THE POST-DELGAMUUKW NATURE AND CONTENT OF ABORIGINAL TITLE

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# TABLE OF CONTENTS

Introduction 1

1. The Source of Aboriginal Title 3
2. The Proprietary Status of Aboriginal Title 10
3. The Content of Aboriginal Title 14
4. The Inherent Limit on Aboriginal Title 21
5. The Communal Nature of Aboriginal Title 30
6. The Inalienability of Aboriginal Title 38

Conclusions 48
taken (the choice would depend on the circumstances and the available evidence), Aboriginal law would nonetheless continue to apply internally to regulate landholding by the members of Aboriginal nations within their communities. Moreover, as those communities would need to have the capacity to change their law for it to continue to be relevant to new circumstances, self-government is a necessary corollary of the concept of Aboriginal title outlined in *Delgamuukw*. We will return to this issue in our discussions of the inherent limit, Aboriginal title's communal nature, and inalienability.

2. The Proprietary Status of Aboriginal Title

Any lingering doubts about the status of Aboriginal title as a property right were clearly put to rest by the *Delgamuukw* decision. Referring to Lord Watson's description of Aboriginal title in the *St. Catherine's* case as "a personal and usufructuary right", Lamer C.J. said:

This Court has taken pains to clarify that aboriginal title is only "personal" in this sense [i.e., in the sense of being inalienable], and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests: see *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at p. 677.

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See "Aboriginal Rights in Canada", *supra* n.6, at 278-91.

*Supra* n.2, at 54.

*Delgamuukw*, *supra* n.1, at 1081-82 (para. 113).
The proprietary nature of Aboriginal title was confirmed by Lamer in his rejection of the argument made by the governments of Canada and British Columbia that Aboriginal title has no independent content, being only the aggregate of other Aboriginal rights to engage in specific activities, such as hunting and fishing, on the claimed land. Instead, he said that Aboriginal title is "an interest in land" and a "right to the land itself". Indeed, the very term "title" would be a misnomer if Aboriginal land rights were not proprietary.

A significant consequence of classifying Aboriginal title as proprietary is to clothe it with all the protection the common law has traditionally accorded to property rights. As prominent commentators on British constitutional principles have repeatedly emphasized, ever since Magna Carta the common law has accorded the same kind of special protection to property rights as it has to other fundamental rights and freedoms, such as liberty and security of the person. As a result, the executive branch of government can only infringe property rights when it has

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35 Ibid., at 1081 (para. 112), 1095 (para. 138), 1096 (para. 140) (emphasis in original at 1096). This should have been apparent from the St. Catherine's decision itself, as Lord Watson said that Aboriginal title to land "is an interest other than that of the Province in the same" within the meaning of s.109 of the Constitution Act, 1867, 30 & 31 Vict., c.3 (U.K.), and that the beneficial interest in Aboriginal title lands would only become available to the provinces "as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title": supra n.2, at 58-59. For discussion, see Hamar Foster, "Aboriginal Title and the Provincial Obligation to Respect It: Is Delgamuukw v. British Columbia `Invented Law'?" (1998) 56 The Advocate 221.

36 See generally Bernard Rudden, "The Terminology of Title" (1964) 80 L.Q.R. 63.

37 For more detailed discussion, see "Constitutionally Protected Property Right", supra n.10.

38 17 John (1215).

unequivocal statutory authority to do so.\textsuperscript{40} Put another way, the Crown cannot seize property by act of state within its own dominions,\textsuperscript{41} as that would be a violation of the rule of law.\textsuperscript{42}

This means that, clear and plain statutory authority apart, after British acquisition of sovereignty and the reception of the common law the Crown has never had the power to infringe or unilaterally extinguish Aboriginal title in Canada.\textsuperscript{43} So even prior to the constitutional entrenchment of Aboriginal title, along with other Aboriginal and treaty rights, by s.35(1) of the\textit{ Constitution Act, 1982},\textsuperscript{44} the Crown in its executive capacity had no more authority to interfere with


\textsuperscript{43} So when Lord Watson stated in the\textit{ St. Catherine's} case, supra n.2, at 54, that Aboriginal title is "dependent upon the good will of the Sovereign", he must have had in mind the legislative authority of the Crown in Parliament rather than the executive authority of the Crown: see\textit{ Mathias v. Findlay}, [1978] 4W.W.R. 653 (B.C.S.C.), at 656. This is because, having held that Aboriginal title is an interest in land (see supra n.35), fundamental constitutional principles would have prevented him from concluding that the Crown in its executive capacity could infringe that proprietary interest without unequivocal statutory authority. For further discussion of this issue in relation to the\textit{ Royal Proclamation of 1763}, see Kent McNeil, "The Temagami Indian Land Claim: Loosening the Judicial Strait-jacket", in Matt Bray and Ashley Thomson, eds.,\textit{ Temagami: A Debate on Wilderness} (Toronto: Dundurn Press, 1990), 185. On Crown acquisition of sovereignty, see supra n.17.

\textsuperscript{44} Schedule B to the\textit{ Canada Act 1982}, c.11 (U.K.). Section 35(1) provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."