DELGAMUUKW v BRITISH COLUMBIA*

I INTRODUCTION

This eagerly awaited decision of the Canadian Supreme Court dealt with a number of issues concerning the existence, content and proof of aboriginal[1] title. In the Canadian context the case is significant, not just because it expands the aboriginal title jurisprudence, but also because it addresses the place of aboriginal title in the scheme of rights protected by s 35 of the *Constitution Act 1982*.[2] However, coming as it does from the Province of British Columbia, the case is also likely to have significance in Australia, particularly in relation to the key issues of survival, proof and extinguishment of native title.[3] There are some striking similarities between Australia and British Columbia in relation to native title issues. Most of provincial Canada was the subject of treaties negotiated between the Crown and First Nations[4] in the 18th and 19th centuries. The treaties purported to extinguish aboriginal rights and title and replace them with treaty-based rights.[5] However, apart from a small area in the north-east of the Province,[6] no such treaties were entered into with the First Nations of British Columbia. As a result, aboriginal title over Crown land in British Columbia, and aboriginal rights deriving from connections to land, have remained largely unextinguished.

* [1997] 3 SCR 1010, (1997) 153 DLR (4th) 193 ('*Delgamuukw*')

1 The term 'aboriginal' is used in this note as it is the term used in the decision and generally in the *Constitution Act 1982*, cases and commentary. The term includes all the indigenous peoples of Canada.

2 *Constitution Act 1982* being Schedule B to the *Canada Act 1982* (UK) c 11 ('*Constitution Act 1982*') A distinction has been made in the Canadian jurisprudence between aboriginal title and aboriginal rights. Two types of aboriginal rights have been recognised. The first derives from aboriginal custom and tradition in relation to particular areas of land, and the second derives from aboriginal custom but is unrelated to specific land. Aboriginal title has been recognised as carrying with it some rights in relation to specific land, including the possibility of possession and occupation. The relationship between rights and title and between aboriginal rights recognised and protected by s 35 of the *Constitution Act 1982* and aboriginal title were among the issues before the court in *Delgamuukw* Section 35 reads:

> 1 The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.
>
> 2 In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada.
>
> 3 For greater certainty, in subs (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.

3 The application of the reasoning in *Delgamuukw* to Australia is considered in detail below.

4 'First Nations' is used to describe Indian groups in Canada. The term is in common usage and is included in legislation such as federal and British Columbia legislation establishing the British Columbia Treaty Process and recognising the peak aboriginal body in the process, the First Nations Summit.

5 See Robert Reiter, *The Law of Canadian Treaties* (2nd ed, 1996) for both the text and current law of the historical treaties

6 Treaty 8 largely covers land in the Province of Alberta but overlaps into the north-eastern corner of the Province of British Columbia.

Much of the common law relating to aboriginal title referred to in the Australian cases derives from British Columbia.[7]

Contextualising *Delgamuukw* in the Australian native title debate requires some understanding of the Canadian common law. Recognition of some continuing aboriginal rights, deriving from a connection with land prior to the acquisition of sovereignty by the Crown, occurred in Canada last century. *St Catherine's Milling & Lumber Co v The Queen*[8] recognised that aboriginal peoples had some rights to use land. These rights were said to derive from the *Royal Proclamation of 1763* (rather than from prior occupation).[9] The Proclamation recognised that aboriginal rights in relation to land endured after sovereignty and could only be surrendered to the Crown. These rights operated as a burden on the Crown's paramount title[10] and were described as personal and usufructuary in nature.[11]

A number of recent cases, beginning with *Calder v Attorney-General of British Columbia*[12] in 1973 and concluding with a series of decisions in 1996 known as the *Van der Peet* trilogy,[13] have grappled with aboriginal rights including aboriginal title and have attempted to define and clarify the source, meaning and extent of the rights accorded by common law. Both *Calder*[14] and *Guerin v The Queen*[15] recognised that a form of aboriginal title existed and suggested that its source was in the prior occupation of the land (rather than the *Royal Proclamation of 1763*). The title so recognised was sui generis rather than the equivalent of any common law tenure but it carried with it something more than usufructuary or merely personal rights.[16] *Guerin* was also important because it identified the existence of a fiduciary duty owed by the Crown which impacted on the manner in which the Crown dealt with aboriginal title. In *Mabo v Queensland [No 2]*, Toohey J relied on this decision in his formulation of the possible existence of a fiduciary obligation on the Crown in Australia.[17] The Canadian court in *Hamlet of Baker Lake v Minister of Indian Affairs and*

[7] Eg, *Calder v Attorney-General of British Columbia* [1973] SCR 313; 34 DLR (3rd) 145; *Guerin v The Queen* [1984] 2 SCR 335; 13 DLR (4th) 321; and *R v Van der Peet* [1996] 2 SCR 507; 137 DLR (4th) 289 ('*Van der Peet*').

[8] (1888) 14 AC 46.

[9] *The Royal Proclamation of 7 October 1763* (UK), reprinted in RSC 1985, App II, No 1 ('*Royal Proclamation of 1763*').

[10] *St Catherine's Milling & Lumber Co v The Queen* (1888) 14 AC 46, 58.

[11] Ibid 54.

[12] [1973] SCR 313; 34 DLR (3rd) 145 ('*Calder*').

[13] *Van der Peet* [1996] 2 SCR 507; 137 DLR (4th) 289; *R v NTC Smokehouse* [1996] 2 SCR 672; 137 DLR (4th) 528; *R v Gladstone* [1996] 2 SCR 723; 137 DLR (4th) 648. For detailed analysis of these decisions see: Janice Gray, 'O Canada! — *Van der Peet* as Guidance on the Construction of Native Title Rights' (1997) 2 *Australian Indigenous Law Reporter* 18; John Borrows, 'Frozen Rights in Canada: Constitutional Interpretation and the Trickster' (1997) 22 *American Indian Law Review* 37; Kent McNeil, 'How Can Infringement of Constitutional Rights of Aboriginal Peoples Be Justified?' (1997) 8 *Constitutional Forum* 33.

[14] [1973] SCR 313, 328; 34 DLR (3rd) 145, 156.

[15] [1984] 2 SCR 335, 377; 13 DLR (4th) 321, 335 ('*Guerin*').

[16] Ibid 382; 339.

[17] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 199–205 ('*Mabo*').

Northern Development[18] recognised that aboriginal rights derived from occupation of certain lands. However, the court limited the right to usufructuary rights amounting to hunting and fishing rights on the land, rather than recognising a proprietary title to or interest in the land itself. The rights derived from the land, but did not carry with them a right to hold or possess the land.

Other cases have considered the issue of the survival of aboriginal rights and the related issue of extinguishment. These cases have arisen in circumstances where the exercise of an aboriginal right, constitutionally protected under s 35 of the *Constitution Act 1982*, has been raised as a defence to a prosecution for breach of a regulatory provision. In this context, two issues have required the Canadian Supreme Court's consideration. The first was whether the activity claimed as an aboriginal right was an aboriginal right that existed in 1982, and thus automatically became a constitutionally protected right upon its enactment. Whether or not the rights survived directly raises the issue of extinguishment.[19] The second issue was whether the regulatory provision itself extinguished the aboriginal right.[20]

In *R v Sparrow*,[21] the Supreme Court suggested a test for determining the survival of aboriginal rights. Any activity undertaken on land by an aboriginal person would be considered part of aboriginal custom, and therefore an aboriginal right, if the particular activity was 'an integral part of [the group's] distinctive culture'.[22] This idea was taken up by the Supreme Court in the *Van der Peet* trilogy.[23] In these cases the Supreme Court considered whether an aboriginal right to fish and to sell fish existed and therefore provided defences to charges of unlawfully fishing or selling fish.[24] The court outlined the requirements necessary to establish whether particular activities or practices constituted an aboriginal right. The right claimed, for example, a right to fish, must derive from the custom or tradition of the aboriginal group and must be 'integral to the distinctive culture of the aboriginal group claiming the right'.[25] The test for establishing whether the activity or practice is 'integral' is 'whether

[18] [1980] 1 FCR 518, 556 ('*Baker Lake*'). The other crucial element of this decision was the framing of a four-part test for the survival of aboriginal rights in terms of the need for an organised society, occupation of a specific territory to the exclusion of other societies, and existence at the time sovereignty was acquired.

[19] Conduct pursuant to a native title right has been used as a defence to prosecutions for similar breaches in Australia. See *Mason v Tritton* (1994) 34 NSWLR 572; *Sutton v Derschaw* (1996) 90 A Crim R 9; *Eaton v Yanner; ex parte Eaton* (Unreported, Queensland Court of Appeal, Fitzgerald P, McPherson JA and Moynihan J, 27 February 1998).

[20] *Eaton v Yanner; Ex parte Eaton* (Unreported, Queensland Court of Appeal, Fitzgerald P, McPherson JA and Moynihan J, 27 February 1998).

[21] [1990] 1 SCR 1075; 70 DLR (4th) 385 ('*Sparrow*').

[22] Ibid 1099; 405. For a brief review of the major authorities on aboriginal rights prior to the British Columbia Court of Appeal decision in *Delgamuukw*, see Kent McNeil, 'The Meaning of Aboriginal Title' in Michael Asch (ed), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and Respect for Difference* (1997) 135–54.

[23] *Van der Peet* [1996] 2 SCR 507; 137 DLR (4th) 289; *R v NTC Smokehouse* [1996] 2 SCR 672; 137 DLR (4th) 528; *R v Gladstone* [1996] 2 SCR 723; 137 DLR (4th) 648.

[24] Ibid. Another case in 1996 dealt with the issue of whether operating a gambling establishment, contrary to provincial laws, was an exercise of self-government and therefore protected by s 35 of the *Constitution Act 1982*: *R v Pamajewon* [1996] 2 SCR 821; 138 DLR (4th) 204.

[25] *Van der Peet* [1996] 2 SCR 507, 549; 137 DLR (4th) 289, 310.

without this practice, tradition or custom, the culture in question would be fundamentally altered or other than what it is'.[26] In addition, the court found that there must be continuity in the practice of the tradition or custom from pre-contact time. Although there can be evolution, the right claimed must be sourced in pre-contact custom.[27] In *Van der Peet*,[28] the custom relied upon, selling salmon, could not be recognised because it was part of or derived from European contact. *Van der Peet* confirmed that aboriginal rights need not be grounded in aboriginal title to land.[29] Rather, aboriginal title was described as a subset or species of aboriginal rights.[30]

The issue of infringement and extinguishment of aboriginal rights arose because it was argued that statutes and regulations that prohibited or limited the exercise of an aboriginal right had the effect of extinguishing the right. In *Guerin*,[31] the Supreme Court found that some form of fiduciary duty was owed by the Crown to aboriginal peoples and that this affected the manner in which the Crown could deal with aboriginal rights. In addition, s 35 of the *Constitution Act 1982* protected such rights from extinguishment without consent. In *Sparrow*,[32] the Supreme Court found that aboriginal rights could be limited or regulated or infringed in accordance with s 1 of the *Constitution Act 1982*,[33] provided that the infringement was justified by the section. Such regulation or infringement could occur without effecting an extinguishment.

Immediately prior to *Delgamuukw* then, the Supreme Court of Canada had recognised the survival of pre-sovereignty aboriginal rights and title as part of the common law in relation to Crown lands not the subject of treaties. On a number of occasions it had recognised hunting and fishing rights and rights to use land as aspects of aboriginal rights. In the *Van der Peet* trilogy[34] the court set out the test for determining whether activities constituted an aboriginal right. However, it had not considered the applicability of the *Van der Peet* test to aboriginal title. Nor had the court considered the nature and content of aboriginal title or the link between aboriginal rights protected by s 35 of the *Constitution Act 1982* and common law aboriginal title.[35] Similarly the court had confirmed that the Crown could, in certain circumstances, infringe aboriginal rights but it had not

[26] Ibid.

[27] Ibid 556; 317. The emphasis on contact rather than sovereignty has been the subject of considerable criticism: eg Gray, above n 13, 25.

[28] *Van der Peet* [1996] 2 SCR 507, 567–72; 137 DLR (4th) 289, 324–7.

[29] Ibid 562; 319.

[30] Ibid 539–40; 356.

[31] [1984] 2 SCR 335; 13 DLR (4th) 321.

[32] [1990] 1 SCR 1075, 1108–9; 70 DLR (4th) 385, 409.

[33] Section 1 reads: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as be demonstrably justified in a free and democratic society.'

[34] *Van der Peet* [1996] 2 SCR 507; 137 DLR (4th) 289; *R v NTC Smokehouse* [1996] 2 SCR 672; 137 DLR (4th) 528; *R v Gladstone* [1996] 2 SCR 723; 137 DLR (4th) 648

[35] This aspect of *Van der Peet* is considered extensively in Kent McNeil, 'Aboriginal Title and Aboriginal Rights: What's the Connection?' (1997) 36 *Alberta Law Review* 117.

considered this issue in relation to aboriginal title. These issues came before the Supreme Court in *Delgamuukw*.

II THE CLAIM

The plaintiffs in *Delgamuukw* were a number of Gitksan and Wet'suwet'en hereditary chiefs, each of whom claimed portions of the total claimed land either on their own behalf or on behalf of their Houses (clan groups).[36] The lands claimed were in central British Columbia and comprised the watersheds of a number of rivers. The lands claimed by each group were adjacent to each other with some overlapping land between them and other First Nations not claimants in the action. The Gitksan and Wet'suwet'en populations totalled around 7000. Approximately 30,000 non-aboriginal people lived within the claimed area.[37] The plaintiffs sought declarations that they had aboriginal title[38] to 58,000 square kilometres of land in the central area of the Province of British Columbia. The case required consideration of the content of aboriginal title, any requirements for proof of that title, the relationship between title and aboriginal rights and between title and s 35 of the *Constitution Act 1982* as well as the power of the provincial government to extinguish aboriginal rights. In addition, there was a claim to the right to self-government or 'jurisdiction' over the area claimed.

The Province of British Columbia counterclaimed and sought declarations that no aboriginal title existed because no aboriginal title survived after the entry of the Province into the Canadian Confederation in 1871. This argument was based on the proposition that laws of general application allowing the grant of fee simple interests in land were sufficient to extinguish aboriginal rights and these colonial enactments had been passed prior to 1871. The significance of British Columbia becoming a part of Canada through entry into the Canadian Confederation was twofold. First, there was an issue of whether the *Royal Proclamation of 1763* applied to, and preserved rights and lands of, aboriginal peoples in British Columbia.[39] Second, the issue of the Province's power to extinguish aboriginal rights and title was raised upon British Columbia's entry into the Confederation, as the federal government had exclusive powers in relation to aboriginal peoples.

[36] *Delgamuukw* [1997] 3 SCR 1010, 1028–9; 153 DLR (4th) 193, 203.

[37] Ibid.

[38] The original claim at trial was for 'ownership' of the land in question but this was later amended to a claim for aboriginal title: *Delgamuukw v British Columbia* [1991] 3 WWR 97, 158. The amendment allowed a finding of aboriginal title without the need to reconcile 'ownership' deriving from aboriginal title and 'ownership' as a fee simple. It also allowed a finding that was consistent with the doctrines of tenure and estates. This removed from the case the potential difficulties raised by a claim based on some notion of allodial ownership which is inconsistent with the doctrines See John Devereux and Shaunagh Dorsett, 'Towards a Reconsideration of the Doctrines of Estates and Tenure' (1996) 4 *Australian Property Law Journal* 30; Brendan Edgeworth, 'Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared after *Mabo v Queensland*' (1994) 23 *Anglo-American Law Review* 397

[39] *St Catherine's Milling & Lumber Co v The Queen* (1888) 14 AC 46.

III BRITISH COLUMBIA SUPREME COURT DECISION

The case at first instance occupied 374 days for evidence and argument with the judgment of McEachern CJ covering almost 400 pages plus schedules.[40]

Evidence presented at the trial indicated that the area had been occupied for up to 6000 years. Historically, occupation comprised villages with areas around villages and rivers used for hunting and gathering. Travel from villages for subsistence was not extensive in area. European contact occurred around 1820 with the arrival of fur traders. Up to and including the present time, it was accepted that both groups were organised in a communal way with each group divided into clans which were subdivided into Houses. Each House had an hereditary chief and each person was born into a particular House. There were tangible indicators of each House's territory such as totem poles with distinctive markers such as crests. There was evidence of spiritual connection to land through song and dance and performance rituals, known as 'Adaawk'[41] and 'Kungax'.[42] This connection was evidenced most significantly by feast halls and reflected connections with land beyond tangible evidence. McEachern CJ described these histories as 'sacred, official litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House'.[43]

The evidence was presented to the court through song and stories by members of the Gitksan and the Wet'suwet'en Houses, supported and interpreted by experts including anthropologists and historians. It was used to establish the detail of internal land holding rules and also to establish the central significance of land in the culture of the claimants.[44] While McEachern CJ admitted the evidence, that relating to spiritual connection with land and oral evidence relating to control and management of the lands was given little weight on the basis that it was not evidence of historical truth and could not be relied on as evidence of history, use or occupation of land.[45]

As a result, his Honour found that at best, the manner of use of land amounted to subsistence use, insufficient to amount to ownership in any sense.[46] However, his Honour found that the *Baker Lake* test[47] was satisfied and thus some subsistence activities amounting to aboriginal rights could be said to exist,[48] provided those activities had been part of the life for some period prior to European contact. This would allow for continued occupation of villages and

[40] *Delgamuukw v British Columbia* [1991] 3 WWR 97. For commentary on this decision, see Michael Asch and Catherine Bell, 'Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of *Delgamuukw*' (1992) 19 *Queen's Law Journal* 50.

[41] The Gitksan term for these rituals.

[42] The Wet'suwet'en term for these rituals.

[43] *Delgamuukw v British Columbia* [1991] 3 WWR 97, 164. For a detailed consideration of the evidence in relation to the Wet'suwet'en, see Antonia Mills, *Eagle Down Is Our Law: Wet'suwet'en Law, Feasts and Land Claims* (1994).

[44] The evidence and its purport is summarised at *Delgamuukw* [1997] 3 SCR 1010, 1071–6; 153 DLR (4th) 193, 235–7 (Lamer CJ).

[45] *Delgamuukw v British Columbia* [1991] 3 WWR 97, 180–1.

[46] Ibid.

[47] *Baker Lake* [1980] 1 FCR 518, 557–61.

[48] *Delgamuukw v British Columbia* [1991] 3 WWR 97, 395.

subsistence rights in certain parts of the claimed areas if those rights had not been extinguished. In fact, his Honour found that they had been extinguished by colonial enactments which demonstrated a clear and plain intention to manage Crown lands in a way that was inconsistent with continuing aboriginal rights by arrangements for granting titles to the land.[49] With insufficient evidence of an established system of governance, his Honour rejected the claim to jurisdiction or self-government.[50]

IV BRITISH COLUMBIA COURT OF APPEAL DECISION[51]

Macfarlane JA, with whom Taggart JA concurred, largely agreed with the conclusions and reasoning of McEachern CJ. His Honour found no basis on which to disturb the findings of fact by McEachern CJ and found that the claim for ownership had not been made out, nor had the claim for jurisdiction over people and resources, such a claim being inconsistent with the *Constitution Act 1867*.[52] In relation to the finding of subsistence rights, his Honour agreed with the application of the *Baker Lake* test,[53] and applied the test first enunciated in *Sparrow* requiring that such practices be an integral part of the aboriginal society.[54] The major point of departure from McEachern CJ concerned the question of extinguishment of such rights. His Honour found that general instruments relating to the Crown's control of lands did not pass the 'clear and plain intention test' for extinguishment and thus were insufficient to extinguish.[55] Determining extinguishment depends upon specific Crown grants which may allow for co-existence of interests.[56] This issue must be dealt with on a case by case basis.

In a separate judgment, Wallace JA largely concurred with Macfarlane JA adding, however, that aboriginal title rights to occupation and use might resemble a common law proprietary title (or may be limited to rights to use). Hutcheon JA dissented in relation to the evidentiary matters, and thus the extent of the area over which aboriginal rights might be exercised. Lambert JA dissented, and in a lengthy judgment foreshadowed the approach ultimately taken by the Supreme Court of Canada.

[49] Ibid 411.
[50] Ibid 388.
[51] *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470.
[52] *The British North America Act 1867* (UK) 30 & 31 Vict, c 3 ('*Constitution Act 1867*').
[53] *Baker Lake* [1980] 1 FCR 518, 557–61.
[54] *Sparrow* [1990] 1 SCR 1099, 1114; 70 DLR (4th) 385, 402.
[55] *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470.
[56] Interestingly, Macfarlane JA suggested that even fee simple grants may not necessarily exclude aboriginal uses (see *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470, 532, citing *R v Bartleman* (1984) 12 DLR (4th) 73), a view confirmed in specific statutory circumstances by the Supreme Court of Canada in *R v Badger* [1996] 1 SCR 771; [1996] 2 CNLR 77.

V SUPREME COURT OF CANADA DECISION

The court's decision comprised two main judgments, one by Lamer CJ, with Cory and Major JJ concurring and one by La Forest J with L'Heureux–Dube J concurring, although there are no major differences in the approaches taken to the issues. McLachlin J gave a one-paragraph judgment indicating that she concurred with the Chief Justice and was in substantial agreement with La Forest J. In the leading judgment, Lamer CJ set out the issues to be addressed in the appeal:

> A Do the pleadings preclude the Court from entertaining claims for aboriginal title and self-government?
>
> B What is the ability of this Court to interfere with the factual findings made by the trial judge?
>
> C What is the content of aboriginal title, how is it protected by s. 35(1) of the *Constitution Act, 1982*, and what is required for its proof?
>
> D Has a claim to self-government been made out by the appellants?
>
> E Did the province have the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of the *Indian Act*?[57]

A *Lamer CJ (Cory and Major JJ Concurring)*

The first issue identified for determination by the Chief Justice was whether the pleadings precluded the court from entertaining claims for aboriginal title and self-government. His Honour dealt very briefly with the point. At the trial there had been a de facto amendment of the claims from ownership and jurisdiction to aboriginal title and self-government respectively. His Honour found that the pleadings were still adequate to enable the court to entertain the appeal. However, the absence of any such amendment in relation to the alteration of the claim from several individual claims to two collective claims meant that a new trial should be ordered on the substantive facts of the case.[58]

The second issue concerned the ability of the court to interfere with the factual findings of the trial judge. The Chief Justice reiterated the test for dealing with evidence in aboriginal rights cases enunciated in *Van der Peet*:

> First, that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims and second, that trial courts must interpret that evidence in the same spirit.[59]

The trial judge's refusal to give weight to the oral evidence meant that had that evidence been properly considered, a different result as to issues of occupation and use of the land claimed may have emerged. This was an error sufficiently serious to warrant intervention by the appellate court. However, the issues were of such complexity that justice would not be served by the appellate court sifting

[57] *Delgamuukw* [1997] 3 SCR 1010, 1061; 153 DLR (4th) 193, 226.
[58] Ibid 1063; 228.
[59] Ibid 1066; 230.

through the evidence and making new findings of fact. As a result, a new trial was necessary.[60]

The Chief Justice found that the fourth issue, the claim to self-government, could not be decided for a number of reasons. The problems associated with the treatment of the evidence and the findings of fact by the judge at first instance made it impossible for the court to determine whether such a claim had been made out.[61] In addition, the claim was too broadly framed to be cognisable by s 35(1) of the *Constitution Act 1982*[62] and the claim had been inadequately pleaded at trial. As a result, this was 'not the right case for the court to lay down the legal principles to guide future litigation',[63] a view which the parties seemed to acknowledge by giving this issue less weight in argument in the course of the appeal.[64]

The fifth issue concerned the power of the Province to extinguish aboriginal title. This issue was crucial to determining whether any aboriginal rights, including title, were extant in 1982 when the constitutional protection in s 35 of the *Constitution Act 1982* came into effect. Although consideration of this issue dealt with the detail of Canadian constitutional relationships, some of the reasoning of the court is relevant to general extinguishment issues in Australia. The Chief Justice held that provincial laws of general application did not extinguish aboriginal rights because they did not satisfy the extinguishment test enunciated in *Sparrow*.[65] That test required any purported extinguishing act to evince a 'clear and plain intention' to extinguish.[66] The distinction between laws that extinguish and those that regulate aboriginal rights, enunciated in *Sparrow*,[67] was confirmed.[68] His Honour suggested that it might be that the only laws of general application that showed a sufficient 'clear and plain intention' to extinguish would be those 'in relation to Indians and Indian lands'.[69] Such laws could not extinguish because the intention to do so would take them outside provincial jurisdiction because of the federal government's legislative jurisdiction in relation to Indians. Consequently, they would be ultra vires the constitutional power of the province.[70] The operation of s 88 of the *Indian Act 1985*,[71] by virtue of which provincial laws of general application also apply to people covered by the Act, cannot be said to extinguish, again because there is no 'clear and plain intention'.[72]

60 Ibid 1079; 240.
61 Ibid 1114–15; 266.
62 Ibid.
63 Ibid.
64 Ibid.
65 [1990] 1 SCR 1075, 1097–9; 70 DLR (4th) 385, 400–1.
66 *Delgamuukw* [1997] 3 SCR 1010, 1120; 153 DLR (4th) 193.
67 [1990] 1 SCR 1075, 1099; 70 DLR (4th) 385, 401
68 *Delgamuukw* [1997] 3 SCR 1010, 1120; 153 DLR (4th) 193, 271.
69 Ibid.
70 Ibid 1121; 271.
71 RSC 1985 c I-5
72 *Delgamuukw* [1997] 3 SCR 1010, 1122–3; 153 DLR (4th) 193, 272.

The remaining issues before the court concerned the content of aboriginal title and the requirements for its proof and its consequential protection by s 35(1) of the *Constitution Act 1982*. The need for a new trial to overcome the evidentiary deficiencies of the first trial meant that the dispute between the parties to the appeal could not be finally determined by the court, but there were significant issues of law over which the parties disagreed which the court felt required its attention.[73] The court's consideration of these issues is the most relevant aspect of the case for Australian native title jurisprudence.

1 *Nature of Aboriginal Title*

The Chief Justice first considered the nature of aboriginal title. Some outstanding aspects of the concept were clarified. Referring to *St Catherine's Milling & Lumber Co v The Queen*,[74] his Honour suggested that the Privy Council's reference to the personal nature of aboriginal title was a means by which the Council could 'capture ... that aboriginal title is a *sui generis* interest in land'.[75] That is, the interest is not a normal proprietary interest in the sense of a fee simple but it is nonetheless proprietary in nature.[76] In fact the sui generis aspect of the title provides the principle unifying the 'various dimensions of that title'.[77] Those dimensions include its inalienability,[78] and its communal nature.[79] A further dimension is its source: 'the prior occupation of Canada by aboriginal peoples',[80] recognised but not sourced in the *Royal Proclamation of 1763*. This provides a link to the common law because of the principle that 'occupation is proof of possession in law'.[81] The sui generis aspect of aboriginal title is that the possession giving rise to the title is possession or occupation enjoyed before the assertion of British sovereignty. This is the key in the 'relationship between common law and pre-existing systems of aboriginal law'.[82]

2 *Content of Aboriginal Title*

As to the content of aboriginal title, the Chief Justice summarised the position:

> [A]boriginal title encompasses the right to *exclusive use and occupation of the land* held pursuant to that title for a variety of *purposes*, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and ... those protected uses must not be irreconcilable with the nature of the group's attachment to that land.[83]

[73] Ibid 1079–80; 240.
[74] (1888) 14 AC 46.
[75] *Delgamuukw* [1997] 3 SCR 1010, 1081; 153 DLR (4th) 193, 241.
[76] Ibid 1081; 241.
[77] Ibid.
[78] In this sense, it is 'personal'.
[79] *Delgamuukw* [1997] 3 SCR 1010, 1082–3; 153 DLR (4th) 193, 242.
[80] Ibid 1082; 242.
[81] Ibid.
[82] Ibid.
[83] Ibid 1083; 243 (emphasis added). The purposes include minerals. See also Richard Bartlett, 'Native Title Includes Minerals! *Delgamuukw v British Columbia*' (1998) 17 *Australian Mining and Petroleum Law Journal* 43.

The first part of this characterisation is important because it deals with the argument that aboriginal title only encompasses rights to *use* the land in accordance with particular customary practices rather than encompassing some notion of exclusivity and possession of land.[84] The Chief Justice relied in part upon the formulation of aboriginal rights in relation to reserve land held under the *Indian Act 1985*.[85] However, his Honour also relied upon the common law and, in particular, *Guerin*[86] and *Canadian Pacific Ltd v Paul*[87] to support his conclusion that aboriginal title amounted to the right to occupy and possess lands and that, once that occupation or title was established, the rights that went with it were not limited to those deriving from custom and included rights to minerals.[88] In other words, the right to exclusive occupation must be related to aboriginal custom, but once the occupation is established, the only limitation on use is the second leg of his Honour's summary: the uses cannot be irreconcilable with custom or the nature of the attachment to the land.

The limitation on aboriginal title arises because of the sui generis aspect of the title.[89] The common law seeks to protect 'in the present day'[90] and into the future, the special connection with land enjoyed prior to sovereignty. It is for this reason that the title is inalienable and its inalienability gives it a non-economic element.[91] To permit actions that would threaten that special connection would be inconsistent with the protection afforded by the common law.[92] This characterisation of the title and the emphasis on its sui generis nature were used to re-emphasise the point that aboriginal title is not a fee simple.[93]

This characterisation of the title was also used to draw a distinction between the content of aboriginal title as opposed to aboriginal rights considered by the court in *Van der Peet*.[94] In that case, the court established the test for establishing that a particular activity was an aboriginal right protected by s 35(1) of the *Constitution Act 1982*, namely the activity must be 'integral to the distinctive culture of the aboriginal group claiming the right'.[95] In differentiating between title and rights, the Chief Justice described aboriginal title as a species of aboriginal rights[96] (for the purpose of s 35(10) of the *Constitution Act 1982*), but set out three different types of aboriginal rights. First, there is aboriginal title as defined above.[97] Second, there are aboriginal rights which might be connected

84 *Delgamuukw* [1997] 3 SCR 1010, 1084; 153 DLR (4th) 193, 244.
85 Ibid. *Indian Act* RSC 1985, c I-5, ss 6, 18; *Blueberry River Indian Band v Canada* [1995] 4 SCR 344.
86 [1984] 2 SCR 335, 13 DLR (4th) 321.
87 [1988] 2 SCR 654; 2 DLR (4th) 22.
88 *Delgamuukw* [1997] 3 SCR 1010, 1084, 153 DLR (4th) 193, 244.
89 Ibid 1088; 246.
90 Ibid.
91 Ibid 1090; 247–8.
92 Ibid 1089; 247.
93 Ibid 1088; 246.
94 [1996] 2 SCR 507; 137 DLR (4th) 289.
95 Ibid 554; 341.
96 *Delgamuukw* [1997] 3 SCR 1010, 1094; 153 DLR (4th) 193, 251.
97 Ibid 1093–4; 251.

with or derive from a particular piece of land but which do not amount to title because of the lack of exclusivity.[98] Third, there are aboriginal rights which are unconnected with land.[99] The emphasis that had been placed on aboriginal rights and the narrow test developed in *Van der Peet* might be explained by the nature of the cases coming before the court, that is, aboriginal rights as a defence to prosecution of regulatory offences.[100] In the context of s 35(1), aboriginal activities on land that is the subject of aboriginal title need not be individually protected, because the title itself is protected; the activities undertaken are 'parasitic on the underlying (aboriginal) title'.[101]

3 *Proof of Aboriginal Title*

The next aspect of the decision dealt with the requirements for proof of aboriginal title. The Chief Justice identified three major criteria for proof of title:

> (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty that occupation must have been exclusive.[102]

The relevant time for proof of occupancy was identified as 'sovereignty' rather than 'contact'. This was a departure from the view expressed in *Van der Peet*[103] which had identified 'contact' as the relevant time for establishing the existence of an aboriginal right relied upon as a defence in a prosecution for an offence.[104] His Honour suggested this represented conceptual consistency because the pre-existing system that was recognised by the common law operated as a burden on the Crown's underlying title, and practically, aboriginal title did not raise the problem of distinguishing those activities integral to the aboriginal group and those influenced by European contact that were at the heart of the *Van der Peet* case.[105]

Occupation itself should be proved by evidence both of actual physical occupation and elements of the traditions and culture of the group itself that connected them with the land.[106] These elements should show that the land was 'of central significance to their distinctive culture.'[107] It is unclear whether his Honour actually was imposing this as a test as he went on to say that while 'this remains a crucial part of the test for aboriginal rights, given the occupancy requirement in the test for aboriginal title, I cannot imagine a situation where this

98 Ibid 1094; 251.
99 Ibid 1095; 251.
100 Ibid 1096; 253. See also discussion above n 24.
101 *Delgamuukw* [1997] 3 SCR 1010, 1096; 153 DLR (4th) 193, 253.
102 Ibid 1097; 253.
103 [1996] 2 SCR 507, 554–5; 137 DLR (4th) 289, 315.
104 See also discussion above n 24.
105 *Delgamuukw* [1997] 3 SCR 1010, 1098; 153 DLR (4th) 193, 254, referring to *Van der Peet* [1996] 2 SCR 507; 137 DLR (4th) 289. The activity in question was the sale of fish.
106 Ibid 1099–101, 255–6.
107 Ibid 1101; 256 quoting *R v Adams* [1996] 3 SCR 101, 117–18; 138 DLR (4th) 657, 667

requirement would actually serve to limit or preclude a title claim'.[108] This occupation may be proved to have existed pre-sovereignty or present occupation may be relied upon to establish past occupation. In the latter case, there must be a continuity between present and pre-sovereignty occupation.[109] However, his Honour did not require 'an unbroken chain of continuity'[110] and referred to 'the requirement that there must be 'substantial maintenance of the connection between the people and land', a requirement his Honour derived from *Mabo*.[111] Although his Honour did not expand on this comment, he did add that it was likely that the nature of the occupation may have changed but 'as long as a substantial connection between the people and land is maintained',[112] a claim to title could succeed.

The crucial element of proof of title, his Honour said, was that occupation must have been exclusive at sovereignty, that is, there must have been the ability to exclude others from the land.[113] Actual proof of this should give equal weight to the common law and aboriginal aspect, that is, there must be factual evidence of actual occupation but this must 'also take into account the context of aboriginal society at the time of sovereignty'.[114] Thus, there might be evidence of other groups occupying the land, but this may be by virtue of permission or agreement in accordance with aboriginal custom. In this context, his Honour relied on McNeil, suggesting that the key issue was 'the intention and capacity to retain control'.[115] His Honour also suggested that a joint exclusive title might be possible. That is, the shared right to exclude others except the joint titleholder might amount to exclusive possession. However, his Honour declined to consider the issue further as it was not relevant to this case.[116] Finally, on the issue of exclusivity, his Honour referred to circumstances in which more than one group had access to land where none of the groups had the right of exclusivity, that is, shared non-exclusive site-specific aboriginal rights that fall short of the requirement for aboriginal title.[117] The possibility of joint title means that the mere fact that more than one group occupied land will not be determinative of a claim for aboriginal title; practice and custom will still need to be explored in order to determine the issue of exclusivity.

4 *Justification for Infringement of Aboriginal Rights*

The final element of the judgment dealt with the issue of justification, that is the extent to which aboriginal rights under s 35(1) of the *Constitution Act 1982*

108 *Delgamuukw* [1997] 3 SCR 1010, 1101–2; 153 DLR (4th) 193, 256–7.

109 Ibid. The issue of the weight given to oral evidence, discussed above at nn 58–59 and accompanying text, will be relevant to establishing this continuity and connection.

110 *Delgamuukw* [1997] 3 SCR 1010, 1103; 153 DLR (4th) 193, 258, quoting *Van der Peet* [1996] 2 SCR 507, 557; 137 DLR (4th) 289, 316.

111 *Mabo* (1992) 175 CLR 1, 59–60 (Brennan J).

112 *Delgamuukw* [1997] 3 SCR 1010, 1098; 153 DLR (4th) 193, 253.

113 Ibid 1104; 259.

114 Ibid.

115 Ibid quoting Kent McNeil, *Common Law Aboriginal Title* (1989) 204.

116 *Delgamuukw* [1997] 3 SCR 1010, 1106; 153 DLR (4th) 193, 261.

117 Ibid.

might be validly infringed, thus allowing regulation of aboriginal activity which falls short of extinguishment.[118] This infringement test has two parts: first, it must further a compelling and substantial legislative objective;[119] second, it must be consistent with the special fiduciary relationship between the Crown and aboriginal peoples.[120] However, the Chief Justice suggested that the standard for applying this test was higher when infringement of aboriginal *title* was contemplated because of the exclusivity of occupation and the right attaching to it.[121] The first part of the test requires that the proposed action by the Crown is significant, that is, it relates to issues such as 'the development of agriculture, forestry, mining and hydroelectric power'[122] as well as more general issues such as protection of endangered species and the general economic development of the Province.[123] As to the application of the second test, his Honour suggested that, consistent with the court's decision in *R v Gladstone*,[124] government action should involve aboriginal people in development and reduce barriers for participation.[125] Further, given the control over land that is the concomitant of aboriginal title, there should be involvement of aboriginal people in decisions taken about their land. This involvement should include consultation, but his Honour pointed out that 'in most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation'.[126] His Honour referred to the 'inescapably economic aspect'[127] of aboriginal title, which suggests that the payment and level of compensation are relevant to the justification test, although his Honour did not engage in a discussion about the level of that compensation.

5 *Negotiation*

In his conclusion the Chief Justice referred to the economic and personal cost of the litigation and, notwithstanding the new trial order, exhorted the parties to settle the issues by negotiation, s 35(1) of the *Constitution Act 1982* providing 'a solid constitutional base upon which subsequent negotiations can take place'.[128]

B *La Forest J (L'Heureux-Dube J Concurring)*

La Forest J delivered a separate judgment but was largely in agreement with both the conclusions and the reasoning of the Chief Justice. The major distinction between the two judgments is one of nuance rather than substance, with La

[118] *Sparrow* [1990] 1 SCR 1075; 70 DLR (4th) 385; *R v Cote* [1996] 3 SCR 139; 138 DLR (4th) 385.
[119] *Delgamuukw* [1997] 3 SCR 1010, 1107; 153 DLR (4th) 193, 260.
[120] Ibid 1108; 261.
[121] Ibid 1112; 264
[122] Ibid 1111, 263.
[123] Ibid.
[124] [1996] 2 SCR 723; 137 DLR (4th) 193.
[125] *Delgamuukw* [1997] 3 SCR 1010, 1112; 153 DLR (4th) 193, 264.
[126] Ibid 1113; 265.
[127] Ibid.
[128] Ibid 1123; 273, quoting *Sparrow* [1990] 1 SCR 1075; 70 DLR (4th) 385.

Forest J expanding upon rather than substantially varying aspects of the judgment of the Chief Justice. There are five aspects of the judgment which deserve attention.

In relation to the amendment of the pleadings to provide for a claim to aboriginal title and self-government, La Forest J agreed that the appeal could proceed on the questions of law but that a new trial was necessary in relation to individual claims. His Honour suggested that there was a discrepancy between a claim for aboriginal title based on occupation of land and the requirement of proof of general occupation which, in essence, seeks to establish that they had jurisdiction over the land, requiring 'proof of governance and control'.[129]

On the issue of the relevant time for proof of occupancy, La Forest J agreed with the Chief Justice that sovereignty was the relevant time for considering the exclusivity of occupation. However, his Honour's approach on the question of continuity was less strict. His Honour suggested that it would be possible to recognise aboriginal title in land occupied post-sovereignty (but in accordance with custom), where the group had moved because of natural disaster or clashes with Europeans. Thus, continuity could be established 'where present occupation of one area is connected to the pre-sovereignty occupation of another area'.[130] Further, 'there is no need to establish an unbroken chain of continuity and that interruptions in occupancy or use do not necessarily preclude a finding of title'.[131]

A similarly less strict approach was taken in relation to occupation of land by more than one group. His Honour referred to occupancy by more than one group, either concurrently or sequentially. He recognised the possibility of joint occupancy where there was concurrent occupation,[132] that is, where each group accommodates the other's occupation, but his Honour also recognised that sequential occupation might occur in accordance with custom, exchange, conquest or cession, and that in these circumstances continuity could be claimed.[133]

On the issue of justification of infringement of aboriginal title, and the requirement for involvement of aboriginal people in decisions about land use, La Forest J suggested that both notice and consultation were required.[134] His Honour expanded on the need for compensation. In referring to 'fair compensation', his Honour emphasised that this is not to be equated with the price of a fee simple.

> Rather, compensation must be viewed in terms of the right and in keeping with the honour of the Crown. Thus ... compensation may be greater where the expropriation relates to a village area as opposed to remotely visited area

[129] *Delgamuukw* [1997] 3 SCR 1010, 1124; 153 DLR (4th) 193, 276.
[130] Ibid 1130; 281.
[131] Ibid
[132] Ibid 1129; 280.
[133] Ibid 1130; 281.
[134] Ibid 1133; 283.

> [and] ... account must be taken of the interdependence of traditional uses to which the land was put.[135]

La Forest J reiterated the view of the Chief Justice[136] about the need to resolve these issues by negotiation, concluding 'that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake'.[137]

VI COMMENT

In the Canadian context, this decision is important because of the link it provides between aboriginal title and protection of aboriginal rights under s 35(1) of the *Constitution Act 1982*. As indicated by McNeil,[138] the Canadian courts had never previously found that aboriginal title amounting to exclusive possession existed, nor had it considered this relationship. Recognition of aboriginal title as a right protected by s 35(1) of the *Constitution Act 1982* has now been affirmed. Given the critical response[139] to the narrowness of *Van der Peet*,[140] the decision is also important in re-characterising the test for the species of aboriginal rights known as aboriginal title in terms of proof, continuity and the uses to be made of the relevant land. Significantly, the court also attached a broader set of considerations to the justification test when dealing with aboriginal title. In particular, there now is a requirement for significant consultation with aboriginal title holders and formal recognition of an economic component in both the title and the satisfaction of the justification test. In practical terms, this approach may well increase the engagement of aboriginal peoples in resource allocation decision-making and increase both the likelihood and quantum of compensation. In British Columbia in particular, both the characterisation of the title and the infringement test may well have a significant impact on the negotiating positions of the federal and provincial governments and First Nations currently engaged in negotiations within the British Columbia Treaty Process.[141]

The significance of the case in Australia is uncertain. The divergence in the conceptual and constitutional characterisation of aboriginal title in Canada and native title in Australia suggests that the case may be of limited relevance in Australia. A central feature of the court's decision was the need to reconcile

135 Ibid 1134; 283.
136 Ibid 1123; 273.
137 Ibid 1134; 284.
138 McNeil, 'Aboriginal Title and Aboriginal Rights', above n 35.
139 Borrows, above n 13; McNeil, 'Infringement of Constitutional Rights', above n 13; Gray, above n 13.
140 [1996] 2 SCR 507, 137 DLR (4th) 289.
141 This process was established in 1993 following the report of the British Columbia Treaty Task Force in 1991. Both the federal and British Columbia Parliaments have passed legislation establishing the process which now has 51 First Nations engaged, although final agreements have not been reached. The Chairperson of the British Columbia Treaty Commission has suggested that the *Delgamuukw* decision is having an impact on negotiations and that the parties, especially the government parties, need to reassess their positions in the light of the decision: British Columbia Treaty Commission, *Treaty Commission Urges Changes to Safeguard Treaty Process*, Press release, No 7 (28 January 1998) 1.

aboriginal title with s 35(1) of the *Constitution Act 1982*. It did this by recognising title as a species of aboriginal rights so protected, and thus created a series of rights in land (aboriginal title) or arising from some site-specific relationship to or use of land resources (aboriginal rights). Having made that distinction, the court was then able to define and give substance to the notion of aboriginal title in a less strict way than it had previously done in relation to aboriginal rights. However, the primary requirement for aboriginal title is proof of exclusive possession. The demands of proof of this element should not be underestimated, nor should the effect of the s 35 arguments on the shape and form of aboriginal title.

There is no equivalent of s 35 of the *Constitution Act 1982* in Australia and therefore, the focus on s 35 and the rights protected thereunder may provide a basis for disregarding aspects of the decision in Australian courts.

In addition, the concept of native title developed in *Mabo*[142] was a single concept, the precise content of the title depending on the customs and traditions of the group claiming native title. The differentiation set out in *Delgamuukw* between rights and title is part of the single native title concept. While it may be that native title in a particular case will amount to exclusive possession,[143] in other cases the title will amount to less than exclusive possession and perhaps consist of use rights only. In the Australian native title jurisprudence, all those rights are covered by the concept of native title and as a result amount to some interest in land. That this could be so was at the heart of the decision in *Wik*,[144] and the subsequent debate about concurrent use and coexistence.[145] In stark contrast, the more liberal view of the Canadian Supreme Court in relation to the content of aboriginal title derives largely from the exclusivity of use and occupation of land. This distinction between the two concepts of title and rights may provide a further basis for disregarding the Canadian approach in Australian native title cases.

It is possible that the Australian courts will develop a split approach to the issue of content of native title. The content of native title is said to derive from the laws and customs of the group claiming the title. Where those laws and customs reveal exclusive possession over land, it may be possible to argue that the approach taken in *Delgamuukw* be applied. That is, the rights attaching to the title would not be limited to rights deriving from custom and tradition but would be expanded to reflect the nature of the title — exclusive possession. The only limitation on use would then be that set out by Lamer CJ, namely that the use not be inimical to the customs and traditions of the group.[146]

The conceptual distinction between aboriginal title on the one hand and native title on the other is at the heart of any comparison between *Delgamuukw* and the

142 (1992) 175 CLR 1, 58–63 (Brennan J), 88 (Deane and Gaudron JJ).

143 As was the case in *Mabo* (1992) 175 CLR 1.

144 *The Wik Peoples v Queensland; The Thayorre People v Queensland* (1996) 187 CLR 1 ('*Wik*').

145 See, eg, National Indigenous Working Group on Native Title, *Coexistence — Negotiation and Certainty: Indigenous Position in Response to the Wik Decision and the Government's Proposed Amendments to the Native Title Act 1993* (1997).

146 *Delgamuukw* [1997] 3 SCR 1010, 1083, 153 DLR (4th) 193, 243.

Australian jurisprudence. However, there are other issues that bear some comparative comment. The Supreme Court reiterated that aboriginal title is not a fee simple but is in fact a sui generis interest in land. This view was expressed in spite of the requirement for exclusivity and the common law notion of possession amounting to a fee simple. While this view has been frequently expressed by courts, it is a significant restatement of the proposition at a time when some writers are seeking to develop the notion that the characterisation of native title as a right to possession as against the whole world,[147] amounts to a fee simple.[148] However, the idea of a title based upon the common law doctrine of possession was developed by McNeil[149] and referred to at some length by Toohey J in *Mabo*.[150] The crucial distinction between Toohey J's view and *Delgamuukw* appears to be that while Toohey J saw any possessory title arising post-sovereignty as part of a recognised common law tenure,[151] the court in *Delgamuukw* characterised the title as arising because of pre-sovereignty possession and part of a sui generis aboriginal title. The need to distinguish the claim from common law tenures and notions of fee simple is perhaps reflected in the change in the pleadings from a claim for ownership to a claim for aboriginal title.[152]

In relation to evidentiary matters, *Van der Peet*[153] has been referred to in some cases in Australia.[154] Gummow J also referred to it in *Wik*,[155] although his Honour used the case as a point of departure with Australian practice (or lack of it) in determining as a matter of fact such issues as whether 'the tide of history' had washed away acknowledgment of tradition.[156] *Delgamuukw* does little to advance this issue, at least in practical terms, as the court did not deal substantively with the evidence of connection. Thus, the meaning and effect of requirements for the maintenance of a substantial connection with land remain unclear. Similarly, it is unclear whether the different levels of proof required in title cases as opposed to the strict requirement of the *Van der Peet*[157] test will be adopted. The centrality of exclusive possession to the claim in *Delgamuukw* raises the possibility of the need to examine whether exclusive possession is an aspect of native title claimed in each Australian native title case. This in turn

147 *Mabo* (1992) 175 CLR 1, 76 (Brennan J)

148 See Noel Pearson, '204 Years of Invisible Title — From the Most Vehement Denial' in Margaret Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (1993) 75.

149 McNeil, *Common Law Aboriginal Title*, above n 115, 6–78.

150 (1992) 175 CLR 1, 208–214.

151 Ibid 213.

152 See discussion above n 38.

153 [1996] 2 SCR 507; 137 DLR (4th) 289.

154 In a ruling on evidence in *Members of the Yorta Yorta Aboriginal Community v Victoria* (Unreported, Federal Court of Australia, Olney J, 29 October 1997) concerning whether 'the tide of history' had washed away acknowledgment of traditional laws, Olney J rejected arguments based on *Van der Peet* [1996] 2 SCR 507; 137 DLR (4th) 289 and the distinct culture argument saying that the answer to issues about custom and continuity were to be found 'in the construction and application of relevant provisions of the Native Title Act'.

155 (1996) 187 CLR 1, 182–3.

156 Ibid 183.

157 [1996] 2 SCR 507; 137 DLR (4th) 289

raises the spectre of a *Milirrpum*[158] style exploration of aboriginal traditions and customs, and also raises some difficulties in relation to the coexistence model adopted by the National Indigenous Working Group.[159] It may be that, as in Canada, a dual test will emerge depending on the nature of the case and the extent of the rights claimed under the title, that is, whether the title in fact amounts to exclusive occupancy. In those cases, the less strict test in relation to the existence and content of native title may be applied.

The court's consideration of the manner in which use and occupation by more than one group might be characterised as title, with recognition of the possibility of joint title either concurrently or sequentially held, provides a basis for dealing with overlapping claims in the Australian context. There is at least a recognition that in principle, the common law can recognise joint aboriginal interests. The case did not deal with the complexities of evidence that might arise in such a case. These were explored in *Milirrpum*[160] and the difficulties in weighing evidence of use and occupation by more than one group emerge in that judgment.[161]

The Canadian Supreme Court's comments in relation to compensation may also find some resonance in Australia. In particular, La Forest J's view that aboriginal title 'is not to be equated with the price of a fee simple'[162] is in direct contrast with the *Native Title Amendment Act 1998* (Cth) which seeks to tie compensation to the freehold value of the land.[163] Seemingly contradicting this provision, the *Native Title Amendment Act 1998* (Cth) also directs that compensation is payable on 'just terms'.[164] There is no doubt that reliance will be placed upon the Canadian Supreme Court's view as Australian courts grapple with the task of 'valuing' native title.

The continued significance of extinguishment as the basis for access to the provisions of the *Native Title Act 1993* (Cth), as well as the definition of native title in that Act[165] which reflects the common law formulation of the concept in *Mabo*,[166] mean that the development of the common law concepts remain central to the native title process in Australia. Perhaps for this reason alone the Canadian Supreme Court's development of the detail of the content of aboriginal title and its proof will be influential in Australian cases.

Delgamuukw has been part of the Canadian legal landscape for almost fourteen years. Given the length of the trial, the final order by the Supreme Court ordering a new trial suggests that it will remain part of the landscape for many years with the possibility of further appellate decisions. Both the length and complexity of the litigation, and the prospect of further lengthy legal action should provide a

158 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 ('*Milirrpum*').
159 National Indigenous Working Group on Native Title, above n 145.
160 (1971) 17 FLR 141.
161 Ibid 160–71, 269–74.
162 *Delgamuukw* [1997] 3 SCR 1010, 153 DLR (4th) 193.
163 *Native Title Amendment Act 1998* (Cth) s 22, inserting *Native Title Act 1993* (Cth) s 51A.
164 *Native Title Amendment Act 1998* (Cth) s 31, inserting *Native Title Act 1993* (Cth) s 53(1).
165 *Native Title Act 1993* (Cth) s 223.
166 (1992) 175 CLR 1, 57 (Brennan J).

salutary note for those involved in the native title debate in Australia. The possibility of large scale extinguishment inherent in the *Native Title Amendment Act 1998* (Cth) raises the concomitant prospect of long and difficult litigation. Even after this painful process, as this Canadian case shows, the answers to the negotiation of ongoing relationships between indigenous peoples and settler societies remain elusive.

However, the guidance provided by the court in *Delgamuukw* should not be disregarded. Both the Chief Justice and La Forest J emphasised the need for the parties in this and similar litigation to resolve the issues by negotiation:

> [U]ltimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by judgments of this court, that we will achieve what I stated in *Van der Peet* ... to be the basic purpose of s 35(1) – 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown'. Let us face it, we are all here to stay.[167]

Perhaps it is this comment in the judgment that provides the most poignant and significant guidance for Australia in the context of the native title debate and the search for reconciliation between Australia's indigenous peoples and its settler society.

MAUREEN TEHAN*

[167] *Delgamuukw* [1997] 3 SCR 1010, 1123–4; 153 DLR (4th) 193, 273.

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