Comprehending 'the genius of the common law' — Native Title in Australia and Canada compared post-*Delgamuukw*

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> The challenge for ordinary Australians today is this: that the foundation for compromise ... comes from their own legal and constitutional heritage. The *Mabo* decision is not a product of indigenous heritage. Rather, more fundamentally, it is the product of the country's English heritage: it is a product of the genius of the common law of England.[1]

The belated recognition of native title in Australia in *Mabo (No.2)* [2] and *Wik* [3] has coincided with a re-invigoration of the debate in Canada over its common law equivalent, aboriginal title. While aboriginal title was recognised as subsisting in Canada by the Privy Council as far back as 1888,[4] and more recently by the Supreme Court of Canada in 1973,[5] the doctrine has been subject to intense scrutiny by the Canadian Supreme Court in the 1990s as a consequence of the protection afforded aboriginal rights by the Canadian Constitution of 1982.

The most recent instalment in this debate, *Delgamuukw v British Columbia*,[6] was decided by the Supreme Court of Canada on 11 December 1997, almost a year to the date the High Court handed down its decision in *Wik* and at the same time that the Australian federal Parliament was reaching the final stages of its marathon debate on

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1 Pearson N 'An Australian history for all of us — Address to the Chancellor's Club Dinner' University of Western Sydney 20 November 1996, in Aboriginal and Torres Strait Islander Social Justice Commissioner (1997) *Fifth Report 1997* Human Rights and Equal Opportunities Commissioner, Sydney 6.

2 *Mabo v Queensland [No.2]* (1992) 175 CLR 1 (*Mabo (No.2)*).

3 *Wik Peoples and Thayorre People v Queensland* (1996) 187 CLR 1 (*Wik*).

4 *St Catherine's Milling and Lumber Co v R* (1888) 14 App cas 46.

5 *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3D) 145.

6 [1997] 3 SCR 1010 (*Delgamuukw*). The decision is also extracted at (1998) 3(1) *Australian Indigenous Law Reporter* 35.

the Native Title Amendment Bill 1997 (Cth).[7] *Delgamuukw* involved claims by the Gitksan and Wet'suwet'en hereditary chiefs, individually and on behalf of their 'houses', to aboriginal title over separate portions of 58,000 square kilometres of British Columbia. The Court upheld the claimant's appeal on the basis that the trial judge had failed to consider the available evidence by not accepting oral histories presented at the trial in evidence. In remitting the claim to trial the Court considered in detail the nature and content of aboriginal title, the test to be met to prove such title and the extent to which Courts should accept oral evidence to prove claims. *Delgamuukw* has been greeted with much joy by aboriginal groups and academics in Canada, in contradistinction to the anger and criticism which they expressed at the Court's earlier decisions in 1996, particularly the *Van der Peet* trilogy.[8]

Delgamuukw is likely to be influential in the Australian context. In recent years there has been an interplay between the decisions of the Canadian Supreme Court and the High Court of Australia in developing the doctrines of Aboriginal and native title. This cross-Atlantic interaction began with the analysis of Justice Blackburn in *Milirrpum v Nabalco Pty Ltd*[9] who considered the Canadian common law in reaching the conclusion that the 'doctrine of communal native title ... does not form, and has never formed, part of the law of any part of Australia.'[10] Justice Blackburn's analysis was regarded as 'wholly wrong' by the Canadian Supreme Court when it confirmed that aboriginal title was indeed part of the Canadian common law two years later in *Calder*.[11] The Supreme Court's decision in *Calder* was one which the High Court relied upon in recognising native title in *Mabo (No.2)*. In turn, *Mabo (No.2)* has subsequently been considered by the Canadian Supreme Court, most notably in the *Van der Peet* trilogy, as well as by the British Columbia Court of Appeal in the lower Court decision in *Delgamuukw*.[12] The Canadian cases have since been considered by the High Court in *Wik*.

In considering the Canadian cases it is important to note that there are common features as well as important distinctions between the Canadian and Australian experiences of

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7 For a critique of the Bill see Australian Law Reform Commission *Submission to the Senate Legal and Constitutional Legislation Committee inquiry into the constitutionality of the Native Title Amendment Bill 1997* (1997).

8 *R v Van der Peet* [1996] 2 SCR 507 (*Van der Peet*); *R v Gladstone* [1996] 2 SCR 723 (*Gladstone*); *R v N.T.C Smokehouse* [1996] 2 SCR 672.

9 (1971) 17 FLR 141 (NT SC).

10 *Ibid* 244-45.

11 *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3D) 145.

12 *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 (*Delgamuukw (BCCA)*).

native title. Whereas Australia has historically given little consideration to the treatment of indigenous peoples,[13] Canada has a long history of dialogue with aboriginal peoples.[14] There has been recognition in Canada of aboriginal rights dating back several centuries through treaties, legislation,[15] land claims policies[16] and the common law. Similarly, when the Canadian Constitution was repatriated from England in 1982, s 35(1) constitutionally entrenched aboriginal rights:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.[17]

Native title rights in Australia do not enjoy such clear constitutional protection.[18] While this is a factor which differentiates the two systems, the Canadian experience is still relevant to Australia, since s 35(1) of their Constitution *protects* aboriginal rights, but does not *create* those rights. Aboriginal rights flow from the prior occupation and usage of the land by the indigenous people of Canada, much as native title rights in Australia does. As s 35(1) protects aboriginal and treaty rights, cases concerning aboriginal rights arise in provinces in which the settlers did not enter into treaties with indigenous people, such as British Columbia. This article will show that the Canadian courts have wrestled with similar dilemmas to those faced by the Australian Courts and that Canada, too, has struggled to come to terms with

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13 This fact was described by W.H.Tanner in 1968 as "the great Australian silence": See O'Donoghue L 'Ending the despair' (1992) 51 *Australian Journal of Public Administration* 212, 215.

14 Webber J argues that indigenous rights in Canada are best understood as originating in 'the practical interaction between colonists and indigenous peoples during the first decades of contact' whereas the recognition of native title in Australia is based on moral reflection or regret over the historical treatment of indigenous people: Webber J 'The jurisprudence of regret: The search for standards of justice in *Mabo*' 17(3) *Sydney Law Review* 1 at 7-8, 10.

15 For example, in accordance with the *Royal Proclamation of 1763* and s 91(24) of the *Constitution Act 1867*.

16 For recent developments see Ivanitz M 'The Emperor has no clothes: Canadian Comprehensive Claims and their relevance to Australia' *Australian Institute of Aboriginal and Torres Strait Islander Studies — Regional Agreements Paper No.4* (1997).

17 *Constitution Act*, RSC 1982, s 35(1).

18 One commentator has noted that an effect of the constitutional protection of Aboriginal rights under s 35(1) in Canada may be that a legislative response to Aboriginal rights such as the *Native Title Act 1993* (Cth) model could lack constitutional authority in Canada: McNeil K 'Co-existence of indigenous and non-indigenous land rights: Australia and Canada compared in light of the *Wik* decision' (1997) 4(5) *Indigenous Law Bulletin* 4 at 4.

the 'genius of the common law'.

Part I of this article provides an overview of the Canadian case law on aboriginal rights under s 35(1), and focuses on the Supreme Court's decisions on the characterization and protection of aboriginal rights in *Sparrow* [19] and the *Van der Peet* trilogy, and the recent decision of *Delgamuukw* on aboriginal title. Having identified those aspects of the Canadian doctrine which are of relevance to Australia, Part II of the article analyses the emerging Australian jurisprudence in light of the Canadian cases, and seeks to provide some suggestions on the direction which the doctrine of native title may take in Australia.

Part I: The Canadian doctrine of aboriginal rights — an overview

The Supreme Court of Canada has considered the meaning and operation of s 35(1) of the Constitution in several cases over the past eight years. The Court's consideration has focused principally on four issues:

- when is an aboriginal right existing or continuing, and correspondingly when has that right been extinguished;
- what is an aboriginal right and what is the test to establish an aboriginal right;
- how aboriginal title fits within the protection of aboriginal rights in s 35(1), and
- the test for establishing aboriginal title; and in what circumstances is a government justified in regulating or limiting the exercise of an aboriginal right.

The first three of these issues are most relevant to Australia.

i. When is an Aboriginal right 'existing' and when has it been extinguished?

The Supreme Court first considered the constitutional protection of aboriginal rights at length in 1990 in the *Sparrow* case, which involved the prosecution of an aboriginal person under fishing regulations for fishing with a driftnet longer than that permitted by the terms of the indigenous fishing licence granted. While admitting the conduct, the appellant defended the charge on the basis that the net length restriction was invalid as it was inconsistent with their protected aboriginal right to fish under s 35(1).

The Court held that an 'existing aboriginal right' is a right in existence when the Constitution came into effect in 1982. If a claimed right had been extinguished prior

19 *R v Sparrow* [1990] 1 SCR 1025 (*Sparrow*).

to 1982 then it was not revived by s 35(1). The Court held that aboriginal rights must be interpreted flexibly so as to allow for their evolution over time and stressed that an approach which 'froze' those rights as they existed at 1982 must be rejected. The Court also rejected arguments that existing rights be recognised according to the specific manner in which they were regulated in 1982 and that regulation in an inconsistent manner necessarily extinguished aboriginal rights. Hence, the protection in s 35(1) of 'existing' aboriginal rights, was taken to refer to rights which are *unextinguished*. The Court in *Sparrow* affirmed that the test for extinguishment of aboriginal rights required that the Sovereign's intention to extinguish must be clear and plain.

The application of the 'clear and plain intention' test for extinguishment of native title is a feature common to jurisdictions which recognise native title rights.[20] There are, however, significant differences in the application of this test between Australia and Canada. These differences are discussed in Part II below.

ii. What is an Aboriginal right and what is the test to establish such a right?

The Court in *Sparrow* was not required to consider what constituted an aboriginal right. That issue was dealt with when the Supreme Court delivered contemporaneously its judgments in the *Van der Peet* trilogy[21] in 1996. In *Van der Peet* the appellant was charged with selling 10 salmon caught under an Indian food fish licence, the sale of fish being prohibited by the licence. In *NTC Smokehouse* the appellant was not indigenous, but was charged with purchasing fish caught pursuant to an Indian food fish licence under the same regulations as at issue in *Van der Peet*. In *Gladstone* the appellants were charged with attempting to sell herring spawn on kelp when one of the appellants did not have an Indian food fish licence and the other had exceeded the permitted catch under their licence. In each case the appellants claimed that the licence restrictions were invalid on the basis that they were inconsistent with their protected constitutional rights to fish under section 35(1). In both *Van der Peet* and *NTC Smokehouse* the appeals were dismissed on the basis that the appellants had not established that they were acting pursuant to an aboriginal right.

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20 For a comparison of the application of the test in Canada, the United States and Australia see Dorsett S, '"Clear and Plain Intention" Extinguishment of Native Title in Australia and Canada post-Wik' (1997) 6 *Griffith Law Review* 96.

21 See citations given in note 8.

22 This fiduciary obligation is discussed below in relation to the *Sparrow* infringement and justification test.

In determining the ambit of an aboriginal right for the purposes of s 35(1), the Supreme Court identified three guiding principles. The purposes underlying the affirmation of aboriginal rights under s 35(1) required a generous, liberal interpretation of what constituted those rights, due to the fiduciary obligation owed by the Crown to aboriginal peoples.[22] The Court also stressed that aboriginal rights exist and are recognised and affirmed by s 35(1) because of one fact: the prior occupation and usage of the land by indigenous peoples in distinctive cultures. aboriginal rights recognised by s 35(1) are the means by which the prior occupation of indigenous peoples is reconciled with the assertion of Crown sovereignty over Canada. The Supreme Court argued that the analysis in *Mabo (No.2)* 'is persuasive in the Canadian context'[23] in relation to the second and third of these propositions.

In accordance with these principles, the Supreme Court held that the test for identifying aboriginal rights must be directed to identifying the crucial elements of those pre-existing distinctive societies:

> in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.[24]

The Court identified a series of factors to be considered in applying this 'integral to a distinctive culture' test, namely:

(a) Factors aimed at identifying the claimed aboriginal right with specificity

The Court must identify precisely the nature of the claim being made in determining whether a claimant has demonstrated the existence of an aboriginal right. To characterise a claim correctly the Court should consider factors such as the nature of the action which the applicant claims was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right. Claims to aboriginal rights must also be adjudicated on a specific rather than a general basis. Their scope and content must be determined on a case by case basis.

(b) Factors to be taken into account in evaluating the claimed right

The Court must take into account the perspective of the aboriginal peoples claiming

23 *Van der Peet*, 544 (Lamer CJ).

24 *Ibid*, 545.

25 *Ibid*, 550.

the right. However, as s 35(1) seeks to reconcile the pre-existence of indigenous rights with the assertion of sovereignty, 'it must be recognized ... that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure.'[25] The Court must also approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims.

The Court must take into account the relationship of aboriginal peoples to the land and their distinctive societies and cultures. As aboriginal rights can exist independently of aboriginal title, the Courts may need to look at factors other than the claimants' relationship to the land.

(c) The claimed right must be of sufficient importance if it is to be recognized

In order to be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question. In determining this the Court does not look at aspects which are central to all societies, nor those which are incidental, but instead at the defining and central attributes of the society in question.[26]

For a practice, custom or tradition to constitute an aboriginal right it must be of independent significance to the aboriginal culture in which it exists. If it is merely incidental to another practice, custom or tradition it will not be recognized as an aboriginal right. The 'integral to a distinctive culture' test also requires that a practice, custom or tradition be distinctive, as opposed to distinct. In other words it is not required that it be unique to the culture, but that it be a distinguishing characteristic of that society.

(d) The time period required for identification of the claimed right

The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact between aboriginal and European societies. This can be demonstrated through evidence of post-contact activities, but only if those activities can be traced back to pre-contact societies.

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26 For example, the appellant's claim in *Van der Peet* that the protected right in question was a right to exchange fish for money or other goods was not accepted by the Court on the basis that the appellant's characterisation of the right as 'significant' was not sufficient to demonstrate that the right was integral to a distinctive culture.

> If an aboriginal practice has adapted or changed because of the arrival of European culture then that will not prevent the activity from being capable of being protected as an aboriginal right, but if the practice, custom or tradition arose solely as a response to European contact then it will not be capable of being so recognized.

The *Van der Peet* test has been extensively criticised for establishing a narrow and restrictive interpretation of what constitutes an aboriginal right.[27] The consideration of whether a practice, custom or tradition is of independent and central significance to the aboriginal culture is said to result in a

> judicial compartmentalization of aboriginal issues ... By isolating these claims from their historical, cultural, social, political and legal contexts, the Court's examinations invariably take place in a juridical vacuum.[28]

It is further argued that the Supreme Court defined aboriginal rights too restrictively, resulting in a 'frozen rights' approach. Justice McLachlin in dissent in *Van der Peet* drew a distinction between an aboriginal right and the exercise of that right — the *right* should be cast in broad, general terms whereas the *exercise* of that right may take a variety of forms, depending on the circumstances. Her Honour considered that the majority incorrectly characterised the modern form of exercising the right as the actual right, foreclosing consideration of the claim as there was no traditional counterpart to the modern practice.

The restrictiveness of the majority approach in *Van der Peet* can be illustrated by the Court's subsequent decision in *Pamajewon* in 1996.[29] The aboriginal right claimed was a right to self-government, including the right to establish and regulate gambling operations on the claimant's reserve lands. The Court assumed without deciding that the claimants had an aboriginal right to self-government, yet dismissed

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27 See the separate dissenting judgments of Justices L'Heureux-Dube and McLachlin in *Van der Peet* and the following commentators: Rotman L, 'Creating a still-life out of dynamic objects: Rights reductionism at the Supreme Court of Canada' (1997) 36 *Alberta Law Review* 1; McNeil K, 'Aboriginal Title and Aboriginal rights: What's the connection?' (1997) 36 *Alberta Law Review* 117; Gray J, 'O Canada! *Van der Peet* as guidance on the construction of Native title rights' (1997) 2 *Australian Indigenous Law Reporter* 18; Borrows J, 'The Trickster: Integral to a distinctive culture' (1997) 8(2) *Constitutional Forum* 27.

28 Rotman, *ibid*, 2.

29 *R v Pamajewon* [1996] 2 SCR 821 (*Pamajewon*). See also the specificity with which the Court defines the aboriginal right in question in *Gladstone*.

the application on the basis that the claimants had failed to satisfy the 'integral to a distinctive culture' test by demonstrating that the specific activity of high-stakes gambling was distinctive to the aboriginal culture prior to contact with Europeans. They held that to cast the claimed right as the right to manage the use of their reserve lands, which would include the right to conduct high-stakes gambling activities, would be an excessively general approach. Justice L'Heureux-Dube in dissent considered the claimant's characterisation of the right in this way as too broad, but also considered the alternative characterisation of the right by the majority — as the right to participate in and to regulate high-stakes gambling activities on their reserve lands — as too specific. Consistent with McLachlin J's reasoning in *Van der Peet*, she considered that the focus should be on the activity itself (that is, do the appellants possess an existing Aboriginal right to gamble?) and not on the specific manner in which the activity is carried out.

McLachlin J also noted that the requirement that the claimed right be 'distinctive' is too indeterminate as it required a subjective evaluation of what is integral, distinctive or specific.[30] L'Heureux-Dube J argued that the majority's reasoning actually meant that the claimed right must be 'distinct', as opposed to 'distinctive', with the result that an activity will not be integral to an aboriginal culture if it is integral to a culture other than that of aboriginal people. If an activity is distinctive to aboriginal and non-aboriginal cultures it is defined as 'non-aboriginal' for the purposes of s 35(1), and aboriginal culture and rights are consequently defined as 'that which is left over after features of non-aboriginal cultures have been taken away'.[31]

L'Heureux-Dube J criticised the analysis of existing aboriginal rights by reference to pre-contact practices, traditions and customs and suggested that this 'implies that aboriginal culture was crystallized in some sort of 'aboriginal time' prior to the arrival of Europeans',[32] and overstates the impact of European influence on aboriginal communities by assuming that everything that indigenous people did after that point was not sufficiently fundamental and significant to their culture and social organisation.

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30 She also argues that the 'integral to a distinctive culture' test is too categorical in that it is an 'all or nothing' approach with no limitations on the right once it has been characterised and established.

31 *Van der Peet*, 596 (L'Heureux-Dube J). Instead L'Heureux-Dube J favoured a more abstract approach that focuses on the protection of the distinctive cultures of which aboriginal rights are a manifestation, rather than a focus on particular practices. On this basis, those practices, customs and traditions which would be protected are those which are sufficiently significant and fundamental to the culture and social organisation of the aboriginal group in question: above, pp 593-95. Contrast this with note 27.

32 *Ibid* 596.

The pre-contact time reference is also criticised because it effected a high burden of proof on the indigenous claimant, particularly as this temporal requirement was coupled with the requirement that the activity be of fundamental significance to the distinctive culture.

iii. What is the relationship between aboriginal rights and aboriginal title?

The Supreme Court in *Van der Peet* noted that aboriginal rights can exist independently of aboriginal title. The relationship between the two was considered in *Delgamuukw* in December 1997. The Court summarised the relationship between aboriginal title and aboriginal rights as follows:

> The aboriginal rights which are recognized and affirmed by s35(1) fall along a spectrum with respect to their 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'... 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 .... At the other end of the spectrum, there is aboriginal title itself.[33]

There is no formal distinction in Australia between Aboriginal rights and Aboriginal title. Native title rights can encompass at one end of the spectrum ... 'the rights flowing from full ownership at common law ... [or an entitlement] to come on land for ceremonial purposes, all other rights in the land belonging to another group.'[34]

The Australian common law[35] and s 211 of the *Native Title Act 1993* (Cth) also envisage that native title rights may extend to a general right to fish or hunt.[36] To

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33 *Delgamuukw*, para 138 (Lamer CJ (Cory and Major JJ concurring)).

34 *Wik*, 126-27 (Toohey J).

35 *Mason v Tritton* (1994) 34 NSWLR 572 (NSWCA), 575, 582 (Kirby P); *Sutton v Derschaw* (1995) 82 A Crim R 318, 324 (Heenan J).

36 The recognition of traditional activities such as fishing and hunting in s 211 is limited to the purpose of exempting those activities from prosecution. It does not, for example, extend to preventing future acts taking place in that area in a manner that is inconsistent with the traditional right: Richard Bartlett 'Native title and fishing rights' (1996) 1 *Australian Indigenous Law Reporter* 365, 380.

date no claimants have been successful in establishing such general, non site-specific rights in Australia.[37]

Delgamuukw was the first case in which the Canadian Supreme Court considered issues relating to the content and proof of aboriginal title, and in particular how the *Van der Peet* test for aboriginal rights applies to claims of aboriginal title. The majority characterised aboriginal title as conferring the right to use land for a variety of activities, not all of which need to be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies: 'Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title.'[38] The Court noted that the range of uses for which the land can be used was subject only to an *inherent limitation* that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This limitation on the content of aboriginal title flows from the definition of aboriginal title as a *sui generis* interest in land.[39] The Court continued that

> the relevance of the continuity of the relationship of an aboriginal community with its land here is that it applies not only to the past, but to the future as well. That relationship should not be prevented from continuing into the future. As a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title.[40]

The Court gave two examples of how this inherent limitation would apply:

> 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 (eg 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 (eg by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).[41]

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37 See below, Part II.

38 *Delgamuukw*, para 111 (Lamer CJ).

39 As with native title in Australia, aboriginal title is inalienable to third parties, can only be surrendered to the Crown, arises from the prior occupation of Canada by aboriginal peoples, and is held communally by the aboriginal group. *Ibid* paras 111, 125.

40 *Ibid*, para 127.

41 *Ibid*, para 129.

The majority drew an analogy between this inherent limitation and the concept of equitable waste at common law.[42] They also specified that the limitation did not in any way limit use to traditional practices as 'that would amount to a legal straitjacket on aboriginal peoples who have a legitimate legal claim to the land'.[43] This 'inherent limitation' concept has the potential, if the Court characterises and elaborates upon this limitation in a restrictive manner (such as that given to aboriginal rights in *Van der Peet)*, of stripping aboriginal title of much of its meaning for aboriginal peoples.[44]

The Court also considered that claims to Aboriginal title differ from claims to aboriginal rights in two significant respects: namely, the degree of connection with the land and the definition of aboriginal rights in terms of activities rather than land. The Court considered that prior to *Delgamuukw* the jurisprudence relating to aboriginal rights had concentrated on the prior social organisation and distinctive cultures of aboriginal people, whereas claims to aboriginal title required that the Court focus on the occupation of the land by indigenous groups. This difference in focus required modification of the *Van der Peet* test for claims to aboriginal title.

The Court considered that the requirement that the land be integral to the distinctive culture of the claimants was subsumed by the requirement of occupancy. The time period for the identification of the aboriginal title was the time at which the Crown asserted sovereignty over the land and not the time of first contact with Europeans. Sovereignty was chosen as the relevant contact point as aboriginal title arises out of the relationship between the common law and pre-existing systems of aboriginal law and is a burden on the Crown's underlying title — 'it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted.'[45] Unlike the *Van der Peet* test, the test for aboriginal title did not require a distinction to be drawn between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact. Under the common law, occupation or possession was sufficient to ground aboriginal title and it was not necessary to prove that the land was a distinctive or integral part of the aboriginal society before European arrival. Present occupation of the land could be relied upon as proof of occupation pre-sovereignty so long as continuity of occupation could

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42 *Ibid*, para 130.

43 *Ibid*, para 132.

44 For example, consider whether the claimants in *Pamajewon* would have been able to make out their claimed right to regulate gambling activities on their reserve lands if they had been able to demonstrate a claim to aboriginal title or whether casino activities would be found to destroy the groups special relationship with the land.

45 *Delgamuukw*, para 145 (Lamer CJ).

be demonstrated. Such continuity would not require an 'unbroken chain of continuity' but instead, citing Brennan J in *Mabo (No.2)*, the Court held that there must be 'substantial maintenance of the connection' between the people and the land.[46]

For a claim to title to be made out the Court additionally required that the claimant group was in exclusive occupation at the time the Crown acquired sovereignty. The Court noted that the concept of exclusivity is a common law concept derived from the notion of fee simple property ownership and should be imported into the concept of aboriginal title with caution. On this basis they noted that exclusivity could be demonstrated even where other aboriginal groups are present or frequented the claimed areas. In those circumstances exclusivity would be demonstrated by the intention and capacity to retain exclusive control of the land,[47] or there may be shared exclusivity over a piece of land.[48] Alternatively, if a group can show occupation but not exclusivity it could still be possible for that group to establish that they possess aboriginal rights short of title. 'Hence, in addition to shared title, it will be possible to have shared, non-exclusive, site-specific rights.'[49]

The Court in *Delgamuukw* also considered the Court's reception of oral histories in aboriginal rights cases. Lamer CJ held that courts must adapt the laws of evidence in order to accommodate oral testimonies, which in many circumstances are the only historical records held by many indigenous communities. The Court held that the trial judge had wrongly discounted significant aspects of the oral histories tendered by the claimants and not given sufficient weight to those histories accepted, and accordingly that a new trial was required. Richard Bartlett has noted that Australian practice to date (under land rights legislation and in native title proceedings) has placed an undue emphasis on anthropological evidence over aboriginal evidence, whereas *Delgamuukw*

> provides a timely reminder of the proper emphasis to be accorded ... [by placing] ... a primary emphasis in the proof of aboriginal claims on the claimants themselves and not on non-aboriginal experts' interpretation and filtering of aboriginal evidence.[50]

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46 *Ibid*, para 153.

47 *Ibid*, para 156. For example, trespass by other groups or the presence of those groups by permission only may reinforce rather than negate proof that the claimant group occupied the land with exclusivity: para 157.

48 *Ibid*, para 158.

49 *Ibid*, para 159.

50 Bartlett R, 'The content and proof of native title: *Delgamuukw v Queen in right of British Columbia*" (1998) 4(9) *Indigenous Law Bulletin* 17, 18.

The reasoning in *Delgamuukw* on this aspect was recently relied upon in Australia when counsel for the Yorta Yorta claimants, before the Federal Court of Australia in May 1998, argued that *Delgamuukw* was persuasive in the Australian context, and that the oral testimony presented during the trial should be accepted and given due weight by the Court.[51]

iv. The Sparrow test of infringement and justification

Once established, an aboriginal right (including title) is not absolute. The Crown can still legislate for aboriginal peoples. The Supreme Court considered in *Sparrow* that the Court's role was to reconcile the regulation of aboriginal rights with the protection afforded to those rights by the Constitution. In order to do so the Supreme Court in *Sparrow* developed a test, which it subsequently altered in *Gladstone*[52] and *Delgamuukw*, as follows:

(a) Does the legislation under consideration infringe an Aboriginal right?

The first part of the test is to determine whether the legislation in question has the effect of interfering with an existing aboriginal right, and if so whether it constitutes a *prima facie* infringement of s 35(1). The Court looks for an adverse restriction on the exercise of the aboriginal right or that the purpose or the effect of the restriction unnecessarily infringes the interests protected by the right. The Court considers whether the limitation is unreasonable, the regulation imposes undue hardship or denies to the holders of the right their preferred means of exercising that right.

(b) Is the infringement justified?

If a *prima facie* interference is found, the Court is required to determine whether this infringement is justified and constitutes a legitimate regulation of the aboriginal right. The legislation, and regulations, must have a valid legislative objective. The Court in *Sparrow* provided three such examples: laws aimed at preserving s 35(1) rights by conserving and managing a natural resource; laws preventing the exercise of aboriginal rights which would cause harm to the general population or aboriginal peoples themselves; or other reasons which are compelling and substantial.

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51 Pheasant B, 'Yorta Yorta deserve oral victory: QC' *The Australian Financial Review* (Sydney), 5 May 1998, 9.

52 Above n 9.

The Court in *Gladstone* in 1996 considered the *Sparrow* test in the context of a claimed right to fish commercially. The Court held that applying the *Sparrow* test in that circumstance would mean that the aboriginal right could become an exclusive right to fish the resource. Accordingly, as:

> distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that Aboriginal societies are part of that community), some limitation of those rights will be justifiable.[53]

In *Delgamuukw* the Supreme Court admitted that this principle in *Gladstone* had the result that 'the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad'.[54] Nevertheless, they held that the *Sparrow* and *Gladstone* principles operated with respect to infringements of Aboriginal title and listed the following objectives which they considered could justify the infringement of aboriginal title:

> the development of agriculture, forestry, mining and hydro-electric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims ... [55]

(c) Does the legislation breach the fiduciary obligation of the Crown to indigenous people?

Earlier decisions of the Supreme Court have held that the Crown owes a fiduciary obligation to aboriginal peoples,[56] and must act fairly in relation to Indians, as 'the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned.'[57] In *Sparrow* the Supreme Court held that this fiduciary relationship was incorporated into s 35(1) by the words 'recognized and affirmed',[58] and that this obligation to aboriginal peoples must be a primary consideration in determining whether the legislation or action in question could be justified. This required that in regulating the use of a resource, such as through fishing regulations, a high priority

53 *Ibid* 774 (Lamer CJ).

54 *Delgamuukw*, para 165 (Lamer CJ).

55 *Ibid.*

56 *R v Guerin* [1984] 2 SCR 335.

57 *R v Taylor and Williams* (1981) 34 O.R (2d) 360, 367 (MacKinnon CJ).

58 *Sparrow*, 1108 (Dickson CJ and La Forest J).

must be allocated to the exercise of the aboriginal right in question. In this case such rights were to be preceded only by regulation for valid conservation purposes. In determining whether the legislation is justified, the test also required that the court consider whether there had been as little infringement as possible in order to effect the desired result, that fair compensation had been paid, and the aboriginal group in question had been engaged in consultations prior to the enactment of the legislation. These factors incorporated a standard of reasonableness into the test for justification.[59] The Court in *Delgamuukw* affirmed the importance of these factors in relation to aboriginal title.[60]

The infringement and justification tests are particular to the history and constitutional landscape of Canada. While the High Court of Australia briefly considered the existence of a fiduciary obligation by the Crown to indigenous people,[61] the differing historical and constitutional factors demonstrate that this aspect of the Canadian case law is not relevant to Australia. The above consideration does demonstrate, however, that the Supreme Court will allow a range of objectives to justify the infringement of aboriginal rights and aboriginal title. Such an approach may ultimately restrict the ability of aboriginal groups or individuals to secure recognition of their rights under s 35(1).

Part II: The Australian doctrine of native title — A comparison

The native title rights of indigenous Australians were recognised by the High Court in *Mabo (No.2)* and *Wik*, but there are still many issues concerning such title which remain unresolved. This section considers aspects of the Canadian decisions which are relevant in the Australian context, and how these cases may inform unresolved issues on native title in Australia. The issues to be considered in this section fall into two broad groups — the source, content and proof of native title, and the test for extinguishment of native title.

i. The source, content and proof of native title in Australia

The jurisprudence relating to the source and content of native title rights in Australia is broadly similar to that in relation to aboriginal rights in Canada. In *Mabo (No.2)* Brennan J stated that:

59 *R v Nikal* [1996] 1 SCR 1013.

60 *Delgamuukw* ,paras 167-69 (Lamer CJ).

61 See for example Toohey J in *Mabo (No.2)*, 158-160.

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to these laws and customs.[62]

This passage was relied upon by Lamer CJ in *Van der Peet* as supporting the proposition that aboriginal rights are based in the pre-existing societies of aboriginal peoples,[63] a proposition from which Lamer CJ went on to formulate the 'integral to a distinctive culture' test. Both Courts have found that native title and aboriginal rights are capable of evolving over time so long as there remains continuity with pre-sovereignty[64] practices, customs or traditions. The High Court has also recognised that native title is sourced and derives its content from traditions, customs, and occupation of the land.[65] The test for proof of title in *Delgamuukw,* with the requirement of proof of occupancy, substantial maintenance of the connection with the land (not necessarily traced back to the pre-sovereignty period) and exclusivity, accords with the Australian jurisprudence. It is likely that the High Court would place reliance on the occupancy requirement, as the Supreme Court did in *Delgamuukw,* when dealing with a claim of native title approaching full ownership in the land, equivalent to aboriginal title.

It is also feasible in native title claims concerning rights not extending to full ownership,

> that *Van der Peet* has paved the way for Australian courts to interpret native title in a similarly restrictive manner ... [to aboriginal rights] ... while at the same time and seemingly inconsistently, expressing a willingness to acknowledge the fluid and evolutionary nature of native title. ... It is likely that when the issue of what specifically will constitute native title (or an exercise of it) is litigated again the Australian courts will be guided by their Atlantic confreres.[66]

The influence of the Canadian case law in Australia, and the likely influence of the Van *der Peet* 'integral to a distinctive culture' test, can be demonstrated by a series of cases relating to prosecutions under various Australian fishery regulations concerning claims of a native title right to fish. In 1994 in *Mason v Tritton,*[67] Kirby P conceded that establishing a claim of native title as a defence required that the defendant meet an

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62 *Mabo (No.2),* 58 (Brennan J).

63 *Van der Peet,* 546 (Lamer CJ).

64 Pre-contact in the case of Aboriginal rights other than Aboriginal title in Canada.

65 *Mabo (No.2),* 51-2 (Brennan J), 86 (Deane and Gaudron JJ), 184-92 (Toohey J).

66 Gray, 'O Canada! *Van Der Peet* as guidance on the construction of Native Title Rights' (1997) 2 AILR, 34.

67 *Mason v Tritton* (1994) 34 NSWLR 572.

extremely high evidentiary standard. In expressly approving passages in *Mabo (No.2)* and the Canadian approach in *Sparrow*, Kirby P held that the evidence must be sufficient to demonstrate the existence of traditional laws and customs which existed pre-sovereignty, that the claimant's descendants had continued to observe uninterrupted, and that the claimant was acting in accordance with such customs and traditions when they breached the regulations in question.[68] The claimant was unsuccessful as he was unable to demonstrate the traditional laws and customs justifying his actions.[69]

In May 1998 the test in *Mason* was approved by Justice Underwood of the Supreme Court of Tasmania in a case in which the applicant claimed that his prosecution under fishing regulations for the taking of abalone was invalid under s 211 of the *Native Title Act 1993*, as it was inconsistent with his native title right to fish.[70] The trial judge had held that the taking of abalone was a traditional Aboriginal activity engaged in since white settlement, but that this finding was not sufficient to ground a claim of native title. In the absence of further evidence demonstrating that the claimant acted in accordance with a tradition or custom in taking the abalone, the trial judge held the claim was not established.[71] On appeal, counsel for the applicant argued that the decisions in *Sparrow* and *Van der Peet* supported their claim for recognition of a right to fish. Underwood J, confirming the decision of the magistrate, held that:

> it is unnecessary ... to consider ... the views of the majority (in *Van der Peet*) with respect to the essential elements of an aboriginal right ... further because application of the principles expressed in both *Mabo (No.2)* and *Van der Peet* demonstrate that the learned magistrate's conclusion was correct that there was no evidence that the taking of abalone was in the exercise of a right possessed under a traditional law and custom. There is no evidence that since time immemorial, fishing for abalone had been a central and significant part of aboriginal custom in the sense that it was an element of a custom *integral to the distinctive culture of a group* of aborigines to which the ancestors of the applicant belonged ... The evidence established no more than that the taking of abalone was something that had been done by aborigines for a very long time.[72]

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68 *Ibid*, 584 (Kirby P), 598 (Priestley JA). This approach was affirmed by Justice Heenan in *Sutton v Derschaw*, as above n36. The Court also relied upon the reasoning in *Mabo* (No.2) and *Sparrow* in holding that regulation of a claimed native title right is not sufficient to manifest an intention to extinguish that right.

69 *Mason*, 574 (Gleeson CJ). See also Bartlett R, above n37, 369.

70 *Dillon v Davies* (Unreported, Supreme Court of Tasmania, Underwood J, 20 May 1998). See also *Sutton v Derschaw*, as above.

71 *Dillon v Davies*, above pp4-5 (Underwood J).

72 *Ibid* 6-7 (italics added).

These cases demonstrate the difficulty faced by claimants in establishing a non site-specific native title right, and the growing influence of the Canadian jurisprudence in Australia on this aspect.

ii. The test for extinguishment of native title

The High Court in *Mabo (No.2)* accepted the 'clear and plain intention' test laid down in *Sparrow* for the extinguishment of native title, although their reasoning in applying the test was not compelling.[73] Lambert JA in *Delgamuukw (BCCA)* criticised the judgment of Brennan J [74] on the basis that, despite asserting that a clear and plain intention must be manifested for extinguishment to be found, Brennan J provided that native title will necessarily be extinguished by an inconsistent grant.[75] The reasoning of the High Court in *Wik* was more satisfactory in elucidating the meaning of the 'clear and plain intention' test. Toohey J, after noting that the Court in *Mabo (No.2)* did not focus attention on the concept of extinguishment, relied upon the reasoning of the British Columbia Court of Appeal decision in *Delgamuukw* in explaining the concept.[76]

In *Delgamuukw* (BCCA) Lambert JA drew a distinction between explicit and implicit extinguishment.[77] Explicit extinguishment is legislative action which explicitly extinguishes native title.[78] Implicit extinguishment is extinguishment brought about by the sovereign power acting legislatively which brings into operation a legislative

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73 Kent McNeil has extensively critiqued the judgments of Brennan J and Deane and Gaudron JJ, and argued that the Court took a pragmatic approach to the issue of extinguishment and went against the overwhelming weight of authority by deciding that native title could be unilaterally extinguished by the Executive, by inconsistent grant or appropriation, prior to the enactment of the *Racial Discrimination Act 1975*: McNeil K, 'Racial discrimination and unilateral extinguishment of native title' (1996) 1 *Australian Indigenous Law Reporter* 181, 219-220. See also Erica-Irene Daes *United Nations Sub-Commission on the prevention of discrimination and protection of minorities — Working Paper on Indigenous peoples and their relationship to land*, extracted at (1997) 2 *Australian Indigenous Law Reporter* 564, para 24 at 568.

74 *Delgamuukw (BCCA)*, 672 (Lambert JA).

75 *Mabo (No.2)*, 49-50 (Brennan J).

76 *Wik*, 126 (Toohey J).

77 Note that while not dissenting in the case, Lambert JA's reasoning is of the minority of the Court.

78 An example is the *Queensland Coast Islands Declaratory Act* 1985 (Qld), which was found unconstitutional in *Mabo v State of Queensland (No.1)* (1988) 83 ALR 14.

scheme which is not only inconsistent with aboriginal rights but which makes it clear and plain *by necessary implication* that, to the extent of the inconsistency, the legislative scheme prevails and the aboriginal rights were extinguished.[79] The *Hindmarsh Island Bridge Act 1997* may constitute implicit extinguishment of native title, should native title be found to have existed. Lambert JA stressed that it is the clear and plain intention, whether explicit or implicit, and not the actual inconsistency (as suggested by the passage by Brennan J in *Mabo (No.2)*), which has the extinguishing effect. Toohey J adopted this in *Wik* where he noted that '[i]f the two can co-exist, no question of implicit extinguishment arises.'[80]

The High Court confirmed that a clear and plain intention to extinguish native title can be manifested implicitly, or by necessary implication, in *Western Australia v Commonwealth*[81] and *Wik*.[82] As Richard Bartlett has commented:

> The majority (in *Wik*) considered that native title is not a subordinate interest at common law and is entitled to equal treatment under the law. Accordingly the application of a clear and plain legislative intention is merely the application of the general rule applicable to all interests imposing a presumption against expropriation of existing rights, in particular without compensation ... [S]uch an intention was only [implicitly] manifested when the inconsistency was such that native title rights and the rights of the grantee are unable to co-exist (Toohey J at 75, Gummow J at 148) or "impossible" of co-existence (Kirby J at 223).[83]

This approach, which 'stresses a rationale of equality rather than pragmatism'[84] has implications for how the Court approaches the following unresolved issues — when is native title extinguished, and if extinguishment is found, is it permanent or temporary?

(a) Co-existence with native title

The High Court in *Wik* affirmed the test in *Mabo (No.2)* that where a subsisting native title right is inconsistent with another interest validly granted by the Crown, the other interest will prevail over the native title to the extent of the inconsistency. The

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79 *Delgamuukw (BCCA)*, 668 (Lambert JA).

80 *Wik*, 126 (Toohey J).

81 (1995) 183 CLR 373, 422.

82 *Wik*, 126 (Toohey J), 249 (Kirby J), 185 (Gummow J).

83 Bartlett R 'The *Wik* decision and implications for resource development' (1997) 16 *Australian Mining and Petroleum Law Journal* 27, 29. Note the use of the term 'expropriation' rather than 'extinguishment'.

84 *Ibid* 27.

question remains how does the Court determine inconsistency and what does it mean that the native title right is prevailed over?

The Canadian courts, primarily in treaty rights cases, look for inconsistency between the aboriginal right and the actual exercise of the Crown grant.[85] In *Sioui*,[86] the Supreme Court held that treaty rights can be exercised on ceded Crown lands in the treaty area as long as their exercise is consistent with Crown use of the land. *Badger*[87] extended this concept to apply to *privately* owned lands by holding that treaty rights can co-exist with a private landowner's rights and be exercised so long as the landowner does not put the lands to visible use. Similarly, in *Saanichtan Marina Ltd v Claxton*,[88] an injunction was granted restraining the construction of a marina due to the existence of a native title right to fish, which had been affirmed by treaty. In each case the result depended on the specific terms of the relevant treaty, with any inconsistency to be determined as a matter of fact and not law. Kent McNeil has suggested that these cases are relevant to aboriginal rights on the basis that:

> the treaty rights at issue in (each) ... case ... would have existed as aboriginal rights prior to the signing of the treaties [see *Simon v R* [1986] 1 CNLR 153 (SCC)] ... If aboriginal rights that have been affirmed by a treaty can co-exist with other land rights, aboriginal rights that have not been so affirmed should be capable of doing so as well.[89]

This is consistent with the lower Court decision in *Delgamuukw*[90] on the issue of co-existence of aboriginal rights on privately owned land. There, MacFarlane J held that:

> two or more interests in land less than fee simple can co-exist ... [But] a fee simple grant of land does not necessarily exclude aboriginal use. Uncultivated, unfenced, vacant land held in fee simple does not necessarily preclude the exercise of hunting rights ... On the other hand the building of a school on land usually occupied for aboriginal purposes will impair or suspend a right of occupation.[91]

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85 This is in circumstances of implicit extinguishment. The test for explicit extinguishment and extinguishment by treaty is strictly legal.

86 *R v Sioui* [1990] 1 SCR 1025. See also McNeil, above n19, 4.

87 *R v Badger* [1996] 1 SCR 771.

88 (1989) 3 CNLR 46 (BCCA).

89 McNeil, above n19, 7.

90 Above, n13.

91 *Ibid* 532, 535 (MacFarlane JA). The Supreme Court on appeal did not consider this aspect of the decision.

By comparison, in *Wik*, the High Court held that inconsistency is determined by considering the legal rights conferred and not the actual exercise of those rights.[92] The High Court recognised one exception to this in *Mabo (No.2)*, where the land remained in the possession of the Crown. Inconsistency would there be determined by the actual usage of the land by the Crown for a purpose that was necessarily inconsistent with the continued exercise of native title rights, such as the construction of public works. Justices Gaudron and Gummow separately in *Wik* suggested that the Court may look to the actual exercise of the rights granted in limited circumstances, such as where a lease requires the grantee to construct improvements over parts of the land such as buildings, dams or airstrips.[93] At this stage, this reasoning is of a minority of the Court.

The Attorney-General's Legal Practice have also suggested that the Court's approach in *Wik* tends to lean towards an examination of the use of the land.

> Despite the declarations that the extinguishment of native title does not in general depend on the activities of the grantee. ... native title will survive to the maximum extent to which it is consistent with *the use of the land* by the grantee.[94]

Such an approach may reflect the principle noted above that it is the clear and plain intention to extinguish and not the inconsistent usage which extinguishes native title. Where such an intention is not shown, it follows that native title holders will be able to continue to exercise their rights concurrently with those of the grantee to the extent that they are consistent.

The High Court requires that a test of *legal* inconsistency be applied, except where the land is in the possession of the Crown, whereas the Canadian courts apply a *factual* inconsistency test. The consequences of this differing approach can be demonstrated by the recent Federal Court decision in *Jim Fego v Northern Territory*.[95] The Court had to consider a situation where a grant of fee simple had been made in 1882 and the land then compulsorily acquired in 1928. The land became unalienated crown land for seven years before it was proclaimed as a quarantine station in 1935 and later a leprosarium. The proclamation of the leprosarium was revoked in 1980. Justice O'Loughlin had to consider two issues — was native title extinguished by the

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92 *Wik*, 27-28 (Brennan CJ), 83 (Toohey J), 87 (Gaudron J), 148 (Gummow J), 210 (Kirby J).

93 *Wik*, 123-24 (Gaudron J), 168 (Gummow J).

94 Attorney-General's Legal Practice *Legal Implications of the High Court decision in The Wik Peoples v Queensland — Current Advice* (1997), para 11.

95 [1998] 119 FCA (27 February 1998), O'Loughlin J (*'Jim Fego'*).

unqualified grant of fee simple in 1882,[96] and if so, could native title revive at a later date. He held that any subsisting native title was extinguished by the grant in 1882, and that it was not capable of reviving. This interpretation imports a stricter standard than under the Canadian approach, under which native title may *not* have been held to have been extinguished. The High Court is yet to consider the issues raised in this case.[97]

(b) Permanent versus temporary extinguishment

If the Court finds that the granted rights are inconsistent with the continuation of native title the Crown grant *prevails* over the native title right to the extent of the inconsistency. It is not yet clear from the cases what is the effect when native title is prevailed over. The judgments in *Wik* expressly stated that there was no need to decide this issue in the case, although Toohey J did note that it may be that, to the extent of the inconsistency, native title rights become unenforceable rather than extinguished.

This suggestion accords with the 'rationale of equality' expressed by the majority judges in *Wik* that native title is only extinguished where a clear and plain intention to extinguish it can be demonstrated. It may be, although this is no more than hinted at by Toohey J in *Wik*, that a limited tenure interest is *not capable* of evincing a clear and plain intention to extinguish native title because of its limited nature. Instead, in the words of Lambert JA in *Delgamuukw* (BCCA):

> What the inconsistency means, short of such a clear and plain intention, is that there is a *problem of priorities* which must be settled on the basis of principle.[98]

Native title, as an inherently defeasible title, would instead *yield* to other interests in a priority contest rather than be extinguished as a result of inconsistency. A recent Federal Court decision by Justice Carr[99] appears to adopt this approach. The case involved a claim by the Western Australian government that the expedited procedure for future acts in the *Native Title Act 1993* (Cth) applied to an application for an extension of a grant of a mining exploration lease, on the basis that the initial

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96 Note that the Native Title Amendment Bill 1997 (Cth) seeks to allow claims over historical freehold land under proposed new ss44A, 44B.

97 A High Court appeal of this case commenced in June 1998.

98 *Delgamuukw (BCCA)*, 670 (Lambert JA) italics added. Consider also the reasoning of the Supreme Court in *Sparrow* on the effect of regulation of an aboriginal right.

99 *Mineralogy Pty Ltd v NNTT* [1997] 1404 FCA (Carr J, 10 December 1997). See also Stephen L 'Extinguishment, revival and *Mineralogy*' (1998) 3 *Native Title News* 88.

grant of the 'lease' extinguished any native title. Carr J noted that an exploration licence is a right which is limited in nature and time and held that:

> The rights conferred by the original licence ... do not ... by necessary implication extinguish any native title rights ... the evidence in this matter, at most, shows not extinguishment of native title rights by the original grant but the potential for *temporary* and partial inconsistency with the enjoyment or exercise of native title rights.[100]

This can be compared with the approach of O'Loughlin J in *Jim Fego*. O'Loughlin J based his decision, that native title could not revive following the grant of a fee simple interest, on the ordinary usage of the term 'extinguishment', which he interpreted as involving an element of finality. This approach relied on the language of the terminology, much as Brennan CJ relied upon the 'language of lease' in *Wik*. As Richard Bartlett has noted, the manner in which the High Court enunciated the clear and plain intention test in *Wik* stressed a rationale of equality, and extinguishment may be the incorrect terminology to explain the legal effect of the doctrine — he instead refers to expropriation.[101]

It may be that the Court could hold that native title becomes unenforceable for the duration of the exercise of a necessarily inconsistent right and *would* revive upon the expiration of that interest. One application of this approach in relation to fee simple interests could be that as a fee simple interest 'expires' upon the acquisition of the interest by the Crown, native title would be capable of reviving upon such acquisition. This would still require proof of a continuing connection to the land.

Conclusion

As the cases considered demonstrate, the reconciliation of prior occupation and use of land by Australian and Canadian indigenous groups with European sovereignty is not an easy task. The genius of the common law allows the Courts to seek to redefine relationships and principles within the existing legal order. As the doctrines of aboriginal rights and native title develop, the Courts must be careful to ensure that their creations do not become another mechanism to facilitate the dispossession of indigenous peoples. This end result will largely be determined by how the Supreme Court applies the 'integral to a distinctive culture', 'inherent limitation' and justification tests in Canada, and how the tests for proof and content of native title (complete with Canadian influences) and the clear and plain intention test for extinguishment are applied in the Australian context.

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100 *Ibid.*

101 Bartlett, 'The *Wik* decision and implications for resource development' (1997) 16 AMPLJ 27.

Postscript

Since this article was written there have been two significant Australian decisions which relate to issues discussed in the article.

i. The Croker Island case[102]

The *Croker Island* case concerned a series of claimed native title rights and interests relating to and including exclusive occupation and use of the sea. At trial, Olney J heard extensive evidence from the claimants of oral histories, genealogical and family histories, in addition to a supporting anthropological report prepared for the claimants. The credibility of this evidence was not challenged by the respondent. Olney J held that the Aboriginal evidence should be primarily relied upon. By comparison, the anthropological evidence presented was used as an 'informative background to the oral testimony of the other witnesses and assists the court's understanding of the cultural significance of much of that evidence'.[103] This approach, which gives primacy to the Aboriginal evidence presented, accords with the approach of the Canadian Supreme Court in *Delgamuukw*.

Olney J did not see the need to consider the Canadian authorities in considering what standard the claimants had to meet to prove their native title rights and interests, although ultimately he adopts an approach which is similar to the Canadian approach. He stated that:

> The question of what is a traditional law or traditional custom has excited some interest in cases overseas jurisdictions but the law in Australia is readily capable of understanding without reference to external authority ... (they) are the laws and customs which have their origins in the culture and social organisation of the relevant group as it existed prior to the advent of non-Aboriginal interference with that culture and social organisation... The task of the Court is to identify those laws and customs which regulated the lives of the forebears of the present members of the applicants prior to European settlement which are currently acknowledged and observed. I do not find any assistance to be derived from Canadian authorities which speak of rights which are 'integral to the distinctive culture' of the claimant group. In Australia, Parliament has provided a definition which says all that needs to be said and is readily capable of being understood and applied.[104]

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102 Yarmirr v Northern Territory ('Croker Island') (Unreported, Federal Court of Australia, Olney J, 6 July 1998, Ref: [1998] 777 FCA).

103 *Ibid* para 65.

104 *Ibid* para 85.

The Croker Island decision is also of interest in the context of this article as Olney J recognised that native title rights and interests may extend across the same spectrum as aboriginal rights in Canada, to non-site specific rights at one end of the spectrum. He stated that:

> Native title rights and interests in relation to lands and waters which are purely usufructuary are accorded the protection of the *Native Title Act* even though those rights and interests are not an adjunct or dependent upon the existence of native title in some other land or waters. The distinction may be of importance in a case in which, for example, a native title right to possess or occupy land has been extinguished but a right to hunt on or fish in the same or adjacent land or waters has nevertheless been preserved.[105]

It must be noted however, that the case also demonstrates the exceptional difficulty of providing evidence that is sufficient to demonstrate a claim at the other end of the spectrum, namely a continuing right of exclusive possession (the equivalent of Aboriginal title).[106]

The case is also the first in Australia in which fishing and hunting rights have been recognised. In finding that these rights continued, Olney J reiterated the understanding in *Mason v Tritton* that regulation of fishing activities does not extinguish native title, and that once established, native title rights can be exercised without complying with licensing and regulatory requirements.

ii. The High Court appeal to Jim Fego[107]

The High Court appeal to the *Jim Fego* decision, discussed in the article, was handed down on 10 September 1998. As expected, by a 7-0 majority (including a six judge single judgment, with Kirby J delivering a separate judgement) the Court held that:

> The references to extinguishment rather than suspension of native title rights are not to be understood as being some incautious or inaccurate use of language to describe the effect of a grant of freehold title. A grant in fee simple does not have some temporary effect on

105 *Ibid* para 87.

106 In the context of this case it must be noted, however, that while the evidence was not accepted as establishing a right to exclusive possession, Olney J rejected that anyone could have exclusive rights over the sea in any case due to Australia's international obligations in this regard: *Ibid*, paras 132 — 135.

107 *Fejo v Northern Territory* ('*Fejo*')(Unreported, High Court of Australia, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 10 September 1998. Ref: [1998] HCA 58).

> native title rights or some effect that is conditioned upon the land not coming to be held by the Crown in the future ... [108]

> The underlying existence of ... traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title. And yet the argument that a grant in fee simple does not extinguish, but merely suspends, native title is an argument that seeks to convert the fact of continued connection with the land into a right to maintain that connection.[109]

Kirby J, in a separate judgment, reached the same conclusion. In doing so he rejected outright authority from overseas jurisdictions, including Canada, on the basis that

> care must be observed in the use of overseas authority in this context because of the differing historical, constitutional and other circumstances and the peculiarity of the way in which recognition of native title came belatedly to be accepted by this Court as part of Australian law.[110]

This article seeks to show that despite such differences, the doctrines of aboriginal rights in Canada and native title in Australia have similar origins and common features. Consequently, it is unfortunate that the Court did not consider the Canadian case law on this issue as it is valuable in broadening our understanding of the origins and application of the clear and plain intention test for extinguishment.

Kirby J also rejected the factual inconsistency test to determine whether native title has been extinguished, and asserted a legal inconsistency standard.[111] This decision demonstrates that the Australian courts will more easily find that native title has been extinguished than their Canadian counterparts, and constitutes a deviation in the application of the 'clear and plain intention' test for extinguishment between the two countries. ●

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108 *Ibid*, para 45 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

109 *Ibid*, para 46.

110 *Ibid*, para 111, (Kirby J).

111 *Ibid*, para 112. Such a standard was also invoked by the main judgment of the Court.