgamuukw*, it extended this approach to the other possible measures.[102]

C. Aboriginal Title Requirements

Lamer C.J.C.'s next task was to apply this general scheme to aboriginal title. He said that since aboriginal title is an exclusive right, any priority to be accorded to it should be less than total.[103] Examples of this kind of priority were aboriginal participation in resource development, allocation of interests related to land to aboriginal occupants, and mechanisms such as reduced licensing fees.[104]

Lamer C.J.C. stressed that measures other than priority might fulfil the second part of the justification test. Indeed, because aboriginal title includes a right to choose between forms of land use, aboriginal title infringements always require consultation.[105] In this respect, aboriginal title may differ from other aboriginal rights, which might not always involve mandatory consultation. Moreover, because aboriginal title has "an inescapable economic component,"[106] infringements will usually require compensation.[107]

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99 *Delgamuukw*, *supra* note 1 at paras. 162–63.

100 *Gladstone*, *supra* note 95 at para. 56.

101 Regarding priority, the Court in *Gladstone*, *supra* note 95, distinguished between "self-limiting" rights such as aboriginal food rights, and rights such as commercial rights, whose only limits were supply and demand. While the former could be given full priority over other interests, permitting exclusive use in some situations, the latter should be given a less stringent non-exclusive form of priority: *Gladstone* at para. 62. Factors relevant to this latter form of priority are: (*i*) evidence of participatory measures such as reduced licence fees; (*ii*) priority in government regulatory objectives; (*iii*) resource use by rights holders relative to their percentage of the population; (*iv*) accommodation of different kinds of aboriginal rights to a particular resource; (*v*) the relative importance of the resource to aboriginal rights holders; and (*vi*) government's criteria for allocating licences between different users: *Gladstone* at para. 64.

102 *Delgamuukw*, *supra* note 1 at paras. 163 and 166.

103 *Delgamuukw*, *supra* note 1 at para. 168.

104 *Ibid.*

105 "There is always a duty of consultation": *Delgamuukw*, *supra* note 1 at para. 168.

106 *Delgamuukw*, *supra* note 1 at para. 166.

107 "[F]air compensation will ordinarily be required when aboriginal title is infringed": *Delgamuukw*, *supra* note 1 at para. 169.

While the Court had said in *Nikal* that the consultation requirement would be satisfied "[s]o long as every reasonable effort is made to inform and to consult,"[108] consultation after *Delgamuukw* is more stringent. It must be in good faith. It must be carried out with the intent of "substantially addressing the concerns" of the aboriginal group.[109] Compensation must be fair. The amount should be determined by "[*i*] the nature of the particular aboriginal title affected ... [*ii*] the nature and severity of the infringement and ... [*iii*] the extent to which aboriginal interests were accommodated."[110]

D. Justification after *Delgamuukw*

For aboriginal title, then, the Supreme Court has shifted the spotlight. Instead of resource use priority, its emphasis is on a mandatory requirement of consultation and a near-mandatory requirement of compensation. The Court has given lower courts more criteria to consider when deciding if rights have been unjustly prejudiced. The measures suggested, such as consultation, compensation, and other forms of accommodation, seem moderate and practical in themselves. The emphasis on consultation flows logically from the element of choice in the content of aboriginal title. The concern with fair compensation does reflect the important economic aspect of aboriginal title.

However, these advances mask two underlying problems. First, although government has a duty to consult, compensate, and accommodate in perhaps other ways, it is unclear just who and where it must accommodate. Second, despite the new detail, the individual criteria seem to raise as many questions as they resolve. Their meaning and the overall direction of the justification process seem buried in increasing detail. Both the fact and the nature of the justification process are an invitation to litigation.

Certainly it is hard to envisage the accommodation of unascertained rights without additional, perhaps ongoing, judicial involvement. How are governments to decide which aboriginal groups should be accommodated—by consultation, compensation, shared management, or other means—until governments know which groups have aboriginal title in a given region, which groups have enforceable use rights, and which groups have no enforceable rights in the region at all? Governments may find it feasible to err on the side of caution by offering consultation opportunities to all groups who might conceivably have an interest in a given area.[111] However, compensation and shared management

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[108] *Nikal*, *supra* note 95 at para. 110.

[109] *Delgamuukw*, *supra* note 1 at para. 168.

[110] *Ibid.* at para. 169.

[111] In *Kitkatla Band* v. *B.C. (Min. of Forests)* (1998), 162 D.L.R. (4th) 568 (B.C. C.A.)) [hereinafter *Kitkatla*], the Kitkatla sought an interim injunction to prevent logging in an area containing culturally altered trees. They asserted an aboriginal title to the area. In review-

schemes would clearly need narrower bounds. Conversely, how are aboriginal groups themselves to establish the rights to which the accommodation duty is linked? For both parties, this legal problem will likely mean more recourse to the courts.

The justification requirement will also require much more judicial involvement. Instead of supplying a framework for assessing proportionality, as it did for *Charter* breach justification in *Oakes*,[112] the Supreme Court has approached s. 35(1) justification more by way of specific examples of legitimate objectives and of required or possible accommodations. By doing this, the Supreme Court has been able to illustrate what it has in mind by justifiable infringement. However, the justification structure has become increasingly complex. With each new criterion or refinement come new questions about its relationship to the others,[113] its own particular meaning, and the overall direction of the structure itself.

Assume, for example, that there has been an infringement of aboriginal title or some other aboriginal right. How will judges interpret *Delgamuukw*'s instruction to consult "with the intention of substantially addressing"[114] aboriginal concerns?[115] To what extent would an offer of consultation suffice? Or assume

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ing the trial judge's decision not to grant the injunction, the Court of Appeal noted that, "[t]he judge appears to have accepted that there is a duty on the Crown to consult where aboriginal title and rights are asserted but yet to be established": (*Kitkatla* at para 16. The Court of Appeal held that the trial judge had not exercised his discretion improperly in refusing the injunction. They did not say if they agreed or disagreed with his position on consultation.

112 See *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138–39.

113 For example, under *Sparrow*, *supra* note 3, priority for aboriginal rights is subject to compelling and substantial legislative objectives such as conservation and public safety. Are the other forms of accommodation also subject to these legislative objectives? If so, does the wider list of valid objectives articulated in *Gladstone*, *supra* note 95, also limit the accommodation needed? For example, is the amount of compensation required subject to an objective such as pursuing regional and economic fairness? Is each one of the specified legislative objectives equally important? If not, is the amount of accommodation required inversely related to the importance of the objective? Can an infringement be justified if there was consultation but not minimum infringement?

114 *Delgamuukw*, *supra* note 1 at para. 168.

115 *Delgamuukw*'s consultation requirement has been involved in most of the case law involving this decision so far. The decisions have been mainly interlocutory, and most of the questions about the nature of the requirement remain to be answered. See *e.g.*, *Cheslatta Carrier Nation* v. B.C. *(Environmental Assessment Board)* (1998), 4 Admin. L.R. (3d) 22 (B.C. S.C.); *Kitkatla Band* v. B.C. *(Min. of Forests)* (25 June 1998), Victoria 982171 (B.C. S.C.); *Kitkatla Band* v. B.C. *(Min. of Forests)* (1999), 4 W.W.R. 269 (B.C. C.A.)) (application for interim injunction pending appeal from above); *Kitkatla Band* v. B.C. *(Min. of Forests)* (1999), 4 W.W.R. 274 (B.C. C.A.)) (appeal from above); *Siska Indian Band* v. B.C. *(Min. of Forests)* (9 July 1998), Vancouver A981672 (B.C. S.C.); *Kelly Lake Cree Nation* v.

that government has posted notices of a proposed development in relevant gazettes and media outlets in a region that might be subject to aboriginal title interests. Has government met the consultation requirement if it proceeds with the development after hearing no responses? For application and content, s. 35(1) justification interpretation may find only limited guidance in common law analogies such as the rules of natural justice.[116] For example, common law natural justice is presumed not to apply to legislative functions, while s. 35(1) justification requirements have no such limitation.

At the other end of the spectrum, how should judges interpret the Court's statement that accommodation will generally require something "significantly deeper than mere consultation?"[117] How should they construe the suggestion that full consent may be required, "particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands?"[118] Will this latter requirement be held to be subject to valid objectives such as conservation?

The compensation requirement will also pose major challenges of approach and interpretation. How, for example, will courts assess the extent of compensation due without first defining the extent and nature of the relevant aboriginal title? How should they compare the economic value of aboriginal title to that of ordinary property rights? How will they decide what kinds of aboriginal title should merit more compensation than others? How much should compensation be reduced by other government efforts at accommodation?[119]

The danger is that by adding still more criteria, the Court will be making the justification structure even more complex, and raising as many new questions as it answers. There is an additional risk that the growing array of detailed remedial prescriptions might appear to some as a viable substitute for longer-term negotiated settlements.

Canada (Min. of Energy and Mines) (1998), 103 B.C.A.C. 253; *Malahat Indian Band* v. *B.C. (Min. of Environment, Lands and Parks* (3 November 1998), Victoria 98/3866 (B.C. S.C.).

[116] For example, common law natural justice, which is based on statutory interpretation is not presumed to apply where government's functions are genuinely "legislative" in nature. Because of its basis in the *Constitution Act, 1982*, s. 35(1) justification has no such limitation. But will it require more consultation before a logging permit is issued than before amendments are made to forestry legislation? Should it?

[117] *Delgamuukw, supra* note 1 at para. 168.

[118] *Ibid.*

[119] The other criteria raise further questions as well. For example, when is accommodation in the form of priority preferable to other forms of accommodation? What measures will satisfy the requirements of priority in a given case? In regard to the objectives, what amounts to "economic and regional fairness?": *Gladstone, supra* note 95 at para. 75 and *Delgamuukw, supra* note 1 at para. 161. How should courts measure "historical reliance" on a resource by non-aboriginals? What about historical reliance on the resource by aboriginals with overlapping aboriginal title or aboriginal rights claims?

At this point, the best approach may not lie in devising yet more justification criteria. Because of the infinite range of infringement situations possible, these would probably have to be as discretionary as the old ones. Instead, what may be needed is to articulate and refine the general principles which underlie the justification process. Although this would not solve the problem of accommodating unascertained rights, it could help make the process simpler and more coherent, by providing a general framework in which to consider the examples supplied by the Court so far. As well, this approach could help stress that the justification requirements are really a means of providing help in particular cases, not a long-term substitute for negotiated settlements.

As seen, s. 35(1) justification has two main components, valid legislative accommodations and required or permissible accommodations. The first component is already supported by a general principle: the requirement of a compelling and substantial legislative objective. This appears to demand at the least a significant public interest. For the accommodation component of justification, the Court has already referred to the Crown's special fiduciary obligations to aboriginal peoples.[120]

Although this is a useful start, it may be possible to provide more guidance by focussing on the special context of justification.[121] Generally speaking, justification appears to involve three main equitable principles. These are the requirements of reasonableness,[122] fairness,[123] and good faith.[124] The Court could

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[120] See *e.g. Sparrow*, *supra* note 3 at 1114-19; *Gladstone*, *supra* note 95 at para. 56; and *Delgamuukw*, *supra* note 1 at para. 163.

[121] The Crown's fiduciary obligations to aboriginal peoples are applied in several different contexts, and can vary in content and effect according to the context. For example, compare the s. 35(1) cases of *Sparrow*, *Gladstone*, and *Delgamuukw*, *above* note 120, with *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, where the concept supported a compensable equitable remedy outside the context of the *Constitution Act, 1982*.

The level of the Crown's special fiduciary obligations to aboriginal peoples can range from reasonableness, good faith, or non-disclosure to more exclusive and onerous requirements such as loyalty, utmost good faith, and avoidance of conflict of interest: *Elliott*, *supra* note 11 at 98–99. At the higher end of these obligations, there is a tension between obligations owed exclusively to one group and general responsibilities to the public at large. Where government is expected to reconcile its special aboriginal obligations with its responsibilities to the general public—a requirement which seems implicit in section 35(1)—the more exclusive and less basic requirements may be inappropriate.

[122] Cory J. suggested in *Nikal* that "the concept of reasonableness forms an integral part of the *Sparrow* test for justification": *Nikal*, *supra* note 95 at para. 110.

[123] This concept appears to underlie most of the procedural justification criteria articulated to date by the Court.

[124] This appears to be the key justification aspect of the fiduciary concept referred to in above note 120.

regard the existing forms of accommodation as factors to consider in deciding if these principles have been met in individual cases.[125] It could treat these factors as guides to one broad underlying question: "[i]n dealing with s. 35(1) rights in this particular case, did government act fairly, reasonably, and in good faith, and pursuant to a compelling and substantial legislative objective?" The Court could stress that what is lawful may well fall short of what is desirable. In suitable cases, it could tell governments: "[*a*]*s a matter of law, you have acted fairly, reasonably, and in good faith. As a matter of justice, you must do more.*"[126]

More emphasis on general principles of accommodation could help clarify that justification of infringements is essentially a balancing process for resolving problems in individual cases, and that judicial resolution of aboriginal title and rights disputes is a backup, not a backbone, for settlement of aboriginal claims.

VII. SELF-GOVERNMENT[127]

WHILE TITLE RELATES TO OCCUPATION and use of land, the concept of government is potentially far broader. It extends to virtually all aspects of life. Governmental powers can range from minimal to vast. They can be binding, coercive, legislative, and paramount. They are likely to affect the entire population of a given territory. In their strongest form, they include the sovereign powers of an international state. Because of this indeterminate content, the notion of government is not susceptible to ready definition by courts. Because of its potential scope, government should probably not be subject to final definition by

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[125] Lamer C.J.C. has moved toward doing this in *Delgamuukw*, by indicating that the choice of individual justification measures and their degree of scrutiny depends on the circumstances of the individual case: *supra* note 100. More emphasis on general principles would make this point even clearer. Compare the Court's present approach to infringement in *R. v. Gladstone*, *supra* note 95 at para. 43, where the Court said: "[t]he questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement." Could infringement also benefit from some general framework principles?

[126] Those who doubt the Supreme Court's potential influence outside the strict bounds of law might recall *Re Constitution of Canada* (1981), 125 D.L.R. (3d) 1 (S.C.C.). The Court's ruling here on constitutional convention had as much impact on political negotiations as its ruling on constitutional law. Although s. 35(1) does not involve constitutional conventions, its moral implications are arguably comparable.

[127] See also *Elliott*, *supra* note 11 at c. 9.

courts.[128] Arguably, basic questions about the shape of government should be made by elected representatives.

It is not surprising then that the Court has said relatively little about aboriginal self-government as a general judicial concept.[129] Lamer C.J.C. offered several specific reasons for this reticence. He said the trial judge's errors of fact made it impossible to determine whether a self-government right had been made out.[130] He said this was "not the right case" in which to formulate general principles on this issue.[131] The parties had emphasised self-government much less here than in the courts below. This was because the claim had been cast in a form inappropriate to s. 35(1). It had been made before the Supreme Court's judgment in *Pamajewon*.[132] "There," said Lamer C.J.C., "I held that rights to self-government, if they existed, cannot be framed in excessively general terms."[133] Finally, Lamer C.J.C. said the parties had failed to address the complex range of possible structures of self-government.[134]

As in *Pamajewon*, the Court has refused to say if aboriginal self-government is an aboriginal right enforceable at common law or protected by s. 35(1) of the *Constitution Act, 1982*.[135] As in *Pamajewon*, the Court has said that a right of self-government is *not* protected under s. 35(1) if it is advanced in broad terms. The Court has identified the possible range and variety of self-government, its relationship to other governments and people, and to those subject to it, as "difficult and central" concerns.[136]

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[128] If courts recognise aboriginal self-government as a distinct aboriginal right under s. 35(1) of the *Constitution Act, 1982*, the definition they give it will be constitutionally entrenched.

[129] It said far less about self-government than the judges in the lower courts: see *supra* note 1 at part B.

[130] *Delgamuukw*, *supra* note 1 at para. 170.

[131] *Ibid.*

[132] *R. v. Pamajewon*, [1996] 2 S.C.R. 821 [hereinafter *Pamajewon*].

[133] *Delgamuukw*, *supra* note 1 at para. 170.

[134] Lamer C.J.C. pointed out that there are many different possible models, "each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc": *ibid.* at para. 170.

[135] This seems to leave untouched the ruling of the majority of the Court of Appeal in *Delgamuukw (appeal)*, *supra* note 10, that no aboriginal self-government with legislative powers superior to Parliament or the provincial legislatures survived the assertion of sovereignty: *Delgamuukw (trial)*, *supra* note 7 at 518–19 and 591–93, and part (b) above. In *R. v. Ignace* (1998), 156 D.L.R. (4th) 713 (B.C. C.A.) at paras. 10–11, rendered after the Supreme Court's decision in *Delgamuukw*, the British Columbia Court of Appeal reaffirmed this position, and said that nothing in the Supreme Court's decision casts doubt on it. They noted that the Court said in *Pamajewon*, *supra* note 132, that self-government rights, if they exist, cannot be framed in excessively general terms.

[136] *Delgamuukw*, *supra* note 1 at para. 171.

The Court's caution on self-government contrasts with its emphasis on aboriginal title. The trial judge's errors of fact and the nature of the pleadings were no obstacle to a major new statement about the character, content, and constitutional protection of aboriginal title. Moreover, in describing the relationship between aboriginal title and aboriginal rights, the Court may be suggesting that s. 35(1) aboriginal rights are—to a greater or lesser degree—associated with land.[137] If so, this could rule out broad governmental powers and structures that are wholly unrelated to land.[138]

Nevertheless, there are some very real roles for aboriginal self-government in the evolving picture of aboriginal rights. First, traditional self-government is now an important part of proof of these rights. *Delgamuukw* makes it clear that aboriginal title derives in part from pre-sovereignty systems of aboriginal law.[139] Evidence of traditional governing laws and structures will be important in establishing aboriginal title claims.[140] They are also a significant part of the *Van der Peet* identification test. Lamer C.J.C. has said that specific aboriginal rights may established at common law if they were recognised traditionally "by either *de facto* practice or by the aboriginal system of governance."[141]

Second, individual traditional rights of governance might include community controls on the use of aboriginal land and resources. If these satisfy the *Van der Peet* or *Delgamuukw* identification tests, there is no reason why they might not be recognised as aspects of aboriginal rights or title. The power to enforce the controls, at least in regard to the aboriginal right holders, would constitute a form of aboriginal self-government.

Third, "government" incorporates a notion of choice and control. Recognition of aboriginal land rights implies a degree of control over the land in question. Nowhere is this more apparent than with aboriginal title. As Lamer C.J.C. has stressed in *Delgamuukw*, choice is an important aspect of aboriginal title.[142] Effectively, then, aboriginal title is very much a matter of self-government.

What about self-government unrelated to aboriginal land and resources? Or broader concepts of self-government that may confer legislative powers? Or concepts such as these with the protection of the *Constitution Act, 1982*? Al-

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137 See generally part V, Aboriginal Title, above.

138 Of course, if they were agreed to by governments and aboriginal groups concerned, powers and structures of this kind could be constitutionally protected as s. 35(1) treaty rights. See *Nisga's Final Agreement*, August 4, 1998, c. 11 and 12.

139 *Supra* note 1 at para. 147.

140 *Ibid.*

141 *Delgamuukw*, *supra* note 1 at para. 159.

142 "[T]he right to choose to what uses land can be put [subject to the restriction against destroying the value of the land to the community]": *supra* note 1 at para. 129.

though *Delgamuukw* does not rule out these possibilities, it seems to suggest these should be pursued through negotiation, not litigation.

VIII. EXTINGUISHMENT

SECTION 35(1) OF THE *CONSTITUTION ACT, 1982* protects aboriginal rights only if they have not been extinguished as of 17 April 1982.[143] The province of British Columbia argued that it had extinguished any remaining aboriginal title in the province between 1871 and 17 April 1982. The Gitksan and Wet'suet'en argued that the province had no jurisdiction to extinguish aboriginal title, because it falls under exclusive federal jurisdiction by virtue of the *Constitution Act, 1867*.[144]

The Supreme Court addressed two questions: (*i*) did British Columbia have jurisdiction to extinguish aboriginal rights during this period; and (*ii*) could a provincial law have the effect of extinguishing aboriginal rights by virtue of s. 88 of the *Indian Act*?[145]

A. Provincial Jurisdiction under the *Constitution Act, 1867*

Lamer C.J.C.'s answer to both questions was no. Section 91(24) of the *Constitution Act, 1867*[146] gives Parliament exclusive legislative jurisdiction in relation to "Indians, and Lands reserved for the Indians." Lamer C.J.C. said that since "Lands reserved for the Indians" includes all lands reserved, on any terms, it must include lands held pursuant to aboriginal title.[147] Hence s. 91(24) gives Parliament exclusive legislative power in relation to aboriginal title. Lamer C.J.C. said this power prevails over provincial ownership of Crown lands in s. 109 of the *Constitution Act, 1867*. Why? Section 109 is subject to interests such as aboriginal title.[148] In Lamer C.J.C.'s view, it is logical that the level of government with primary constitutional responsibility for aboriginal peoples' welfare should also have jurisdiction over aboriginal title. The same logic also ap-

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143 The date of the enactment of s. 35(1)). See *Sparrow*, *supra* note 3 at 1091–93.

144 *Supra* note 12.

145 R.S.C. 1985, c.I–5.

146 *Supra* note 12.

147 *Delgamuukw*, *supra* note 1 at para. 174.

148 Section 109: All Lands, Mines, Minerals and Royalties belonging to the several Provinces of Canada...at the Union ... shall belong to the several Provinces ... *subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same* [emphasis added].

plied to jurisdiction over other aboriginal rights tied to land, since some of these could be as fundamental to aboriginal people as title itself.[149]

The Chief Justice found another protection for aboriginal rights in the word "Indians" in s. 91(24). He said that this provision protects a central core of "Indianness."[150] It encompasses aboriginal rights, including those referred to in s. 35(1) of the *Constitution Act, 1982*. Indianness includes aboriginal rights in relation to land, and also "practices, traditions, or customs which are not tied to land."[151] By virtue of the constitutional doctrine of inter-jurisdictional immunity,[152] provinces cannot legislate in relation to either kinds of aboriginal rights.[153]

The province had argued that provincial laws of general application could extinguish aboriginal rights. Lamer C.J.C. agreed that such laws can affect aboriginal rights and other matters within s. 91(24). To do so, though, they must not single out these matters for special treatment. Then Lamer C.J.C. noted that at common law, extinguishment requires a clear and plain intention to extinguish.[154] Hence the common law condition for extinguishment requires a provincial law to single out Indians for special treatment. This, in turn, would render the law *ultra vires* s. 91(24). Moreover, a provincial law that purported to extinguish aboriginal rights would directly affect the quality of "Indianness" at the core of s. 91(24). As such, the law would be barred by the doctrine of interjurisdictional immunity,[155] and would not apply.[156]

B. Provincial Jurisdiction under Section 88 of the *Indian Act*

Provincial laws of general application which affect Indianness can sometimes be given effect by s. 88 of the *Indian Act*.[157] However, Lamer C.J.C. said s. 88 does

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[149] *Delgamuukw, supra* note 1 at para. 176.

[150] *Delgamuukw, supra* note 1 at para. 181, referring, *inter alia*, to *Dick* v. *The Queen*, [1985] 2 S.C.R. 309 at 326 and 315.

[151] *Delgamuukw, supra* note 1 at para. 178.

[152] On interjurisdictional immunity, see generally P.W. Hogg, *Constitutional Law of Canada*, Student Edition, (Toronto: Carswell, 1997) at 361–370 and 566–567.

[153] *Delgamuukw, supra* note 1 at para. 178.

[154] *Delgamuukw, supra* note 1 at para. 180. The requirement is from *Sparrow*, supra note 3 at 1099.

[155] *Supra* note 153.

[156] *Delgamuukw, supra* note 1 at para. 181.

[157] See *Dick, supra* note 150. Section 88 provides that,

> Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws

not rescue provincial laws that purport to extinguish aboriginal rights. In his view, s. 88 lacks a clear and plain intention required to extinguish aboriginal rights.[158] As well, he thought the express reference to treaty rights in s. 88[159] shows a clear intention not to undermine aboriginal rights.[160]

For the most part,[161] the Court's reasoning on the division of legislative powers is a logical extension of previous case law. As Lamer C.J.C. pointed out, the argument that s. 91(24) is limited to Indian reserves was rejected over a century ago.[162] Moreover, if aboriginal rights are not part of the "Indianness" or

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are inconsistent with this Act or any order, rule, regulation, or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

158 *Delgamuukw*, *supra* note 1 at para. 183.

159 *Supra* note 147.

160 *Delgamuukw*, *supra* note 1 at para. 183. In this context, "undermine" appears to refer to the word "extinguish" in the sentence above.

161 It is rather surprising, though, that Lamer C.J.C. rejected the province's referential incorporation argument by saying that section 88 does not show the clear and plain intent required to extinguish aboriginal rights. Since section 88 is only a general enabling provision, arguably the relevant intention is not that of section 88, but that of the provincial legislation seeking support from section 88. This is because:

(*i*) extinguishment of aboriginal rights requires a clear and plain legislative intent to extinguish;

(*ii*) provincial legislation with the *intent* of affecting the core area of section 91(24) cannot be referentially incorporated by section 88 (see *Dick* v. *The Queen*, [1985] 2 S.C.R. 309, where the Supreme Court held that the kind of provincial law that is "rescued" by section 88 is a law of uniform territorial application whose effect *but not purpose or intent* is to impair Indianness); and

(*iii*) aboriginal rights are part of the core area of section 91(24) of the *Constitution Act, 1867*, it follows that section 88 cannot referentially incorporate provincial laws purporting to extinguish aboriginal rights.

162 See *Delgamuukw*, *supra* note 1 at para. 174, referring to *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 A.C. 46 (J.C.P.C.) at 59. Note that the clear and plain intention requirement applies only to extinguishment. It would not prevent s. 88 from rescuing certain provincial laws of general application which infringe but do not extinguish aboriginal rights. Of course, a provincial law rescued by section 88 might still fail the justification test in *Sparrow*: see *R.* v. *Alphonse*, [1993] 5 W.W.R. 401 (B.C.C.A).

In a thoughtful paper, K. McNeil argues that because of the exclusivity of federal jurisdiction under section 91(24), provincial laws which infringe but do not extinguish aboriginal title, would touch on Indianness and would be in relation to the Indian lands component of this provision: "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask. L. Rev. 431 at paras. 33 and 46 respectively. Hence such laws cannot be rescued by section 88 of the *Indian Act*. However, this interpretation seems at odds with (*i*) that part of *Delgamuukw* which envisages provincial justifi-

reserve nature of Indian land cores of s. 91(24), it is difficult to imagine what *would* be part of it. Since aboriginal rights cannot be extinguished without a clear and plain intention, it follows that no provincial law could extinguish aboriginal rights without singling out matters in s. 91(24).

C. A Case for Deferral?

Although the Court's reasoning is logical, its potential consequences are breathtaking. First, vast aboriginal title areas of British Columbia and other non-treaty areas of Canada are now clearly subject to exclusive federal legislative jurisdiction in relation to "Indians, and Lands reserved for the Indians."[163] Second, the core of s. 91(24)—within which provinces cannot legislate independently—includes aboriginal rights. To the extent that they affect aboriginal rights, then, provincial game, environment, health, and similar laws presumably have no have independent force. To affect aboriginal rights at all, these laws must be rescued by s. 88 of the *Indian Act*. If they purport to extinguish aboriginal rights, s. 88 does not save them. Third, provincial laws enacted prior to 17 April 1982, cannot extinguish aboriginal rights, without or with the help of s. 88.[164] Fourth, provincial governments may owe Canadian aboriginal peoples immense sums in compensation for unconstitutional extinguishment between Confederation and 17 April 1982. While, the Court said little about these implications in *Delgamuukw*, it will be addressing them for decades to come.

In light of potential consequences like these, courts may find it necessary to defer final rulings on injunctions or compensation until governments and claimants have had an opportunity to settle matters through negotiation. The alternative could well be economic paralysis, judicial backlogs, deterioration in aboriginal and non-aboriginal community relations, and yet more legal uncertainty.

IX. Conclusion

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cation of provincial infringement (McNeil concedes this but argues that division of powers analysis is logically prior to the question of s. 35(1) justification); (*ii*) the principle articulated in *Dick*, *supra* note 150 at 315, and not renounced in *Delgamuukw*, that provincial laws of general territorial legislation can be saved by s. 88 if they have the effect but not the intent of impairing Indianness; and (*iii*) the general tendency of courts not to construe exclusivity in absolute terms in division of powers analysis.

163 *Constitution Act, 1867*, *supra* note 12 at s. 91(24).

164 And now neither federal nor provincial laws enacted after 17 April 1982 can unilaterally extinguish aboriginal rights. Compare the "plenary but good faith" power of Congress (but not state legislatures) to acquire American Indian lands: *Lone Wolf* v. *Hitcock* (1903), 187 U.S. 533 (C.C.A.) at 565, as modified by decisions such as *U.S.* v. *Sioux Nation of Indians* (1980), 448 U.S. 371 (U.S.S.C).

THE SUPREME COURT OF CANADA says that s. 35(1) of the *Constitution Act, 1982* "provides a solid constitutional base upon which subsequent negotiations can take place."[165] It may be wrong. *Delgamuukw* shows that the judicial concepts of s. 35(1) aboriginal rights and title are still far from solid. Because these concepts derive in part from outside the established structures of the common law, they must achieve a stability of their own. They are legal concepts in a state of becoming.

In this context, *Delgamuukw* is a remarkable building effort with impressive but mixed results. For example, the Court has taken a flexible approach to aboriginal oral evidence, but that approach is incomplete. The Court has given life to aboriginal title, but it needs to say more about aboriginal rights as a whole. The Court has related provincial extinguishment to aboriginal rights and the federal system, but it has yet to grapple with the consequences.

Ironically, the volume of work ahead is partly the product of an activist Court. Embracing the notion of *sui generis*, the Court has broken major new legal ground for aboriginal rights, for the third time in a decade.[166] *Sui generis* underscores an important pluralist reality.[167] At the same time, it offers few ready analogies or bridges to the existing common law.[168] Each new elaboration of these special rights has the potential to create as many questions as it resolves. To take two examples, the concepts of shared exclusivity will require more elaboration in regard to overlapping aboriginal claims, and the land attachment

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165 *Delgamuukw*, *supra* note 1 at para. 186, quoting from *Sparrow*, *supra* note 3 at 1105.

166 The other two major landmark decisions were *Sparrow*, *supra* note 3 at 1105, and *Van der Peet*, supra note 14.

167 See *e.g.*, J. Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L.J. 629, tracing the judicial origins of the concept, and seeing it as vital to greater non-aboriginal recognition of First Nations law.

168 For example, see the Hon. M. Bastarache, "The Challenge of the Law in the New Millennium" (1997-98) 25 Man. L.J. 411 at 413, who opined:

> Not surprisingly, that *sui generis* property right [articulated in *Delgamuukw*] is a novel creation and one which will no doubt require many cycles of trial and appeal before its precise character is fully fleshed out. In the meantime, the tapestry of property law has a piece missing of indeterminate size which places considerable strain on the coherence of the structure. And yet, can there be any doubt that aboriginal interest in lands, which they have used since time immemorial, must be recognised and protected under our law? The difficulty is in accommodating, adjudicating, and vindicating that obvious reality when it doesn't quit fit into the conventional paradigms of property law. And where will these *sui generis* property rights fit in with the rest of our hierarchy of legal rights? We have embarked on the road of refashioning our legal tools. Time will tell whether aboriginal aspirations, and realities, of land occupation can be successfully and sensitively recognised by our law.

qualification will need further legal definition to determine its extent and application.

In this situation, courts should be cautious about generating even more work for themselves. In some areas addressed in *Delgamuukw*, such as aboriginal self-government, we may be reaching the limits of judicial effectiveness. Ultimately, the law of aboriginal rights and title is a highly discretionary balancing act between aboriginal and non-aboriginal interests. Beyond a point, greater judicial involvement produces not less but greater uncertainty, and greater uncertainty leads to more litigation.

A way out of this conundrum is to limit and re-focus the nature of involvement by courts. First, the Supreme Court of Canada should provide trial courts with a more balanced and systematic approach to oral evidence. It should identify alternative evidentiary safeguards to complement the relaxed approach to hearsay, and to provide a framework for assessing the weight of oral aboriginal evidence in relation to a particular claim.

Second, and in the longer term, it may be possible to transfer the job of assessing evidence in support of a particular claim, from trial courts to an independent administrative tribunal with expert members, including aboriginal expert members.

Third, where possible, the Court should consolidate its new law with the old. For example, it should be possible to combine the identification tests for aboriginal title and other aboriginal rights without losing what makes each distinct.

Fourth, the Court should clarify that the concept of aboriginal rights is not open-ended. It is not dependent wholly on what judges consider *integral* or *distinctive* in a particular case. It has a common denominator. The Court came close to finding this denominator in *Delgamuukw*. It is time to make it explicit.

Fifth, the Court could treat the numerous existing s. 35(1) justification criteria as guides to a broader and simpler underlying question. This would ask if government acted fairly, reasonably, and in good faith, and pursuant to a compelling and substantial legislative objective, in an individual case.

Sixth, in light of the Court's ruling on provincial extinguishment powers, courts should consider delaying final remedies until aboriginal and government parties have had a reasonable opportunity to negotiate accommodations themselves.

This general approach recognises that there are limits to what courts can do with aboriginal rights. Claims derived from life hundreds of years ago, in very different societies, are not good material for the adversarial trial process. There is a thin line between strengthening a base for political negotiations and strengthening an alternative to political negotiations.[169] Overall, in *Delgamuukw*

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[169] It is still too soon to say what effect the Supreme Court's decision in *Delgamuukw* will have on this question. A year after *Delgamuukw*, British Columbia courts had rendered about ten

the Supreme Court did a good job of expounding the law of aboriginal title. But a more effective court role is not necessarily an expanded role. From here on, courts may be able to do more by doing less. After *Delgamuukw*, the road should lead not back to the court house but on to the legislature.[170]

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decisions referring to the Supreme Court's decision. Most involved interim injunctions for failure to consult in regard to claimed aboriginal title interests: *supra* note 116. See also *R. v. Stump* (3 April 1998), Williams Lake 17856 (B.C. Prov. Ct.) (proper time for identifying aboriginal rights); *R. v. Ignace* (1998), 156 D.L.R. (4th) 713 (B.C. C.A.)) (*Delgamuukw* did not affect superior court's jurisdiction to conduct criminal trial involving aboriginal person); and *Stoney Creek Indian Band v. B.C. (Min. of Forests)* (1999), 1 C.N.L.R. 192 (B.C. S.C.) (interpretation of s.88 of *Indian Act*). By the time of the first anniversary of *Delgamuukw*, negotiations between the Gitksan and Wet'suwet'en and governments had recommenced, but with little evident progress. Although the Nisga'a Final Agreement seemed likely to secure legislative ratification, there were few signs of major treaty progress elsewhere. See *Present Status of B.C.T.C.* (British Columbia Treaty Consultation Process), online: <http//aaf.gov.bc.ca/aaf/treaty.status.htm>. A news item (Canadian Press, "First Nations frustrated at treaty progress" (Canadian Press, December 14, 1998), online: QL (CP98)) said:

> [A] year has passed since the country's highest court issued a historic ruling on aboriginal rights, but First Nations say they are no closer to settling treaties with B.C. and the federal governments.
>
> [Grand Chief Edward Johns of the First Nations Summit] said he is not convinced governments are committed to implementing the ruling, even though they said last year that it reaffirmed the importance of negotiating land claims...
>
> Some of the 116 bands involved in 51 treaty negotiating tables in B.C. are beginning to wonder if court action would be more fruitful, even though they would prefer to negotiate, added Robert Louie of the Westbank First Nation.

[170] How should legislators be addressing these issues? Should land claims agreements have constitutional amendment or public referendum support as well as aboriginal and legislative ratification? Although these questions are beyond the scope of this comment, they are with us now and need answers.