SOME THOUGHTS ON ABORIGINAL TITLE

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Introduction

Justice Ivan Cleveland Rand, for whom this lecture is named, served as a judge in the Supreme Court of Canada for some sixteen years, between 1943 and 1959. During that period, the Supreme Court of Canada handed down only three reported decisions relating to the rights of aboriginal peoples.[1] In two of these cases, Justice Rand delivered separate opinions.[2] Some passages that appear there are worth pondering.

In the *St. Ann's Island Shooting and Fishing Club* case,[3] decided in 1950, Justice Rand stated with respect to a provision of the *Indian Act*:[4]

> The language of the statute embodies the accepted view that these aborigines are, in effect, wards of the state, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing with their privileges must bear the imprint of Governmental approval...

Six years later, in the case of *Francis* v. *The Queen*,[5] Justice Rand remarked with respect to a clause favouring Indians in the Jay Treaty of 1794:

> Appreciating fully the obligation of good faith toward these wards of the state [i.e. the Indians], there can be no doubt that the conditions constituting the *raison d'etre* of the clause were and have been considered such as would in foreseeable time disappear. ... Whether, then, the time of its expiration has been reached or not it is not here necessary to decide; it is sufficient to say that there is no legislation now in force implementing the stipulation.

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[1] *Miller* v. *The King* [1950] 1 D.L.R. 513 (S.C.C.); *St. Ann's Island Shooting and Fishing Club Ltd.* v. *The King* [1950] 2 D.L.R. 225 (S.C.C.); and *Francis* v. *The Queen* (1956), 3 D.L.R. 641 (S.C.C.). For a complete collection of reported aboriginal cases decided during Justice Rand's term, see B. Slattery & S. Stelck, eds., *Canadian Native Law Cases* (Saskatoon: University of Saskatchewan Native Law Centre, 1987) which covers the period 1931-1959.

[2] In the third case, *Miller* v. *The King* [1950] 1 D.L.R. 513 (S.C.C.), Rand J. concurred in the judgment of Kerwin J.

[3] *Supra*, note 1, at 232.

[4] The Court was considering the version of the *Act* found in R.S.C. 1906 , c. 81.

[5] *Supra*, note 1, at 650.

It is a striking fact that in both these passages Justice Rand affirms that the Indians were considered "wards of the state". Wards are people — often minors — who have been placed under the care of a guardian on the grounds that they are incapable of handling their own affairs. The implication is that Indians are unable to manage their own affairs, which the state consequently manages on their behalf. Now, true guardians can usually be held legally accountable for their actions. However, with Indians, the case was considered to be different. So, while Justice Rand notes that the government had trust obligations toward the Indians, he describes those obligations as a "political trust" — apparently assuming that the obligations were not enforceable in the law courts but only before the tribunals of morality and politics. According to this view, the rights and privileges of aboriginal peoples were generally held at the discretion of the Crown, whose actions were not reviewable in the courts. The relationship between the Crown and aboriginal peoples was governed not by law but by political and moral considerations. The history of Canada since 1763 suggests that the constraints of mere morality and politics did not serve aboriginal peoples very well.

In fairness to Justice Rand, it is not clear from these passages that he was doing much more than reciting the standard view of the status of aboriginal peoples, without necessarily endorsing it. For he was, of course, a man of larger views and a declared opponent of arbitrary state action. In the famous case of *Roncarelli* v. *Duplessis*,[6] decided in 1959, he held that, where the Premier and Attorney-General of a Province used his powers deliberately to destroy the vital interests of a citizen, the Premier could be sued personally for damages. Justice Rand stated in no uncertain terms that if the courts were to allow government according to law to be superseded by the arbitrary actions of public officers, this "would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure."[7]

Since the time of Justice Rand, we have seen the gradual emergence of the view that the relationship between the Crown and aboriginal peoples is governed by the rule of law, not simply that of politics. As such, the rights of aboriginal peoples are protected by the courts and cannot be superseded by the arbitrary actions of public officers.

This evolution in legal understanding has proceeded at two different but related levels. Starting with the *Calder* decision[8] in 1973, and continuing with the decisions in

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[6][1959] S.C.R. 121.

[7]*Ibid.* at 142.

[8]*Calder* v. *British Columbia (A.G.)* [1973] S.C.R. 313 (S.C.C.).

Guerin,[9] *Simon*,[10] *Sparrow*,[11] *Sioui*,[12] *Van der Peet*[13] and *Delgamuukw*,[14] the Supreme Court has gradually elaborated a comprehensive scheme of aboriginal and treaty rights that recognizes them as legal rights and not merely rights held at the pleasure of the Crown. This transformation in our legal understanding was highlighted by Chief Justice Dickson and Justice La Forest in their joint decision in the *Sparrow* case[15] in 1990. They remarked:

> For many years, the rights of the Indians to their aboriginal lands – certainly as *legal* rights – were virtually ignored. ... For fifty years after the publication of Clement's *The Law of the Canadian Constitution* (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. ... In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument; ... It took a number of judicial decisions and notably the *Calder* case in this Court (1973) to prompt a reassessment of the position being taken by government.[16]

This judicial trend has also been reinforced by the constitutional entrenchment of existing aboriginal and treaty rights in section 35(1), *Constitution Act*, 1982.[17] This section states:

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

Once again, in the *Sparrow* case[18] Chief Justice Dickson and Justice La Forest commented on the profound significance of this section, as the culmination of a long and difficult struggle in both the political forum and the courts, quoting a passage from Professor Noel Lyon:

> [T]he context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which

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[9]*Guerin* v. *The Queen* [1984] 2 S.C.R. 335 (S.C.C.).

[10]*Simon* v. *The Queen* [1985] 2 S.C.R. 387 (S.C.C.).

[11]*R.* v. *Sparrow* [1990] 1 S.C.R. 1075 (S.C.C.).

[12]*R.* v. *Sioui* [1990] 1 S.C.R. 1025 (S.C.C.).

[13]*R.* v. *Van der Peet* [1996] 2 S.C.R. 507 (S.C.C.).

[14]*Delgamuukw* v. *British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.).

[15]*Supra*, note 11.

[16]*Ibid.* at 1103-04.

[17]*Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (U.K.), 1982, c. 11.

[18]*Supra*, note 11, at 1105-06.

> the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.[19]

In my remarks today, I will deal with the subject of aboriginal title, focussing on aspects particularly relevant to the Provinces of New Brunswick and Nova Scotia.[20] First, I will review the criteria laid down by the Supreme Court of Canada governing the proof of aboriginal title. I will then consider the judicial tests governing extinguishment of aboriginal title. Finally, I will turn my attention to the manner in which the New Brunswick courts have dealt with question in the recent *Peter Paul* case.[21]

Proof of Aboriginal Title

Where an aboriginal group asserts aboriginal title to certain lands, an inquiry will focus on two matters. First, was the aboriginal group (or its predecessor-in-title) vested with aboriginal title to those lands at the time the Crown acquired sovereignty? Second, was this aboriginal title extinguished in the period between the date of sovereignty and the date when its existence is sought to be demonstrated?[22] The party asserting the existence of aboriginal title bears the burden of proving that the aboriginal group (or a predecessor-in-title) held aboriginal title at the date of Crown sovereignty. By contrast, once the existence of aboriginal title is established, the burden of proving that it was extinguished falls on the party opposing the claim.[23] In this section, we will deal with the proof of aboriginal title. The question of extinguishment is considered in the next section.

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[19]Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95 at 100.

[20]In early colonial times, the lands now comprised in the provinces of New Brunswick and Nova Scotia fell within the asserted boundaries of the British colony of Nova Scotia, so that for present purposes the two Provinces may conveniently be considered together. This paper does not deal with the position of aboriginal title in the Atlantic Provinces of Prince Edward Island and Newfoundland, whose histories are somewhat distinct.

[21]*R.* v. *Peter Paul* [1997] 4 C.N.L.R. 221 (N.B. Prov. Ct.), aff'd *R.* v. *Peter Paul* [1998] 1 C.N.L.R. 209 (N.B.Q.B.), rev'd *R.* v. *Peter Paul* [1998] 3 C.N.L.R. 221 (N.B.C.A.).

[22]Normally the latter is the date when the dispute arises, however in some cases it may be an earlier date, as for example where an aboriginal group claims compensation for a statutory taking of aboriginal title at a previous period.

[23]*R.* v. *Sparrow*, *supra*, note 11, at 1099, adopting the rule laid down by Hall J. in *Calder* v. *British Columbia (A.G.)*, *supra*, note 8, at 404.

In *Delgamuukw*,[24] the Supreme Court holds that in order to establish aboriginal title an aboriginal group must satisfy three criteria:

- The land must have been occupied prior to Crown sovereignty.
- That occupation must have been exclusive.
- If present occupation is relied on as proof of occupation prior to Crown sovereignty, there must be continuity between present and pre-sovereignty occupation.

The first two criteria, taken together, relate to what we may call **the requirement of historical occupation**. This requirement must be satisfied in all cases where a group asserts aboriginal title. By contrast, the third criterion only applies in cases where present occupation is relied on as proof of pre-sovereignty occupation. We may call this **the requirement of continuing connection**. The following sections are devoted to these two requirements.

Historical Occupation

To establish aboriginal title an aboriginal group must prove that it (or a predecessor-in-title) had exclusive occupation of the land at the date the Crown gained sovereignty. This requirement has three distinct elements: (a) occupation; (b) the date of Crown sovereignty; and (c) exclusivity. We will consider these elements separately.

i. Occupation

In *Delgamuukw*, the Court holds that the aboriginal presence on the land at the time of sovereignty must amount to occupation. But what does occupation consist of? Two different positions were advanced before the Court. The governmental parties argued that aboriginal title arises only where there is *physical occupation* of the land. The aboriginal parties submitted that occupation may be established, at least in part, by reference to *aboriginal law*. In the first case, aboriginal title would reflect certain tangible realities that existed at the time of sovereignty — concrete practices, alterations in the physical environment, structures and other material signs of occupation — which could presumably be detected by an attentive outside observer. In the second case, aboriginal title would reflect conceptions of land and territory under aboriginal laws and customs, which would require the court to look at the matter through the eyes of the aboriginal group in question and to take into account certain immaterial realities.[25] The difference between the two approaches becomes clearer when applied to certain remote or little-visited places, such as the peaks of mountains or inaccessible gorges. Under

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[24] *Supra*, note 14, at 1097. For exposition purposes, I have reversed the order of the last two requirements as found in the judgment.

[25] *Ibid.* at 1099.

the first approach, it would be difficult to establish aboriginal title to such places because there would be little in the way of physical occupation to appeal to. However, under the second approach, a group could show that under aboriginal law those places formed part of the communal territory, even if, given the inhospitable or remote nature of the terrain, that outlook did not give rise to much tangible physical activity.

Faced with these two arguments, the Court in *Delgamuukw* adopts a comprehensive approach, holding that both physical occupation and the aboriginal perspective on land should be taken into account, with equal weight being given to each.[26] While physical presence on the land is clearly relevant to establishing occupation, so also is the outlook of the aboriginal group in question. That outlook can be gleaned in part, but not exclusively, from the traditional laws of the group:

> As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.[27]

With respect to the first matter, the Court observes that at common law the fact of physical occupation is proof of possession, which in turn will ground title to the land.[28] Physical occupation may be established in a variety of ways, including:

- the construction of dwellings;
- the cultivation and enclosure of fields; and
- the regular use of definite tracts of land for hunting, fishing or exploitation of resources.[29]

The third category is clearly an important one in this context, because many aboriginal groups in Canada originally used their lands mainly for hunting, trapping, fishing and gathering. In his separate opinion in *Delgamuukw*, La Forest J. stresses that aboriginal occupancy refers not only to the use of village sites or other permanently settled areas but also to the use of adjacent lands and even remote territories to pursue

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[26]*Ibid.* at 1099-1100; citing *Baker Lake (Hamlet of)* v. *Minister of Indian Affairs and Northern Development* [1980] 1 F.C. 518 (F.C.T.D.) at 559, 561 and *R.* v. *Van der Peet*, *supra*, note 13, at 546-47, 551.

[27]*Delgamuukw* v. *British Columbia*, *supra*, note 14, at 1100.

[28]*Ibid.* at 1100-01; citing K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 73; E. H. Burn, *Cheshire and Burn's Modern Law of Real Property*, 14th ed. (London: Butterworths, 1988) at 28; R. E. Megarry & H. W. R. Wade, *The Law of Real Property*, 4th ed. (London: Stevens, 1975) at 1006.

[29]*Delgamuukw* v. *British Columbia*, *supra*, note 14, at 1101, citing McNeil, *Common Law Aboriginal Title*, *supra*, note 28, at 201-02.

a traditional mode of life.[30] He argues that this conclusion is supported by the terms of the *Royal Proclamation of 1763*,[31] which, although not the sole source of aboriginal title in Canada, bears witness to British policy towards aboriginal peoples, based on respect for their right to occupy their ancestral lands. La Forest J. observes that the *Proclamation* reserved vast tracts of land for aboriginal peoples and that these tracts were by no means limited to villages or permanent settlements but were characterized more generally as "Hunting Grounds" and "for the use of the said Indians". He concludes that under the *Proclamation*'s terms, which were applied in principle to aboriginal peoples across the country, aboriginal peoples were entitled to possess these lands and not to be molested or disturbed in their possession.[32]

In determining whether physical occupation has been proven, the Court in *Delgamuukw* adopts the view that "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed".[33] Obviously, then, we should not expect the occupation patterns of hunters and fishers to conform to the patterns of farmers or ranchers. Neither should we expect that lands should be used to their maximum potential with the best available technology. The fact that a tract of land could be turned to profitable agricultural use does not mean that a hunting group that confines itself to exploiting the land's renewable resources fails to "occupy" the land.[34]

However, physical occupancy is not the only relevant factor. According to *Delgamuukw*, a court also needs to take into account the aboriginal perspective on the occupation of their lands. This perspective can be ascertained in part from the traditional laws of the group, such as its land tenure system or rules governing land use.[35] In effect, then, the Court stresses the need to remain open to the aboriginal

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[30]*Delgamuukw* v. *British Columbia*, *supra*, note 14, at 1131.

[31]*Royal Proclamation of October 7, 1763*, in Clarence S. Brigham, ed., *British Royal Proclamations Relating to America* (Worcester, Mass.: American Antiquarian Society, 1911), 212.

[32]*Delgamuukw* v. *British Columbia*, *supra*, note 14, at 1131-32; citing *R.* v. *Wesley* [1932] 4 D.L.R. 774 (Alta. S.C., A.D.) at 787, and *R.* v. *Sikyea* (1964), 43 D.L.R. 150 (N.W.T.C.A.), affirmed in *Sikyea* v. *The Queen* [1964] S.C.R. 642 (S.C.C.).

[33]*Delgamuukw* v. *British Columbia*, *supra*, note 14, at 1101, quoting B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 758.

[34]See *Mitchel* v. *United States*, 9 Peters 711 (U.S.S.C. 1835) at 746, where Baldwin J. stated that under the law applying in the Crown's American colonies in 1763: "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected ...".

[35]*Delgamuukw* v. *British Columbia*, *supra*, note 14, at 1100.

outlook on the nature of their relationship with the land, rather than applying rigid criteria that reflect conceptions, values and priorities alien to the group concerned.

In his separate opinion, Justice La Forest makes some interesting observations on the question of occupancy. He notes that an aboriginal group claiming aboriginal title must obviously *specify* the area occupied. However, when dealing with vast tracts of land, it may be impossible to identify the boundaries of the area occupied with any great precision. Nevertheless, this failing should not preclude recognition of a general right of occupation of the affected lands. The delineation of exact territorial limits is a matter that can be settled by subsequent negotiations between the aboriginal claimants and the government.[36] In other words, where an aboriginal group can prove that it occupied a certain territory but is less successful in demonstrating its precise boundaries, a Court may recognize the group's aboriginal title and leave the delineation of accurate boundaries to the negotiating process.

ii. The date of Crown sovereignty

The claimant group must show that it occupied the lands in question at the date of the Crown's sovereignty — what we will call the "threshold date". However, the Court's explanation of this criterion is ambiguous. Is it the date when the Crown first **asserted** sovereignty or rather the date when it actually **acquired** sovereignty? The Court's language allows for either interpretation.[37] The issue is far from academic. From the early days of European contact, Great Britain, France and other imperial states advanced overlapping claims to enormous territories that they had not even explored, much less brought under their control. From time to time, they also signed treaties with each other that acknowledged and adjusted some of these claims. While these treaties were binding on the signatories, they could not affect the rights of third parties such as aboriginal peoples. So, the date that Crown sovereignty was actually **acquired** was often substantially later than the date it was first **asserted** — possibly as much as several centuries in some parts of Canada.[38]

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[36]*Ibid.* at 1128-29.

[37]The Court's initial formulation of the criterion states that "the land must have been occupied *prior to sovereignty*"(*ibid.* at 1097; emphasis added). The Court then speaks in several places of the time when the Crown *asserted sovereignty* over the land (*ibid.* at 1097-99). It closes its discussion by reiterating the trial court's finding that British sovereignty over British Columbia was "*conclusively established*" by the Oregon Boundary Treaty of 1846 (*ibid.* at 1099; emphasis added).

[38]This depends in part on whether these early claims are construed as full territorial claims, as "speculative grants", or as assertions of exclusive spheres of influence; see discussion in B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories* (D.Phil. Thesis, Oxford University, 1979; reprint, Saskatoon: University of Saskatchewan Native Law Centre, 1979) at 66-125.

In attempting to resolve this issue, it is helpful to distinguish between (1) the **legal event** consisting of the Crown's acquisition of sovereignty and (2) the **evidence** relating to that question. As for the first point, it is submitted that the threshold date for aboriginal title is established by the legal event marking the Crown's acquisition of sovereignty *vis-a-vis* the particular aboriginal people in question rather than as against other European states or the United States. As the Court observes, since aboriginal title is a burden on the Crown's underlying title, it does not make sense to speak of such a burden existing before the underlying title itself came into existence.[39] However, the Crown would not gain a genuine underlying title to lands held by an aboriginal people until it actually gained sovereignty over that people, no matter what agreements or understandings on the point existed with other colonial powers. So long as an aboriginal people was actually independent, the Crown's claims would remain a fiction.

As for the second point, in ascertaining the date of sovereignty, it is clear that a court should take into account all the available evidence. That evidence will include any Crown assertions of sovereignty, but it will also embrace a range of other significant material, including treaties with the aboriginal people in question, acts of conquest, settlements and tangible manifestations of governmental control. In this context, a unilateral Crown claim of sovereignty is a relevant factor, but it is far from being conclusive. Much will depend on the history of Crown dealings with the particular aboriginal people in question, as seen in the larger political context.

What happens when an aboriginal group occupied certain lands at the time of Crown sovereignty but afterwards moved to another area, whether voluntarily or due to the pressures of war, internal conflict, encroaching settlement or environmental conditions? May the group gain aboriginal title to the lands that it moves to? Does the group lose its title to the lands it occupied at the threshold date? We will consider these questions in turn.

At first glance, the requirement that occupation must exist at the time of Crown sovereignty appears to prevent an aboriginal group from gaining title to lands to which it migrates after sovereignty. However, on closer consideration, the matter is not so clear-cut. Suppose, for example, that the group moves to lands held by another aboriginal group. Here it can be argued that the migrating group may inherit the title of its predecessors-in-possession, by virtue of conquest, cession, merger or exchange. Some cryptic remarks by the Court seem to allow for this possibility. After stating the requirement of occupation at the time of sovereignty, the Court notes:

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[39] *Delgamuukw* v. *British Columbia*, *supra*, note 14, at 1098.

> This is not to say that circumstances subsequent to sovereignty may never be relevant to title or compensation; this might be the case, for example, where native bands have been dispossessed of traditional lands after sovereignty.[40]

Once again, Justice La Forest throws an interesting light on the question. While he agrees that the time of sovereignty is more appropriate than the time of first contact as a threshold date for aboriginal title, he suggests that the date of sovereignty may not be the only relevant time to consider. He cites two sorts of cases. The first is where an aboriginal group occupied certain lands at the time of Crown sovereignty but subsequently moved to another place, where it has remained to the present day. The move may have been prompted by clashes with settlers or by natural causes such as flooding. In this sort of case, the existence of aboriginal title should not be denied just because the relocation occurred post-sovereignty. Rather, La Forest J. argues, "continuity may still exist where the present occupation of one area is connected to the pre-sovereignty occupation of another area."[41] The second case arises where lands that were occupied by one aboriginal group at the time of Crown sovereignty subsequently passed to the claimant aboriginal group by such means as conquest, cession, merger or exchange. Here, La Forest J. states, the occupancy of the claimant group may be connected to the occupancy of the initial group, so that occupation extending back to the date of Crown sovereignty may be established in this manner.[42]

To summarize, La Forest J. suggests that a claimant aboriginal group may satisfy the requirement of occupation at sovereignty in any one of three ways:

1. proof that it occupied the lands claimed at sovereignty;
2. proof that its occupation of the lands claimed is connected with its occupation of other lands at sovereignty; or
3. proof that its occupation of the lands claimed is connected with another aboriginal group's occupation of those lands at sovereignty.

Let us turn now to a distinct but related question. Does a group that ceases to occupy lands held at sovereignty lose title to those lands? The answer to this question may depend on the circumstances. In particular, a group ousted from its lands by governmental act or settler encroachment might be in a stronger position than a group that leaves of its own free will. For simplicity, we will set aside such complicating factors as forcible dispossession and confine our discussion to the case where the group leaves its lands voluntarily. Here the answer seems to depend on the answer to the question just considered. If we hold that aboriginal title arises exclusively from

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[40] *Ibid.* at 1099.

[41] *Ibid.* at 1130.

[42] *Ibid.* at 1130-31, citing Slattery, "Understanding Aboriginal Rights", *supra*, note 33, at 759.

occupation at sovereignty and may not be gained by occupation in the post-sovereignty period, it seems to follow that continuing occupation is not necessary in order to maintain aboriginal title in the post-sovereignty period. By contrast, if we hold that aboriginal title may be gained by occupation in the post-sovereignty period, it seems likely that it may also be lost by failure to occupy. The opinion of Lamer C.J. in *Delgamuukw* sheds little light on these matters. However, it seems implicit in the reasoning of LaForest J. that a migrating group that gains title to lands occupied post-sovereignty would lose title to any lands occupied at sovereignty.

iii. Exclusivity

A claimant group must show that its occupation of the land was **exclusive.**[43] This requirement mirrors the fact that aboriginal title imports the right to exclusive use and occupation of the land. Nevertheless, the Court warns that this requirement must be applied with caution and in light of the concrete context of the aboriginal society in question. The fact that other aboriginal groups frequented the land or were present on it does not necessarily mean that the claimant group's occupation was not exclusive. All that is needed, says the Chief Justice, is "the intention and capacity to retain exclusive control".[44] The mere presence of trespassers will not negate title where the claimant group intended and attempted to enforce their exclusive rights. Indeed, as Professor Kent McNeil has observed, the presence of other aboriginal groups on the land might actually reinforce the claimant group's title, because where "others were allowed access upon request, the very fact that permission was asked for and given would be further evidence of the group's exclusive control".[45]

In other cases, two or more groups may have **joint title** to lands, arising from their shared exclusive occupancy of those lands. This situation arises, for example, where two aboriginal nations live together on a certain tract of land and recognize each other's right to live there but deny the right of anyone else to live on the land. In such instances, shared exclusive possession means the right to exclude all others except those with whom possession of the land is shared.[46]

The Court reiterates that, if an aboriginal group can show that it occupied a certain tract of land but did not do so exclusively, it can always show that it had site-specific aboriginal rights short of aboriginal title. In other words, while exclusive occupation

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[43]*Delgamuukw* v. *British Columbia*, *supra*, note 14, at 1104.

[44]*Ibid.*, quoting McNeil, *Common Law Aboriginal Title*, *supra*, note 28, at 204.

[45]*Delgamuukw* v. *British Columbia*, *supra*, note 14, quoting McNeil, *Common Law Aboriginal Title*, *supra*, note 28, at 204.

[46]*Delgamuukw* v. *British Columbia*, *supra*, note 14, at 1105-06, citing *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (U.S.S.C. 1941). See also La Forest J.'s comments in *Delgamuukw* v. *British Columbia*, *supra*, note 14, at 1129.

is an essential prerequisite for aboriginal title, it is not a prerequisite for site-specific rights. Consider, for example, the case where a certain area was used for hunting by several aboriginal groups, however the groups did not have exclusive title to the area either singly or jointly. In this case, aboriginal title could not arise because the crucial element of exclusivity would be absent. However, the individual groups might each have a site-specific right to hunt in the area. Since the rights are non-exclusive, their holders presumably could not prevent outside groups from using the land to hunt as well. However, the rights would enjoy constitutional protection under section 35(1) as aboriginal rights.[47]

In this example, the hypothetical site-specific rights are non-exclusive; that is, they do not operate so as to exclude other groups from the area in question. The question arises whether site-specific rights are intrinsically non-exclusive or whether this is a matter for proof in each case. The Court does not explicitly address this question, however its discussion supports certain inferences.

In a case where a group has the right to use certain lands in a manner that excludes all other groups from using those lands **for any purposes whatsoever**, that right probably amounts to aboriginal title rather than a site-specific right. For example, where it can be shown that (a) a group had the exclusive right to hunt in a certain area, and (b) this right barred other groups from using the area for any purposes whatsoever, it seems likely that the case for aboriginal title has been made out. The exclusivity of the right strongly supports the inference that the group has a right to the land itself. Nevertheless it is perhaps possible to envisage a case where a group has an exclusive right to use lands for a specific purpose but the existence of that right does not prevent other groups from using the land **for other purposes**, so long as these purposes are compatible with the first group's right.

In conclusion, the question cannot be settled in the abstract but must depend on the evidence of a particular group's activities in each case. As the Court remarks, such a flexible approach accords with the general principle that the common law should evolve to recognize aboriginal rights "as they were recognized by either *de facto* practice or by the aboriginal system of governance."[48]

Continuing Connection

In *Delgamuukw*, the Chief Justice concedes that it may be very difficult for an aboriginal group to prove that it occupied certain lands at the date of Crown sovereignty, given that extensive written records are not generally available for such early periods. In some cases the task may be almost impossible. Yet to set a standard

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[47] *Ibid.* at 1106-07.

[48] *Ibid.* at 1106.

of proof so high that it cannot ordinarily be met is obviously unfair. How should this dilemma be resolved? The Court holds that in view of the difficulty in obtaining evidence of pre-Crown occupation, an aboriginal group may provide evidence of **present** occupation as proof of **pre-sovereignty** occupation.[49]

In other words, proof of present occupation gives rise to a presumption of fact that this occupation existed at sovereignty. By way of parallel, in the *Simon* case[50] the Supreme Court held that evidence that the appellant was a current member of the Shubenacadie Band of Micmac Indians living in the same area as the original Micmac tribe was sufficient to prove the appellant's connection to a treaty signed by a Chief of the Shubenacadie Micmac tribe in 1752. Chief Justice Dickson commented:

> True, this evidence is not conclusive proof that the appellant is a *direct* descendant of the Micmac Indians covered by the Treaty of 1752. It must, however, be sufficient, for otherwise no Micmac Indian would be able to establish descendancy. The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this Treaty.[51]

In *Delgamuukw*, the Court holds that where a group relies on present occupation as proof of pre-Crown occupation, it must show a measure of continuity between present and past occupation. It emphasizes that the continuity need not be unbroken.[52] In some cases, an aboriginal group's occupation of the land may have been disrupted for a certain period, perhaps due to colonial interference. To apply the requirement of continuing connection too strictly would risk undermining the purposes of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect aboriginal land rights.[53] Nevertheless, as the High Court of Australia held in the *Mabo* case,[54] there must be substantial maintenance of the connection between the claimant group and the land. For the connection to be maintained, the group's occupation of the land need not have remained the same. To the contrary, the nature of the occupation will likely have changed, as the group adapted

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[49]*Ibid.* at 1102, referring to the earlier discussion in *R.* v. *Van der Peet*, *supra*, note 13, at 555-56.

[50]*Simon* v. *The Queen* [1985] 2 S.C.R. 387 (S.C.C.).

[51]*Ibid.* at 407-08.

[52]*Delgamuukw* v. *British Columbia*, *supra*, note 14, at 1103, citing *R.* v. *Van der Peet*, *supra*, note 13, at 557.

[53]*Delgamuukw* v. *British Columbia*, *supra*, note 14, at 1103, quoting *R.* v. *Côté* [1996] 3 S.C.R. 139 (S.C.C.) at 175.

[54]*Mabo* v. *Queensland* (1992), 107 A.L.R. 1 (H.C. of A.).

its mode of life to new circumstances and opportunities. This fact will not ordinarily rule out a claim of aboriginal title.[55]

It must be said that the Court's treatment of this topic is less than satisfactory. On the one hand, the Court holds that present occupation may serve as evidence of pre-Crown occupation. This approach tacitly invokes a **presumption** of connection between the past and the present. On the other hand, the Court also states that in such instances a group must **prove** a connection between present and past occupation, which seems at odds with the presumption just laid down. Evidence of present occupation will serve as proof of pre-Crown occupation only where little independent evidence of the pre-Crown situation exists. In such instances, how will it be possible to prove an historical connection between the past and the present, since it is precisely the **absence** of evidence about the past that forces reliance on present occupation as proof? The possibility of proving an historical connection is usually highest where there is reliable historical evidence as to the pre-sovereignty situation. Yet, according to the Court's formulation, this is precisely the case where proof of continuity is not required.

Perhaps what the Court means is the following. Where independent evidence of historical occupation is lacking or insufficient, an aboriginal group may tender evidence of its present occupation in order to fill gaps in the historical record. However, in doing this, the group has to show **some connection** between its present occupation and the past situation. In other words, contemporary evidence can be used as a guide to the past only when it is supported by a certain amount of historical evidence establishing its reliability in this context. Obviously, it is not in every case that contemporary practices provide a reliable guide to the past. Nevertheless, the Court is willing to accept contemporary evidence for these purposes, subject only to the proviso that there be some evidence as to its reliability as a guide to the historical situation.

Extinguishment

As seen earlier, the party asserting the existence of aboriginal title bears the burden of proving that the aboriginal group in question (or a predecessor-in-title) held aboriginal title at the date of Crown sovereignty. However, once the existence of aboriginal title is established, the burden of proving that it was extinguished falls on the party opposing the claim. The latter rule was first articulated by Justice Hall in the *Calder* case,[56] where he stated that once aboriginal title is established, it is presumed to continue until the

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[55] *Delgamuukw* v. *British Columbia*, *supra*, note 14, at 1103.

[56] *Calder* v. *British Columbia (A.G.)*, *supra*, note 8, at 401-04. Hall J. was dissenting in the result but not on this point.

contrary is proven. Citing a number of authorities, including the statement of Viscount Haldane in the Privy Council decision of *Amodu Tijani*,[57] Hall J. went on to conclude:

> It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be "clear and plain".[58]

This rule was adopted by a unanimous Supreme Court in the *Sparrow* case.[59] Speaking for the Court, Dickson C.J. and La Forest J. quoted the above passage from Justice Hall's judgment and went on to hold that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right. Applying this criterion, they concluded that in the case at hand "the Crown has failed to discharge its burden of proving extinguishment."[60]

Prior to the enactment of section 35(1) of the Constitution Act, 1982, there were a variety of ways in which aboriginal title could conceivably be extinguished. Here we will consider only one of these possible ways, which is particularly germane to our discussion, namely the Crown's acquisition of sovereignty over a territory.[61]

Under British colonial law, the Crown's acquisition of sovereignty over an inhabited territory was governed by a principle of continuity. Under this principle, the property rights of the local inhabitants were presumed to continue undisturbed, in the absence of some definite act of expropriation by the Crown performed in the course of acquisition. The principle of continuity was laid down by the Privy Council in the *Amodu Tijani* case, which dealt with a cession of territory to the Crown by the King of Lagos in 1861.[62] Under the terms of the treaty, the King ceded to the Crown the port and island of Lagos, with all the rights, profits, territories and appurtenances belonging thereto. In construing the treaty, Viscount Haldane stated:

> No doubt there was a cession to the British Crown, along with the sovereignty, of the radical or ultimate title to the land, in the new colony, but this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully

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[57]"The original native right was a communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or circumstances."; *Amodu Tijani* v. *Secretary of Southern Nigeria* [1921] 2 A.C. 399 (P.C.) at 410; quoted in *Calder* v. *British Columbia (A.G.)*, *supra*, note 8, at 402.

[58]*Calder* v. *British Columbia (A.G.)*, *supra*, note 8, at 404.

[59]*R.* v. *Sparrow*, *supra*, note 11.

[60]*Ibid.* at 1099.

[61]For fuller discussion, see Slattery, "Understanding Aboriginal Rights", *supra*, note 33, at 761-69.

[62]*Amodu Tijani* v. *Secretary of Southern Nigeria*, *supra*, note 57.

> respected. This principle is a usual one under British policy and law when such occupations take place. The general words of the cession are construed as having related primarily to sovereign rights only. ... A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly. The introduction of the system of Crown grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing.[63]

This approach was adopted by Hall J. in the *Calder* case:[64]

> The appellants rely on the presumption that the British Crown intended to respect native rights; therefore, when the Nishga people came under British sovereignty ... they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation.[65]

The principle of continuity was reiterated by Dickson J. in the *Guerin* case.[66] He noted that in *Calder* the Supreme Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their lands. Although the *Calder* court split three-three on the issue of whether the Nishga Nation's aboriginal title to their ancient territories had been extinguished by British Columbia enactments, six judges in the case were in agreement that aboriginal title existed in Canada, at least where it had not been extinguished by appropriate legislative action. In this respect, *Calder* was consistent with the position of Chief Justice Marshall of the United States Supreme Court in the cases of *Johnson* v. *M'Intosh*[67] and *Worcester* v. *Georgia*,[68] where he held that the rights of Indians to the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in North America. Although the claimant nation gained the ultimate title to the land claimed, the Indians' rights of occupancy and possession remained unaffected. Dickson J. went on to note that the principle that a change in sovereignty over a territory does not in general affect the presumptive title of the inhabitants was approved by the Privy Council in the *Amodu Tijani* case. He concluded that this principle supports the assumption implicit in *Calder* that Indian title is an

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[63] *Ibid.* at 407-08.

[64] *Calder* v. *British Columbia (A.G.)*, *supra*, note 8.

[65] *Ibid.* at 402.

[66] *Guerin* v. *The Queen*, *supra*, note 9.

[67] *Johnson* v. *M'Intosh*, 8 Wheaton 543 (U.S.S.C. 1823).

[68] *Worcester* v. *Georgia*, 6 Peters 515 (U.S.S.C. 1832).

independent legal right which, although recognized by the *Royal Proclamation of 1763*, nonetheless predates it.[69]

These, then, are some of the basic principles laid down by the Supreme Court governing the proof and extinguishment of aboriginal title. What impact do they have on the question of aboriginal title in New Brunswick and Nova Scotia? We will consider this matter in the context of the recent *Peter Paul* case.

The *Peter Paul* Case

The *Peter Paul* case began innocuously enough in 1996 with a charge in the New Brunswick Provincial Court.[70] The accused was Mr. Thomas Peter Paul, a status Indian, member of the MicMac nation and resident of the Papineau Reserve. He was charged with unlawfully removing timber from Crown lands without a license contrary to the *Crown Lands and Forests Act* of New Brunswick. The Court held that all the essential elements of the offence had been proven, leaving only one for debate: namely, whether the act was done "unlawfully". The defence argued that Mr. Peter Paul had not acted unlawfully, since he was exempt from the requirement of obtaining a license by reason of the fact that he had a treaty right to harvest timber on Crown lands, a right guaranteed by the *Constitution Act*, 1982.

In a carefully reasoned judgment, Arsenault J. held that the accused's activities fell within the terms of a Treaty concluded at Annapolis Royal on June 4, 1726 with the Indian tribes inhabiting the Province of Nova Scotia (which included Indians living in territories now comprised in modern New Brunswick). In particular, he held that the small-scale harvesting of timber for commercial purposes was a "lawful occasion" within the terms of the Treaty, which provided in part as follows:

> That the said Indians shall not be molested in their persons hunting fishing and shooting and planting on their planting ground nor in any other their lawfull occasions.[71]

Basing himself largely on the terms of section 88 of the Indian Act and the Supreme Court decisions in *Simon*[72] and *Sioui*,[73] Justice Arsenault held that the treaty provision prevailed over the provincial legislation in question. On the latter point, Justice Arsenault was only following a well-trodden path, blazed by the Supreme Court. More significant was his ruling that the commercial harvesting of timber was one of the

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[69]*Guerin* v. *The Queen*, *supra*, note 9, at 376-78.

[70]*R.* v. *Peter Paul* [1997] 4 C.N.L.R. 221 (N.B. Prov. Ct.).

[71]Quoted in *ibid.* at 234.

[72]*Simon* v. *The Queen*, *supra*, note 10.

[73]*R.* v. *Sioui*, *supra*, note 12.

"lawful occasions" envisaged in the Treaty of 1726. In sum, despite some references to aboriginal rights, the judgment clearly turned on the question of treaty rights.

On appeal to the Court of Queen's Bench, the case took a new and interesting turn.[74] Justice Turnbull dismissed the appeal and upheld Mr. Peter Paul's acquittal, however he invoked different grounds than those advanced by the trial court. Justice Turnbull rejected Justice Arsenault's conclusion that the right to take timber for commercial purposes was one of the "lawful occasions" envisaged by the Treaty of 1726, arguing that this right was not contemplated by any of the parties to the treaty.[75] Nevertheless, after a detailed review of a large mass of historical evidence, he came to three inter-connected conclusions.

First, Justice Turnbull seemingly inclined to the opinion that the process by which the British Crown acquired sovereignty over the old Province of Nova Scotia (which included the territory now comprised in New Brunswick) did not affect the existence of aboriginal title in the Province, other than to give the Crown an underlying title to the soil.

Second, he held that the treaties concluded by the Indians of the Province with the Crown in the period following 1713 did not involve a cession of aboriginal title to the Crown or a recognition by the Indians that the Crown held a complete title to the soil, to the exclusion of aboriginal title. All that the Indians acknowledged was the British Crown's jurisdiction and dominion over the Province.[76] Indeed, Justice Turnbull held that these treaties, and in particular the treaties concluded in the period 1725-26, actually recognized and protected the Indians' rights to the lands in their possession. This right was akin to a usufructuary right; however it was not restricted to personal use but amounted to a full-blown right of beneficial ownership, which was subject to the overall dominion and jurisdiction of the Crown.[77] As a result, the Indians had the right to cut trees on all Crown lands in New Brunswick because the restrictions in the *Crown Lands and Forests Act* did not accord primacy to Indian rights and so did not meet the guidelines laid down in the *Sparrow* decision[78] for the application of section 35(1), *Constitution Act*, 1982.[79]

This was, of course, a very significant ruling, one that went far beyond the relatively limited ground cited by the trial court. Not surprisingly, the decision was

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[74]*R.* v. *Peter Paul* [1998] 1 C.N.L.R. 209 (N.B.Q.B.).

[75]*Ibid.* at 210-11.

[76]*Ibid.* at 212, 230, 244.

[77]*Ibid.* at 212-15, 230, 236, 248-49.

[78]*R.* v. *Sparrow*, *supra*, note 11.

[79]*R.* v. *Peter Paul*, *supra*, note 74, at 249.

appealed to the New Brunswick Court of Appeal.[80] In its decision, not only did the Court of Appeal reject the reasoning and conclusions advanced by Justice Turnbull in the Court of Queen's Bench, it also rejected the more modest conclusions of Justice Arsenault at trial and entered a conviction.

The primary grounds advanced by the Court of Appeal for overturning Justice Turnbull's judgment were that in reaching his conclusions he relied on historical materials that were not placed before him by the parties but were unearthed by his own historical research. The Court of Appeal concluded that Justice Turnbull was not entitled to take judicial notice of the materials in question or to make use of them without giving notice to the parties or affording them the opportunity to address arguments or present further evidence on relevant points arising from the materials. The Court concluded that since the arguments of counsel and the evidence tendered were not directed to the issue of aboriginal title, this was not a case in which a court could properly assess any claim of aboriginal title to Crown lands in New Brunswick.[81]

As for the narrower conclusion reached by Justice Arsenault at trial, the Court of Appeal noted that Mr. Peter Paul did not put in issue, by Notice of Contention, Justice Turnbull's reversal of that conclusion. Nevertheless, the Court went on to consider and reject Justice Arsenault's interpretation of the Treaty provision on the ground there was insufficient historical evidence presented at trial regarding the intentions of the parties to the treaty and in particular no evidence to support the conclusion that commercial tree harvesting was a "lawful occasion" contemplated by the Treaty.[82]

This, then, is a short account of the progress of the *Peter Paul* case through the courts of New Brunswick. What can we say about the case and in particular about the views expressed by the Court of Appeal?

First, we may note that, although treaty rights have traditionally been of some importance to aboriginal peoples in New Brunswick and Nova Scotia, and no doubt will continue to be so, the *Peter Paul* case demonstrates that in the long run aboriginal title constitutes the fundamental underlying issue. In principle, treaty rights are clearly distinguishable from aboriginal rights, since their nature and extent depends on the specific terms of the treaty in question, as agreed by the parties. However, in practice, the line between treaty rights and aboriginal rights is not always clear. Certain treaty provisions effectively operate to affirm and protect aboriginal rights already recognized at common law. Such rights may be described as "treaty-protected aboriginal rights". The *Peter Paul* case illustrates this possibility, insofar as Justice Turnbull held in effect

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[80] *R.* v. *Peter Paul* [1998] 3 C.N.L.R. 221 (N.B.C.A.).

[81] *Ibid.* at 224, 226, 229, 230.

[82] *Ibid.* at 225-26, 231-34.

that the aboriginal title of the accused had been recognized and affirmed in certain Indian treaties concluded after the Crown's succession to France in 1713.

Second, there can be little doubt that the question of aboriginal title in New Brunswick is a complex and difficult issue, one that has a profound importance for all residents of the Province, including the aboriginal peoples. As such, it merits careful and balanced consideration in light of the full array of historical materials and legal arguments. So, with respect, the Court of Appeal was surely correct in ruling that it would be premature to draw any conclusions on the question of aboriginal title in New Brunswick in the absence of complete documentation and legal arguments. The Court was also right to hold that Justice Turnbull should not have relied on his own research in this area, in particular without giving the parties the opportunity to tender arguments on the materials uncovered.

Nevertheless, with respect, we suggest that the Court of Appeal strayed from its own principles in prematurely tendering certain opinions on the existence of aboriginal title in New Brunswick. In particular, the Court stated that in treaty promises of June 4, 1726 the Indian signatories acknowledged "his Said Majesty's just titles to this His Said Province of Nova Scotia or Acadia", as well as the fact that His Majesty by the "Treaty of Utrecht is become the rightful Possessor of the Province", and the existence of "King Georges Jurisdiction and Dominion Over the Territories of the Said Province". The Court went on to assert that the Treaty did not create or acknowledge an aboriginal title to land:

> Indeed, by it, Mr. Peter Paul's ancestors acknowledge not only the Crown's jurisdiction and dominion over the lands, *but also the Crown's title and rightful possession to the lands.* Furthermore, Mr. Peter Paul did not lead any evidence that would negate the above acknowledgements. Thus, Mr. Peter Paul has not established Aboriginal title to the Province of New Brunswick and, therefore, any Indian right derived from Aboriginal title to cut timber on Crown or private land in New Brunswick.[83]

It must be said that the inference that the Court draws from the wording of the Treaty of 1726 is not very persuasive. This inference seems to ignore a number of fundamental considerations.

First, as seen earlier, the Privy Council and the Supreme Court have authoritatively held that there is a basic distinction between sovereignty and property rights. Sovereign title to a territory does not necessarily import full property rights to the lands located in that territory, any more than property rights to such lands necessarily import sovereign title. Sovereignty is, of course, a question of international law. It entails the right to rule a certain territory to the exclusion of other international entities. By contrast, property rights are primarily a matter of domestic law. They entail the right to occupy and use a certain tract of land to the exclusion of other individuals and groups. The fact

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[83] *Ibid.* at 231; emphasis added.

that the Crown has sovereignty over a certain territory in international law does not mean that it has complete property rights to the lands within the territory as a matter of domestic law.

Second, contrary to what the Court of Appeal seems to assume, it is reasonably clear that the references in the Treaty of 1726 to the British Crown's "just titles" to Nova Scotia, its rightful possession of the Province and its "Jurisdiction and Dominion" there uniformly address the question of the Crown's international title to the territory and its succession to the claims of the King of France under the Treaty of Utrecht in 1713.[84] They do not deal with the question of aboriginal land rights, nor do they suggest that the Crown has an unencumbered property right to the lands of Nova Scotia under domestic law to the exclusion of aboriginal title.

Third, as noted above, British and Canadian courts have accepted the view that where the Crown acquires an inhabited territory, the change of sovereignty is governed by a principle of continuity. Under this principle, the existing property rights of the local inhabitants presumptively survive the change of sovereignty and are recognizable in the courts established by the new sovereign. So, in the absence of valid acts to the contrary, the land rights of the aboriginal peoples of Nova Scotia were not abrogated by the Treaty of Utrecht of 1713 or the Treaty of 1726 but continued to exist under the aegis of the British Crown. This conclusion is reinforced by the Supreme Court's rulings, discussed earlier, that the burden of proving the extinguishment of aboriginal title rests on the party alleging extinguishment, and that the intent to extinguish must be expressed in language that is clear and plain.

Finally, the continuing existence of aboriginal title in the old Province of Nova Scotia is confirmed by the well-known Proclamation issued by the British Crown on October 7th, 1763. The *Proclamation* recognized that unsurrendered lands in the possession of the Indian nations living under the Crown's protection were reserved to them and could only be ceded to the Crown in a public treaty concluded with the Indian nation in question. Careful consideration of the *Proclamation* in its historical context supports the conclusion that its principal Indian provisions applied to Nova Scotia.[85] While a detailed review of the relevant materials cannot be given here, one piece of historical evidence seems particularly telling. Shortly after the *Proclamation*'s issue, the British government forwarded a copy of the document to the Governor of Nova Scotia for publication. The Governor responded in these terms:

> A few days since, I had the Honour of Your Lordship's letters dated the 10th and 11th of October; the former containing His Majesty's Commands, for publishing the Royal Proclamation relative to the new conquer'd Countries in America: which was

[84]For fuller consideration of the issues relating to the Crown's acquisition of Nova Scotia, see Slattery, "The Land Rights of Indigenous Canadian Peoples", *supra*, note 38, at 126-48.

[85]The scope of the Proclamation is considered in detail in Slattery, *ibid.* at 191-282.

> immediately done here, and will very shortly be effected in the distant and remote parts of this Government.[86]

The point, of course, is not that the *Proclamation* is the source of aboriginal title in modern New Brunswick and Nova Scotia, but simply that it confirms the continued existence of aboriginal title in these Provinces.

So, in conclusion, I suggest that we should take the Court of Appeal's remarks on aboriginal title in the *Peter Paul* case with a grain of salt. New Brunswick and Nova Scotia cannot claim immunity from the general principles laid down more than a quarter-century ago in the *Calder* case, principles that have been reiterated and clarified by the Supreme Court in a series of authoritative cases culminating in the recent decision in *Delgamuukw*. Although most of these cases originated in other parts of Canada, the basic principles recognized by the Supreme Court are general in scope and apply to the whole of Canada.

To my mind, then, the question of aboriginal title in New Brunswick and Nova Scotia is very much alive and will continue to preoccupy the courts of those provinces for some years to come. Perhaps the governments of New Brunswick and Nova Scotia would be wise to read the judicial writing on the wall and take steps to resolve the matter by timely negotiations.

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[86]Quoted in Slattery, *ibid.* at 247; for further evidence of the *Proclamation*'s application in Nova Scotia, see *ibid.* at 247-50.