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Delgamuukw and the Protection of Aboriginal Land Interests

*Gordon Christie**

Afin de déterminer la nature du contrôle dont jouissent les détenteurs du titre autochtone sur les domaines autochtones, il faut examiner la doctrine de fiducie, car c'est l'application de cette doctrine en matière des violations législatives qui sert à établir les limites dans lesquelles les détenteurs du titre autochtone peuvent s'attendre au respect de leurs droits. Dans l'affaire Delgamuukw, *la Cour suprême du Canada a adopté et appliqué son interprétation de la relation fiduciaire entre la Couronne et les Autochtones énoncée dans l'affaire* Gladstone. *Ce faisant, la Cour suprême a défini le pouvoir des gouvernements canadiens de contrôler l'usage qui peut être fait des terres détenues en vertu du titre autochtone. Ironiquement, la Cour ayant décrit le titre autochtone comme étant de nature exclusive, l'application de la règle énoncée dans l'arrêt* Gladstone *augmente le pouvoir de la Couronne de façon importante. Cela a mené à la création de la notion juridique de titre autochtone, laquelle semble à première vue très prometteuse pour les peuples autochtones qui cherchent à se conformer à leurs responsabilités sacrées envers leurs terres. En réalité,*

To determine the extent to which Aboriginal title-holders enjoy control over Aboriginal title lands, it is necessary to explore fiduciary doctrine, for the application of this doctrine to the question of legislative infringement determines the limits within which Aboriginal title-holders can expect to see their interests respected. In Delgamuukw *the Supreme Court Canada adopted and applied an understanding of the Crown-Aboriginal fiduciary relationship it developed in* Gladstone. *In so doing the Supreme Court set out the power of Canadian governments to control the uses to which Aboriginal title lands can be put. Ironically, since Aboriginal title is characterized by the Court as exclusive in nature, the application of the* Gladstone *position significantly enhances the power of the Crown. The result is the creation of a judicial concept of Aboriginal title which on first reading might appear to hold out much promise to Aboriginal peoples struggling to meet sacred responsibilities vis-à-vis their lands, but which is actually impotent to slow the exploitation of Aboriginal lands by Canadian governments and third parties acting under authority of Canadian governments. Clearly, then,*

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* Gordon Christie, Assistant Professor, Osgoode Hall Law School. I would like to thank, for their conversation and encouragement, the members of the Indigenous Rights Colloquium. Parts of this paper were (roughly) sketched out in an earlier work for the *Delgamuukw National Review*. All errors and deficiencies are directly attributable to the author.

par contre, elle n'est d'aucune utilité pour ralentir l'exploitation des terres autochtones par les gouvernements canadiens et les tierces parties agissant pour le compte des gouvernements canadiens. De toute évidence, il faut donc voir l'arrêt Delgamuukw *comme un instrument juridique qui sert à poursuivre les efforts d'assimilation des peuples autochtones dans le courant principal de la société canadienne.*

Delgamuukw *must be understood as a legal tool employed in continuing efforts to assimilate Aboriginal peoples into mainstream Canadian society.*

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I. INTRODUCTION

In *Delgamuukw* v. *British Columbia,*[1] the Supreme Court of Canada offered guidance to Canadian courts on a variety of judicially unresolved matters concerning the nature of Aboriginal title.[2] While the general nature of Aboriginal rights had been circumscribed in *Van der Peet,*[3] Aboriginal rights in relation to lands traditionally occupied by Aboriginal peoples had not been clarified. *Delgamuukw*, a case which in lower courts had already assumed legendary status,[4] offered an opportunity to settle questions about the general legal nature of Aboriginal interests in Aboriginal lands.

On a general plane of abstraction, it can be said that Aboriginal peoples share a vision of their lands and their relationships to these lands (so long as it is borne in mind that the details of the structures built out of the shared conceptual base differ from region to region). This shared vision can be expounded in terms of spiritual connections to those lands Aboriginal peoples see as placed in their care by the Creator; spiritual connections spelled out in terms of sacred responsibilities.[5] Conditions conducive to the

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[1] [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 [hereinafter *Delgamuukw* cited to S.C.R.].

[2] In the early seminal decision, *St. Catherine's Milling and Lumber Co.* v. *R.* (1888), 14 App. Cas. 46 at 54 (P.C.) [hereinafter *St. Catherine's Milling*], the Privy Council held that Aboriginal title was a "personal and usufructuary right". As Lamer C.J. noted in *Delgamuukw*, *supra* note 1 at 1083, the court then "declined to explain what that meant because it was not 'necessary to express any opinion upon the point' (at p.55)". Lamer went on to point out that: "[s]imilarly, in *Calder* (*Calder* v. *British Columbia (A.G.)*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145 [hereinafter *Calder* cited to S.C.R.]), *Guerin* (*Guerin* v. *R.*, [1984] 2 S.C.R 335, 13 D.L.R. (4th) 321 [hereinafter *Guerin* cited to S.C.R.]), and *Paul* (*Canadian Pacific Ltd.* v. *Paul*, [1988] 2 S.C.R. 654, 53 D.L.R. (4th) 487 [hereinafter *Paul* cited to S.C.R.]), the issues were the extinguishment of, the fiduciary duty arising from the surrender of, and statutory easements over land held pursuant to, [A]boriginal title, respectively; the content of title was not at issue and was not directly addressed." Apart from this apparent reluctance to define the content of Aboriginal title, the courts devised a test to determine the validity of a claim to title in *Baker Lake (Hamlet)* v. *Canada (Minister of Indian Affairs and Northern Development)*, [1980] 1 F.C. 518 (T.D.), [1980] 5 W.W.R. 193 [hereinafter *Baker Lake* cited to F.C.]. They set out a test for the legitimate infringement of Aboriginal rights by the Crown in *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [hereinafter *Sparrow* cited to S.C.R.], modified this test somewhat in *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 [hereinafter *Gladstone* cited to S.C.R.], and laid out the nature of Aboriginal rights in general in *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 [hereinafter *Van der Peet* cited to S.C.R.]. Since the Supreme Court had put some distance between Aboriginal rights and Aboriginal title in *R.* v. *Adams*, [1996] 3 S.C.R. 101, 138 D.L.R. (4th) 657 [hereinafter *Adams* cited to S.C.R.], the nature of title remained to be determined.

[3] *Van der Peet*, *supra* note 2.

[4] *Delgamuukw* v. *British Columbia* (1991), 79 D.L.R. (4th) 185, [1991] 3 W.W.R. 97 (B.C.S.C.); *Delgamuukw* v. *British Columbia* (1993), 104 D.L.R. (4th) 470, [1993] 5 W.W.R. 97 (B.C.C.A.). The trial judgment, in particular, received a notorious standing, as criticism from a multidisciplinary front fell on MacEachern J.'s ruling. See *e.g.* F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books, 1992), and D. Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Burnaby: Talonbooks, 1998).

[5] Included below are a small sample drawn from the now fairly prolific and widely disseminated statements and tracts attesting to this generally held perception of the nature of land, and the relationships between Aboriginal peoples and their lands:

1. Statement of the Gitwangak Chiefs, quoted in Skanu'u (A. Wilson) and

protection of these Aboriginal interests in Aboriginal land--interests culled from the perspective Aboriginal peoples bring to this issue--are not difficult to determine. The rightful authority of Aboriginal peoples to "govern" their lands should be

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> D. Monet, *Colonialism on Trial: Indigenous Land Rights and the Gitksan and Wet'suwet'en Sovereignty Case* (Philadelphia: New Society Publishing, 1992) at 1: "We hold these lands by the best of all titles. We have received them as a gift from the Creator to our Grandmothers and Grandfathers, and we believe that we cannot be deprived of them by anything short of direct injustice."
> 2. Statement of Hopi Religious Leaders, as quoted in P. Knudtson & D. Suzuki, *Wisdom of the Elders* (Toronto: Stoddart Publishing, 1992) at 137: "This land was granted to the Hopi by a power greater than man can explain....The land is sacred and if the land is abused, the sacredness of Hopi life will disappear and all other life as well....The Hopi were given special guidance in caring for our sacred lands so as not to disrupt the fragile harmony that holds things together....We received these lands from the Great Spirit and we must hold them for him, as a steward, a caretaker, until he returns."
> 3. G. Cajete, "Ensoulment of Nature" in A. Hirschfelder, ed., *Native Heritage: Personal Accounts by American Indians, 1790 to the Present* (New York: Macmillan, 1995) at 55-57: "Traditionally, Indian people have expressed in multiple ways that their land and the maintenance of its ecological integrity is key to their physical and cultural survival....Indian people expressed a relationship to the natural world that can only be called *ensoulment*....This projection of the human sense of soul...has been called 'participation mystique'....It is from this orientation that Indian people believed that they had responsibilities to the land and to all living things, similar to those which they had to each other....They understood themselves as literally born of the earth of their Place....This was the ultimate identification of being indigenous to a place and forms the basis for a fully internalized bonding with Place....The disconnection of that kinship can lead to a deep split in the inner and outer consciousness of the individual and group....which can ultimately only be healed through re-establishing the meaningful ties to the land that have been lost. Reconnecting with nature and its inherent meaning is an essential healing and transformational process for Indian people."

An attempt to provide an overview of a generalized Aboriginal conception of Aboriginal title is offered by Leroy Little Bear in "Aboriginal Rights and the Canadian 'Grundnorm'" in J.R. Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986) at 243.

The *Report of the Royal Commission on Aboriginal Peoples* also provides valuable insights into Aboriginal peoples' conceptions of land and their interrelationships with it. See Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Communications Group, 1996) (Co-chairs: R. Dussault & G. Erasmus) [hereinafter *RCAP*]. One key point linking together the varied conceptions is that the granting of lands by the Creator is never conceived of as absolute. Rather, there is at least one general condition on the granting, namely that the Aboriginal grantees maintain and respect their sense of responsibilities toward not only their immediate community, but to past and future generations, and to all other inhabitants of the lands, plant, animal and otherwise.

acknowledged,[6] and the power to do so placed in their hands. This would enable Aboriginal peoples to circle back to the task of fulfilling their responsibilities.

We might expect that the Supreme Court would struggle to integrate the Aboriginal vision of land "title" into Canadian law, trying to bridge the gap between the dominant legal system and the interests of the colonized and dispossessed. Unfortunately, the legal creature known as "Aboriginal title"[7] (rising out of the Court's reasoning in *Delgamuukw*) seems to have very little to do with Aboriginal visions of land title, and everything to do with accelerating the integration (and disappearance) of Aboriginal peoples into Canadian society.

When we consider that Aboriginal peoples can only hope to meet their responsibilities *vis-à-vis* the stewardship of their lands when they enjoy a sufficient degree of control over the uses to which these lands are put, it is clear that the key question in examining *Delgamuukw* is the extent to which the judgment moves the law along on a path toward reinitiating Aboriginal land control. This demands that we move beyond the description of the nature of Aboriginal title offered by the Court, for this tells us little more than how the Court conceives the nature of the relationship between Aboriginal title-holders and their lands. What we need to focus on is the question of the extent to which the Court upholds the ability of the title-holders to control the uses to which their lands are put. As we will find, however, resolving this question requires that we examine the extent to which the Court upholds the power of Canadian governments to control these very same lands. What emerges from an examination of both the nature of Aboriginal title and the respective powers of Aboriginal peoples and Canadian governments *vis-à-vis* Aboriginal lands is a picture of a judicially determined creation which is described so as to *appear* quite powerful, but which is severely restricted if exercised by Aboriginal title-holders.

We turn, then, to certain features of Aboriginal title. These are the features which both (a) *describe* the sorts of power Aboriginal title-holders *ought* to be able to exercise, and (b) *determine* the sort of control over traditional territory that Aboriginal land-owners are *actually* accorded. The *combination* of these features determines the extent to which Aboriginal peoples will be able to revitalize, under current Canadian law, their relations to the land and its spirits.

II. THE NATURE OF ABORIGINAL TITLE

A. *A Right to Land*

In spelling out the content of Aboriginal title in *Delgamuukw*, Lamer C.J. concluded the following:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves [A]boriginal rights. Rather,

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[6] It may be problematic to employ the term "govern" if this carries with it certain Euro-Canadian overtones (such as notions of dominance and majority rule). See T. Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, Ontario: Oxford University Press, 1999) at 24-29.

[7] Henceforth this term will denote the conceptualization of Aboriginal interests in Aboriginal lands developed by the Supreme Court, in distinction from those conceptualizations Aboriginal peoples might provide.

> it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of [A]boriginal societies.[8]

In *Van der Peet*,[9] the Supreme Court tied Aboriginal rights to the *traditional practices* and *customs* of the people in question. In making this determination concerning Aboriginal title, Lamer C.J. struck out on a different conceptual path, for allowance was made for Aboriginal rights *not* tethered to "aspects of practices, customs and traditions....integral to the distinctive cultures of aboriginal societies."[10]

Over the last few decades, the judiciary has come to see itself as protecting the interests of Aboriginal peoples *as Aboriginal peoples*. This is the doctrine of "Aboriginality," the protection of various essences of diverse Aboriginal cultures as expressed through their historic practices and customs. In *Van der Peet*, for example, Lamer C.J. laid down a fundamental understanding of the nature of constitutionally protected Aboriginal rights, saying that they are known as *Aboriginal* rights precisely because the aim has been to constitutionally protect Aboriginal peoples *as Aboriginal peoples*, something only made possible with the protection of particularly *Aboriginal* practices and the like.[11]

A number of commentators have criticized this approach to Aboriginal rights on the basis that it "freezes" Aboriginal peoples in the past, forcing them to show how they exhibit today the same cultural practices and traditions that existed at the time of contact.[12] Only if Aboriginal people live up to a standard of Aboriginality grounded in historic practices and customs are they able to assert Aboriginal rights. Besides trapping Aboriginal communities in constructs based on centuries-old customs and traditions, this

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[8] *Delgamuukw*, *supra* note 1 at 1080. That this does not amount to some form of inalienable fee simple estate will be made clear as the full content of Aboriginal title is revealed.

[9] *Van der Peet*, *supra* note 2.

[10] *Delgamuukw*, *supra* note 1 at 1080. In discussing how the dialogue between the courts and the legislatures plays a major role in determining the direction that jurisprudence on Aboriginal law takes, Jonathan Rudin noted that *Delgamuukw* (as *Sparrow* had earlier, though in a different context) set out on a new jurisprudential path. See J. Rudin, "One Step Forward, Two Steps Back: The Political and Institutional Dynamics Behind the Supreme Court of Canada's Decisions in *R.* v. *Sparrow*, *R.* v. *Van der Peet* and *Delgamuukw* v. *British Columbia*" (1998) 13 J.L. & Soc. Pol'y 67 at 90.

[11] See *Van der Peet*, *supra* note 2 at 534: "[A]boriginal rights must be viewed differently from *Charter* rights because they are rights held only by [A]boriginal members of Canadian society. They arise from the fact that [A]boriginal people are *[A]boriginal*" (emphasis in original). And later at 548: "[t]he test for identifying the [A]boriginal rights recognized and affirmed by s.35 (1) must....aim at identifying the practices, traditions and customs central to the [A]boriginal societies that existed in North America prior to contact with the Europeans."

[12] See *e.g.* J. Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 Am. Indian L. Rev. 37 [hereinafter "Frozen Rights"]; K. McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998) 5 Tulsa J. of Comp. & Int'l Law 253 [hereinafter "Territorial Sovereignty"]; R. L. Barsh & J. Y. Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 McGill L. J. 993.

doctrine also acts to oppress Aboriginal peoples, forcing them to either live according to standards imposed by the courts or lose their historic claims.[13]

The finding that Aboriginal title constitutes a "right to land" would seem to move away from this protectionist (and paternalistic) doctrine. The Court has taken a step away from the general approach to Aboriginal rights in acknowledging uses of the land as *Aboriginal*, when falling under Aboriginal title, *even when they are not tied to historic uses.*[14]

Nevertheless, while it is vital to understanding the nature of Aboriginal title, the impact of the new "right to land" direction for Aboriginal title must be measured against other elements that go into its *sui generis* nature as defined by the Supreme Court.[15] Otherwise one might imagine that Aboriginal peoples have been accorded the sort of title which could enable them, as landowners, to renew traditional lives and to

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[13] This criticism, which I endorse, is consistent with the claim that since Aboriginal peoples can only reconnect with their age-old responsibilities if control of their lands is placed in their hands, this must be the aim of Canadian law. The argument against "freezing" Aboriginal people and their rights is (a) aimed at practices, not principles or beliefs; and (b) points to instances of colonialism, wherein Euro-Canadian courts determine the parameters of the issue at hand, the mechanisms for finding and validating facts, the nature of the impugned rights, and even the very conceptual framework within which all this takes place. The call for reinvigoration of Aboriginal land control, on the other hand, emanates from within Aboriginal communities, and is not directed toward particular physical uses of the land, but at enabling the continuation and strengthening of sacred connections to the land.

[14] Exploring the Court's discussion of the nature of the Crown's fiduciary duties to Aboriginal title-holders reveals that *protecting* Aboriginal societies as Aboriginal societies–even from themselves–is still an underlying theme in Aboriginal title, as this concept is developed in *Delgamuukw*. See Section III, below, for more on this topic.

[15] That Aboriginal title is *sui generis* in nature has been an explicit tenet of Canadian law since Dickson J. concluded in *Guerin*, *supra* note 2 at 382 that "in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law." In light of this inappropriateness, Dickson J. characterized the Indian interest in land as *sui generis* a few lines later. This line of reasoning was carried forward in *Sparrow*, *supra* note 2 at 1112 where Dickson J. and La Forest J. held that "[c]ourts must be careful....to avoid the application of traditional common law concepts of property as they develop their understanding of....the '*sui generis*' nature of [A]boriginal rights."

In *Delgamuukw*, *supra* note 1 at 1081, Lamer C.J. held that: "Aboriginal title has been described as *sui generis* in order to distinguish it from 'normal' proprietary interests, such as fee simple." This aspect of Aboriginal title, which might seem to grant a license to the Supreme Court to invent doctrine, will come back into the discussion later, when we explore the proof requirements set out in *Delgamuukw*.

William F. Flanagan challenges the theoretical underpinning of the Court's use of the *sui generis* designation in his article "Piercing the Veil of Real Property Law: *Delgamuukw* v. *British Columbia*" (1998) 24 Queen's L.J. 279. Acknowledging that there may be reason to "pierce the veil," Flanagan notes at 283-285 the danger of labeling a new legal concept as *sui generis*: "as is the case in corporate law, whenever a court asserts such a broad jurisdiction to disregard established legal doctrine in order to achieve what is perceived as an equitable result, it is entering uncharted waters." In the context of *Delgamuukw*, the concern becomes "whether 'piercing the veil' in this case is an elaborate device to *restrict* the scope of [A]boriginal title, rather than a culturally sensitive approach that recognizes that 'formalistic' and 'alien' principles of property law should not be applied to [A]boriginal title." (emphasis in original)

legally challenge much of the resource exploitation currently devastating their traditional territories.

We begin with some features of Aboriginal title that seem to strengthen the nature of the Aboriginal right to land. This is followed by an exploration into the Court's discussion of the power of the Crown to infringe Aboriginal title, a discussion which reveals the true power accorded Aboriginal title-holders.

B. *Exclusivity*

The court in *Delgamuukw* made a number of fairly unremarkable findings[16] in conjunction with several more interesting determinations. Aboriginal title was found to be a collective or communal right, not an interest grounded in the rightful claims of individual Aboriginal people. This has long been a common law understanding of Aboriginal claims to land.[17] Aboriginal title was also found to be inalienable, except to the Crown. This also is no surprise, and has underscored Crown dealings with issues of Aboriginal claims to land at the very least since the Royal Proclamation.[18]

In finding a right to land itself, however, the court also found an *exclusivity* of ownership absent from earlier decisions on Aboriginal title.[19] On numerous occasions, Canadian courts had held that valid Aboriginal claims to land amounted to rights to use and occupy certain tracts.[20] To elevate these rights to the status of rights to the *exclusive* use and occupation of the land must certainly add an element that transforms the judiciaries' understanding of the nature of Aboriginal title.

It might seem a fairly natural approach to unpacking what this element adds to the concept of Aboriginal title to suppose that the term means basically what it means in other property contexts. Exclusivity, then, would entail a particular sort of ownership, for when a right of this nature is acknowledged, the party with an interest in the land not only has the right to enjoy the land and its fruits, but also, to some degree, the ability to determine how, if at all, others will do likewise.

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[16] "Unremarkable" in this context is measured against jurisprudence on Aboriginal title, as it existed up to this point, and is certainly not meant to suggest that these determinations are, in themselves, unremarkable.

[17] *Delgamuukw, supra* note 1 at 1082: "A further dimension of [A]boriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an [A]boriginal nation."

[18] *Royal Proclamation of 7 October, 1763*, R.S.C. 1985, App. II, No. 1:

> We do, with the advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name.

[19] *Delgamuukw, supra* note 1 at 1083: "[T]he content of [A]boriginal title can be summarized by two propositions: first, that [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 [A]boriginal practices, customs and traditions which are integral to distinctive [A]boriginal cultures." The second proposition concerns an "inherent limit" to Aboriginal title, not discussed in this work.

[20] See *e.g. St. Catherine's Milling, supra* note 2; *Calder, supra* note 2; *Guerin, supra* note 2; *Van der Peet, supra* note 2.

Exclusivity would seem, then, to entail a significant degree of *control*, including, as Kent McNeil points out, "as much right as any other landholder to prevent others–and this includes governments–from intruding on and using their lands without their consent."[21] This would appear to be a powerful newly "discovered" feature of Aboriginal title. This would also seem to entail a feature which appears later in the judgment, as Lamer C.J. takes note of several characteristics of Aboriginal title that go into determining the particular form and content of the fiduciary duty that the Crown will fall under in its dealings with Aboriginal peoples *vis-à-vis* their land: "[A]boriginal title encompasses *the right to choose* to what uses land can be put."[22]

Exclusivity of Aboriginal title would appear to be further strengthened when the place of this right in the Constitutional scheme is brought to mind: "Indeed," McNeil continues, "[Aboriginal title-holders] should have even greater protection against government intrusion than other landholders because their Aboriginal rights have been recognized and affirmed by the Constitution, whereas the property rights of other landholders have not."[23]

This form of exclusivity is, however, a very odd creature. It would seem to make sense to say that it entails a significant degree of control, and that it is enhanced in light of the constitutionalization of Aboriginal rights. But when we look to the "cash value" of exclusivity in this context (a task to be undertaken in detail in the next part of this work)[24] we find the ledger strangely depleted. Aboriginal peoples would not seem entitled to buy a "no trespassing" sign, let alone entitled to enforce a "significant" degree of control over their lands.

Granted the *sui generis* status of Aboriginal title[25] seems to give free rein to the Court to construct whatever peculiar vision seems appropriate in its eyes. If anything, however, this only heightens the air of mystery hanging over a form of title which, though seemingly powerful, is actually quite impotent. To appreciate this mystery, we must look to how the Court has spelled out the power of the Crown in relation to Aboriginal title lands.

III. INFRINGEMENT OF ABORIGINAL TITLE

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[21] K. McNeil, *Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got it Right?* (Toronto: Roberts Centre for Canadian Studies, 1998) at 11 [hereinafter *Defining Aboriginal Title*]. It must be kept in mind that a common landowner, lacking the radical or underlying title vested in the Crown (not being a sovereign power), can find his or her consent ignored or over-ridden in certain clearly defined situations.

[22] *Delgamuukw, supra* note 1 at 1111 (emphasis in original). A few paragraphs later Lamer C.J. repeats at 1113 that: "[A]boriginal title encompasses within it a right to choose to what ends a piece of land can be put." While exclusivity and the right to choose ends are presented as separate aspects of Aboriginal title in these paragraphs, the latter must issue from the former, for no mention is made of the right to choose ends when the court presents its definition of Aboriginal title.

[23] *Defining Aboriginal Title, supra* note 21 at 11. McNeil goes on to point out that this feature does not seem to be given the weight it should by the Supreme Court, for later in *Delgamuukw* the court lays down the law concerning the infringement of Aboriginal title, presenting a picture of legitimate infringement which would not seem applicable to common landholders' interests. This is discussed more fully later in this paper.

[24] See, in particular, the discussion of fiduciary doctrine as it applies to the Crown's interaction with Aboriginal title.

[25] See *supra* note 15 for a discussion of the *sui generis* nature of Aboriginal title.

A. *The Power of the Crown*

To explore the power of the Crown in relation to Aboriginal lands, we need to consider remarks coming at the end of the judgment, as the Court turned to the question of legislative infringement of Aboriginal title. While these latter remarks do not purport to illuminate the content of Aboriginal title, they have an enormous impact on the sort of title Aboriginal peoples will be able to assert. For example, these remarks signal a powerful factor counter-balancing a naive or simplistic "exclusive right to land" vision of Aboriginal title. Furthermore, the discussion of legislative infringement reveals detail concerning the degree of land control the Supreme Court finds intertwined with the concept of Aboriginal title. In examining the power that the governments of Canada enjoy over Aboriginal lands, the power in the hands of Aboriginal peoples is thrown into negative relief.

There is in *Delgamuukw* a complex, and at times confusing, discussion of the sort of involvement required of, or reparation owed to, Aboriginal people adversely affected by legislative infringement of the enjoyment of their title and associated rights.[26] In certain circumstances, for example, the *consent* of an Aboriginal party may be required before government action is taken:

> [A]boriginal title encompasses within it a right to choose to what ends a piece of land can be put....There is always a duty of consultation....In most cases, it will be significantly deeper than mere consultation. Some cases *may* even require the full consent of an [A]boriginal nation, particularly when provinces enact hunting and fishing regulations in relation to [A]boriginal lands.[27]

Some might see this as significantly strengthening the pre-*Delgamuukw* Aboriginal position, for depending on the Aboriginal right in question (*i.e.* a powerful connection to a particular piece of land, of central importance to the people in question), this might seem to necessitate obtaining consent *before* infringement can take place.

This remark must, however, be taken in the context of the Court's discussion of the power of the Crown in relation to Aboriginal title. In this regard we must consider the nature of the *fiduciary duties* the Crown must acknowledge in relation to Aboriginal peoples and their lands, and the manner by which the Crown may properly discharge these duties. It is fiduciary doctrine which structured the discussion of infringement in *Sparrow*[28] and *Gladstone*,[29] cases which set out the Court's position on the power of the Crown *vis-à-vis* constitutionally protected Aboriginal rights. Fiduciary doctrine comes in to determine Crown duties, such that outside the circle inscribed by Crown-Aboriginal fiduciary relationships, it is not clear that the Court would find the Crown has any greater duty in regards to Aboriginal peoples than it has to any other subset of the Canadian population.[30] It is in properly discharging fiduciary obligations

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[26] *Delgamuukw, supra* note 1 at 1111-1114.

[27] *Ibid.* at 1113 (emphasis added). Note the connection in this passage to "traditional activities," those central to the distinctive culture of the Aboriginal people in question.

[28] *Sparrow, supra* note 2.

[29] *Gladstone, supra* note 2.

[30] Even Crown-Aboriginal treaties are approached by the Court through fiduciary doctrine. See *Adams, supra* note 2; *R.* v. *Badger*, [1996] 1 S.C.R. 771, 133 D.L.R. (4th) 324.

that the Canadian government can *legitimize* legislative action that *prima facie* infringes the impugned Aboriginal right(s).

Before exploring how the Court deploys fiduciary doctrine in recent decisions, a few words are in order concerning the general nature of the law of fiduciary relations, and more specifically how it *ought* to apply in the Crown-Aboriginal context. A useful analysis of the nature of Crown-Aboriginal fiduciary relationships is provided by Leonard Rotman in *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada.*[31]

B. *The Nature of Fiduciary Relationships*

In *Parallel Paths*, Rotman eschews the common misconception of fiduciary doctrine as "merely a set of loosely fitting or entirely unrelated rules functioning in an ad hoc fashion," arguing instead for a theory which holds that fiduciary doctrine "....is a blueprint for the protection and continued efficacy of interdependent societal relations."[32]

Along these lines Rotman argues for a functional, situation-specific approach. To employ this approach is to engage a three-stage process: determining whether the particular relationship under scrutiny is fiduciary in nature; subjecting a relationship so characterized to the general principles of fiduciary doctrine; and applying the appropriate remedy, should a breach be found.[33]

In the Crown-Aboriginal context, the first stage would depend on whether the questionable activity was in relation to the general historic relationship between the Crown and Canada's Aboriginal peoples, or based on a particular set of circumstances surrounding the Crown and some particular Aboriginal people. We can limit discussion to the general context, and leave the application to more particularized situations to the natural extension of these comments and the investigation that would need to follow the allegation of a breach of fiduciary duty in those narrower confines.

On a very general level, the existence of a fiduciary relationship between the Crown and Canada's Aboriginal peoples is clear.[34] This relationship, Rotman argues, is based in the historic interaction between the two parties, a relationship on an *international* level.[35] The relationship continued and evolved through the devolution of

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[31] (Toronto: University of Toronto Press, 1996) [hereinafter *Parallel Paths*].

[32] *Ibid.* at 199.

[33] *Ibid.* at 177.

[34] Of course the Supreme Court has recognized the existence of this fiduciary relationship, and in *Sparrow*, *supra* note 2, noted that this relationship is constitutionally entrenched in s. 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Constitution Act, 1982*]: "The existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed."

Nevertheless, as Rotman notes, merely recognizing the existence of the relationship, without specifying how the relationship came into existence, and the precise nature of this relationship, does a great disservice. It leaves unanswered just those fundamental questions that need to be resolved before progress can be made on the second two stages of the process of applying fiduciary theory. See *Parallel Paths*, *supra* note 31 at 204-205.

[35] At the outset of the relationship there can be no doubt that the British Crown thought of Aboriginal peoples as constituting nations. Furthermore, the relationship was formed between unequals, for Aboriginal peoples were much more powerful than the visitors, and remained so for quite some time. See *Parallel Paths*, *supra* note 31 at 21-73 for an historical overview and

power to the Canadian Crown, and exists today constitutionally entrenched in s. 35(1) of the *Constitution Act, 1982.*[36] The relationship emerged as essentially fiduciary when the Crown, as it became the fiduciary, began to take on, or "capture", power enjoyed by Canada's Aboriginal peoples. Aboriginal peoples simultaneously became beneficiaries. In this transfer of power is found the fountainhead of this general fiduciary relationship--all understanding must flow from complete appreciation of this movement.

Once a transfer of power is effectuated, four basic elements of any fiduciary relationship can be articulated, each of which applies in the general Canadian-Aboriginal context: (1) the fiduciary must have the ability to positively or negatively affect the interests of the beneficiary; (2) the interests of the beneficiary--in the context of the fiduciary relationship--can only be met through the actions of the fiduciary; (3) the fiduciary has an obligation to act in the beneficiaries' best interests; and (4) the beneficiary relies on the honesty, integrity, and fidelity of the fiduciary as it acts in the beneficiaries' best interests.[37]

Given the existence of these elements of the relationship, the question then is what doctrinal consequences follow. Referring to Hohfeld's influential work on the nature of the law as "merely the description and enforcement of the bundle of rights and duties that are possessed by the participants in various situations and which govern the relationships that stem therefrom,"[38] Rotman argues that "fiduciary doctrine creates a situation whereby after beneficiaries' transfer of powers to their fiduciaries, certain rights are bestowed on the beneficiaries, and concurrent obligations are imposed on their fiduciaries to act in the former's best interests."[39] Tying together the obligations of the fiduciary is a "common, core obligation pertaining to all fiduciaries within the scope of their fiduciary positions.... to act in the best interests of their beneficiaries."[40]

Whether or not a breach of the general fiduciary relationship has occurred in any particular situation depends on the presence or lack of utmost good faith in the actions of the fiduciary in relation to the prescribed interests of the beneficiaries. While the fiduciary may enjoy some latitude in deciding the nature of the best interests of those beneficiaries it serves, even those decisions must be subject to the requirement of good faith.

C. Sparrow *and* Gladstone: *Application of Fiduciary Doctrine to the Infringement of Aboriginal Rights*

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analysis of the first few centuries of interaction, and the Supreme Court discussion in *Sioui* v. *Quebec (Attorney General)*, [1990] 1 S.C.R. 1025 at 1052-53, 70 D.L.R. (4th) 427 [hereinafter *Sioui* quoted to S.C.R.]: "[We] can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain good relations with them very close to those maintained between sovereign nations....This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations. The papers of Sir William Johnson....demonstrate the recognition by Great Britain that nation-to-nation relations had to be conducted with the North American Indians."

[36] *Constitution Act,1982, supra* note 34.

[37] *Parallel Paths, supra* note 31 at 178-179 (paraphrased).

[38] *Ibid.* at 180.

[39] *Ibid.*

[40] *Ibid.* at 181.

The *Sparrow* decision laid the groundwork for the determination of legitimate infringement of Aboriginal rights by legislative action.[41] In that decision the Court found that only "compelling and substantial" legislative objectives could legitimately diminish the enjoyment of Aboriginal rights by an Aboriginal people.[42] In particular, the Court took the time to point out that "the public interest" is simply too vague and broad an objective to stand up as justification for an infringing piece of legislation, or a regulation falling thereunder.[43]

Structuring this determination is the Court's application of fiduciary doctrine. In the landmark *Guerin* decision, the Court located a fiduciary relationship between the Crown and the Musqueam, a relationship grounded in the transfer of control over surrendered Musqueam land to the Crown, control which the Court argued must be exercised in the best interests of the Musqueam.[44] In *Sparrow*, the reasoning behind this determination was extended beyond its application to the particular facts in the *Guerin* decision. Fiduciary doctrine, in the mind of the Court, came to structure Crown-Aboriginal relations in general.[45]

The evolution of the application of fiduciary doctrine continued in *Gladstone*, as the Court pulled back from its earlier reluctance to countenance "public interest" objectives, and took the position that balancing with public interests--essentially third party interests--is precisely the sort of process that can be undertaken in determining the appropriateness of potentially infringing governmental action.[46] In *Delgamuukw*, the *Gladstone* line of reasoning was followed and applied in the context of Crown infringement of Aboriginal title.

A number of mysteries surround the Court's discussion of legislative infringement in *Delgamuukw*. Besides the Court's mysterious finding that *provincial*

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[41] *Sparrow, supra* note 2.

[42] *Ibid.*

[43] *Ibid.* at 1113: "We find the 'public interest' justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights."

[44] *Guerin, supra* note 2.

[45] *Sparrow, supra* note 2.

[46] *Gladstone, supra* note 2 at 774. Problems with this development are explored in Section III. F, below.

activities could now legitimately infringe Aboriginal title,[47] there is an air of mystery

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[47] The very sorts of "public interest" objectives that the Court presents as examples of legitimate legislative goals are those that typically fall under the jurisdiction of the provincial governments, governments that have traditionally been thought of as constitutionally limited in relation to matters that effect Aboriginal peoples. This has been thought to be so especially on reserve land (falling as this does clearly under the jurisdiction of the federal government by way of s. 91(24) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3 reprinted in R.S.C. 1985, App. II, No.5, and since the court has gone so far as to equate Aboriginal interests in reserve land to Aboriginal interests in land over which there exists a valid claim to Aboriginal title in *Guerin*, *supra* note 2 at 379, this should be so in relation to much of the land which is the subject of comprehensive land claims. Somewhat mysteriously, the court indicated otherwise in *Delgamuukw* (for analysis and criticism see K. Wilkins, "Of Provinces and s. 35 Rights" (1999) 22 Dal. L.J. 1 at 185; J. Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw* v. *British Columbia*" (1999) 37 Osgoode Hall L.J. 537 [hereinafter "An Analysis of *Delgamuukw*"]; "Defining Aboriginal Title," *supra* note 21; N. Bankes, "*Delgamuukw*, Division of Powers and Provincial Land and Resource Law: Some Implications for Provincial Resource Rights" (1998) 32 U.B.C.L.R. 317).

A number of commentators have argued that the only way out of this confusion is for the Court to re-address the situation in the future, and in the course of their re-assessment uphold the long-standing restriction on provincial power *vis-à-vis* Aboriginal lands. See "Defining Aboriginal Title," *supra* note 21 at 24-25; and Wilkins, *supra* note 47.

The way out of this apparent conflict is not necessarily, however, to return to the position that the federal government enjoys exclusive jurisdiction over all such lands. It is possible to question the nature of the alignment of "lands reserved for Indians" with Aboriginal title lands. While the Court has clearly held that the Aboriginal interest in reserve lands is the same as the Aboriginal interest in Aboriginal title lands, it is, after all, *the status of the land* that is at issue, not whether the Aboriginal interests are the same. The analysis should begin with a determination of the status of the land.

One could argue that "lands reserved for Indians" are only those set aside in specific provisions in treaties. Certainly there exists precedent stating otherwise, that "lands reserved for Indians" is a broad category encompassing all land in Canada not yet free of the burden of Aboriginal title by way of treaty. (This line of reasoning emanates from *St. Catherine's Milling*, *supra* note 2 at 59. In discussing an argument advanced by the counsel for Ontario to the effect that "the expression 'Indian reserves' was used in legislative language to designate certain lands in which the Indians had, after the royal proclamation of 1763, acquired a special interest, by treaty or otherwise, and did not apply to land occupied by them in virtue of the proclamation," the Privy Council found that in s. 91 (24), "the words *actually used* are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation" (emphasis added).) Nevertheless, this would be a point the Court could retreat from. Few would dispute the fact, for example, that it is odd to suppose that the federal government has had, irrespective of over a century of provincial activity in British Columbia, exclusive jurisdictional authority over much of the land falling within this province's borders. Furthermore, this makes sense historically, for Aboriginal lands would, as pre-treaty lands, also be those lands over which Aboriginal peoples had ownership rights prior to the assertion of Crown sovereignty—indeed, prior to contact. Finally, very little needs to be conceptually modified, for: (a) it makes little sense to hold that prior to the existence of a treaty Aboriginal lands could be 'set aside', and (b) one could simply limit the notion of federal jurisdiction over this land to the ability to remove the 'burden' of Aboriginal title, leaving both underlying Crown title, and broader legislative authority, in the hands of the provinces.

This might appear to be a dangerous proposition to put forward, for it has commonly been understood that the federal government *ought* to be the sole party with jurisdictional authority over Aboriginal lands, since the provinces are more likely to disregard Aboriginal

surrounding this apparent pull-back from the *Sparrow* approach.

We need only concern ourselves with the latter mystery. How is it that the Crown, held by the Court to be in a fiduciary position *vis-à-vis* Aboriginal rights-holders, is licensed to determine courses of action potentially impacting on the rights of these beneficiaries on the basis of measurements involving third party interests?[48]

Exploring the mystery surrounding the Court's consideration of the power of the Crown to infringe Aboriginal title requires an examination of the paragraphs leading up to Lamer C.J.'s startling claim that:

> In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title.[49]

The task is to work backwards. What are the "purposes" with which these objectives are consistent? These purposes are connected to the "*reconciliation* of the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty, which entails the recognition that 'distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community.'"[50] While the doctrine of reconciliation mentioned in this passage comes from *Van der Peet*,[51] the entailment comes from *Gladstone*.

The doctrine of reconciliation, as startling as it may be,[52] now seems to underlie most, if not all, of the major decisions in the area of Aboriginal law. It has emerged as the principle which structures how the Court will now deal with all substantive questions about Aboriginal rights (and Aboriginal title).[53] The decision in *Gladstone* merely shows how the use of this principle plays out when questions of infringement arise.

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interests in land. This is, however, a misplaced concern. If the provinces were to have legislative authority over Aboriginal title lands this would not put them in a position to disregard Aboriginal interests in the lands–on the contrary, it would catch provincial governments in a web of responsibilities and duties. The Supreme Court would be, effectively, placing the provinces with such legislative authority in potentially onerous fiduciary positions. The real danger would be that the fiduciary web would be tremendously weakened by a biased or reluctant Court. See L. Rotman, "Hunting For Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in *Badger* and *Van der Peet*" (1997) 8 *Constitutional Forum* 40 [hereinafter "Hunting For Answers"]; Rudin, *supra* note 10.

[48] Note that the mystery is not so much that the Court retreated from finding that the public interest could be brought in by the Crown as an objective claimed to be suitably compelling and substantial–after all, the only objection the Court raised to this is that the public interest is too vague and broad, a matter that can be clarified and narrowed with appropriate attention to detail–rather, the mystery is about the application of fiduciary doctrine in this manner. See *Parallel Paths*, *supra* note 31.

[49] *Delgamuukw*, *supra* note 1 at 1111. The quote comes from *Gladstone*, *supra* note 2 at 774.

[50] *Delgamuukw*, *supra* note 1 at 1111 (emphasis in original).

[51] *Van der Peet*, *supra* note 2.

[52] See *e.g.* Barsh & Henderson, *supra* note 12; *Parallel Paths*, *supra* note 31.

[53] See further discussions, below, in Sections III. D. and III. F.

Since the element to be reconciled with Crown sovereignty is *nothing more* than the prior presence of Aboriginal peoples, and the prioritizing of Aboriginal interests cannot be taken out of the context of the "broader, social, political and economic community," the principle of reconciliation plays out in measures designed to *integrate* the Aboriginal community *into* the greater community. For the Crown to satisfy its fiduciary duties to Aboriginal peoples post-*Gladstone*, the Court requires no more than efforts to work Aboriginal peoples into the greater social, political and economic life of Canada. When Aboriginal title is considered, the conditions on the Crown crystallize as requirements to attempt to include Aboriginal peoples in Crown authorized operations on Aboriginal lands, efforts to inform decisions reached about such operations with an Aboriginal input, and efforts to fairly compensate when the Aboriginal use of Aboriginal land is economically impacted.[54]

While the application of the principle of reconciliation *explains* the Court's approval of "public interest" objectives as meeting the standard of "compelling and substantial" put in place in *Sparrow*, it does not, however, succeed in *justifying* this approval. On what basis can it be said that in the context of Aboriginal title the Crown may *legitimately* infringe the enjoyment of this title when this enjoyment is measured against "valid" third party interests? How can the Court's reasoning be reconciled with fiduciary doctrine?

This question is even more pressing when we recall that Aboriginal rights have been recognized and affirmed in s. 35 of the *Constitution Act, 1982*.[55] Would not the constitutionalization of Aboriginal rights offer them protection from precisely this sort of "weighing and balancing" with non-Aboriginal interests? After all, as McNeil suggested, this constitutionalization should enhance what already seems to be a significant form of land title. Clearly, we need to explore in ever more detail how the Court understood fiduciary doctrine to play out in the Crown-Aboriginal context in relation to Aboriginal title.

First, we take a more detailed look at the Court's recent ruminations on the general nature of the fiduciary relationship holding between the Crown and Aboriginal peoples, and what this relationship demands of the Crown. The conceptualization of this relationship is then examined in relation to the Court's application of this doctrine to Aboriginal title.

D. *Analysis of "Form" and "Degree of Scrutiny"*

In *Delgamuukw*, the Court held that "the requirements of the fiduciary duty are a function of the 'legal and factual context' of each appeal."[56] In *Sparrow* and *Gladstone* this context dictated that the fiduciary duty be interpreted and applied "in terms of the idea of priority."[57] The theory that informs discussions about priority,

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[54] In Section III. F., below, the Court's ruminations on legislative infringement of Aboriginal title are explored and critiqued in greater detail.

[55] *Constitution Act, 1982*, *supra* note 34.

[56] *Delgamuukw*, *supra* note 1 at 1108.

[57] *Ibid.* at 1108.

Lamer C.J. noted, is that the fiduciary relationship between the Crown and Aboriginal peoples requires that Aboriginal interests be placed first.[58]

Priority allocation, however, turned out not to be a simple matter, as *Gladstone* demonstrated. While in *Sparrow* the alleged right was only for fishing for food purposes, in *Gladstone* the alleged right was to a commercial scale fishery. The Court could not sanction placing an Aboriginal fishery *ahead* of all other concerns (except conservation), and avoided a simple priority allocation by devising a complex matrix dependent on the "form" of the fiduciary duty and the "degree of scrutiny" that would be demanded of the government legislation.

Sparrow had already seen the introduction of the notion that the *form* of the fiduciary obligation could vary according to the "legal and factual context" of the situation. The fiduciary duty, the Supreme Court held, could be articulated in different ways, requiring, for example, that there be as little infringement as possible, that compensation be on the table if the situation is one of appropriation, and that, if the matter concerns decision-making which might adversely affect the alleged Aboriginal right, consultation be carried out.[59]

Gladstone added the notion that there could be variation in the *degree of scrutiny*, variation which impacts on the manner by which the Crown prioritizes Aboriginal interests that are in the mix with other concerns.[60] Since the alleged right in *Gladstone* was for a commercial fishery the Crown was held to a much lower standard of scrutiny, and was only required to show that the potentially infringing actions *reflect* prior Aboriginal interests–in effect ensuring that the allocation of any resources be carried out *respectfully*. Far from demanding, then, that the Aboriginal interests be placed at the penultimate position when interests are to be prioritized,[61] this new approach to spelling out conditions for satisfaction of the Crown's fiduciary duties only requires that the Crown *show respect* for the fact that Aboriginal peoples were present in Canada long before the Crown (and Canada) were part of the political landscape.[62]

These remarks do not, however, go far enough in illuminating the dynamic of the Crown-Aboriginal relationship. In particular, the question of the *justification* of the Court's approval of 'public interest' objectives has still not been addressed satisfactorily. We must continue to delve into the Court's reasoning. What, *precisely*,

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[58] *Ibid.* at para. 1108. This would accord with the analysis of the Crown-Aboriginal fiduciary relationship carried out by Rotman, in *Parallel Paths*, *supra* note 31. The relationship, he argues, is grounded in the historic interactions between the Crown and Canada's Aboriginal peoples (arising in both a general fiduciary relationship, insofar as the Crown has entered into a broad relationship with the First Peoples of Canada, as evidenced by the Royal Proclamation, and other general instruments such as the Constitution Acts; and particular fiduciary relationships, insofar as the Crown has entered into agreements and relationships with particular Aboriginal peoples over the last few centuries). Insofar as Aboriginal peoples have reposed their trust in the integrity and honour of the Crown, trusting that the Crown will act in their best interests when acting in relation to these interests, the result ought to be a policy of prioritizing Aboriginal interests in the land (above all, that is, but such paramount concerns as conservation interests).

[59] *Sparrow*, *supra* note 2.

[60] *Gladstone*, *supra* note 2 at para. 62, noted in *Delgamuukw*, *supra* note 1 at 1110.

[61] That is, the interest would follow valid conservation measures.

[62] Consistent with the current treatment of Aboriginal rights, this discussion hinges on the notion that the aim in contemporary jurisprudence must be to facilitate the reconciliation of the prior presence of Aboriginal societies with the assertion of Crown sovereignty.

are the "form" and "degree of scrutiny" of a fiduciary obligation, and how do these impact on the nature of the duties befalling the Crown?

As we noted above, the Court pointed out in *Delgamuukw* that while in *Sparrow* the articulation of the fiduciary duty had been carried out in terms of priority, other interpretations of the duty would be possible in different contexts. The Court then addressed the question of *when* differing modes of interpretation would be called for. This, Lamer C.J. suggested, "will in large part be a function of the nature of the aboriginal right at issue."[63]

Lamer C.J. fleshed out this suggestion through a re-examination of the Court's consideration of the notion of 'priority' in *Gladstone*. The key difference between the sort of Aboriginal right at issue in *Sparrow* and the sort of Aboriginal right at issue in *Gladstone* is that the former was "internally limited" (being a claim to a right to fish for food, ceremonial and social purposes), while the latter had no such internal limit (being a claim to a commercial fishery, only limited externally, by matters of supply and demand). This difference in the sort of Aboriginal right claimed "demanded," then, that the Court reinterpret the notion of priority, so that when this notion is employed in the context of determining the fiduciary obligations of the Crown, it does not have the consequence of forcing the Crown to recognize an Aboriginal "exclusive right to exploit the fishery on a commercial basis."[64]

But what is the ground for this demarcation of Aboriginal rights according to whether or not they have internal limits? According to Lamer C.J., it "was not the intention of *Sparrow*"[65] to hold the Crown to a fiduciary duty to prioritize an Aboriginal commercial fishery in the same manner as it was told to prioritize an Aboriginal "personal" fishery. Why, however, was this not the intention?

The answer lies, once again, in the theory of reconciliation enunciated in *Van der Peet.*[66] We have already noted how this theory structured the reorganization of the notion of the fiduciary relationship in *Gladstone*. The aim of s. 35(1), according to the Court in *Van der Peet*, is limited to acknowledging the prior presence of Aboriginal societies in Canada. Therefore, this section of the Constitution is to be used to *reconcile* the sovereignty of the Crown with this prior presence. What this implies about the contemporary position of Canada's Aboriginal peoples can be summed up in one pithy phrase: "distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign."[67]

So long as the impugned Aboriginal right is one which does not threaten to directly conflict with the interests of other elements of the "broader social, political and economic community" within which Aboriginal peoples find themselves, the right is to be taken quite seriously by the Crown. As the fiduciary, they are held to a high standard of conduct, and are instructed by the Court to prioritize this Aboriginal interest above all but "compelling and substantial" legislative objectives. On the other hand, should the impugned Aboriginal right be one which threatens to come into direct conflict with other legitimate interests of other elements of the "broader social, political and economic community," the right is not one which the Court will ask the Crown to prioritize in this

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63 *Delgamuukw, supra* note 1 at 1109.
64 *Ibid.* at 1110.
65 *Ibid.*
66 *Van der Peet, supra* note 2.
67 *Delgamuukw, supra* note 1 at 1107.

simple manner. Rather, the Crown will only be held to the task of "respecting" the Aboriginal interest as it works toward fulfilling its general obligations to this greater community.[68]

1. Delgamuukw: *Application of Fiduciary Doctrine to the Infringement of Aboriginal Title*

The Court in *Delgamuukw* applied this complex matrix of varying "forms" and "degrees of scrutiny" to the question of the infringement of Aboriginal title. The result, as was hinted at earlier, is a startling transformation of Aboriginal title from what one might initially think is a fairly strong form of land ownership to what is in actuality an exceedingly weak grade of title. One key to this, as should be clear from the above discussion, is the categorization of Aboriginal title as a class of Aboriginal rights lacking an internal limit.[69] Ironically, the very characterization of Aboriginal title as a *right to the exclusive use and occupation of land* comes on the scene to strip Aboriginal title of most of its force.

In addition to the exclusivity of Aboriginal title, Lamer C.J. found two other aspects of Aboriginal title which effect the form of, and scrutiny attached to, the fiduciary duties of the Crown: the right to choose the ends to which the land can be put, and an inescapable economic component to this title.[70] These aspects also go into structuring the particular legal and factual context, and since they too encompass rights which might come into direct conflict with the interests of others within the broader community, they result in the Crown being called upon to prioritize Aboriginal interests in ways which only *reflect* the priority of these interests.

In light of the exclusivity of Aboriginal title, the Crown may have to work to include the affected Aboriginal peoples in the operations it wishes to advance or promote. In *Gladstone,* this was spelled out in terms of boosting Aboriginal participation in the overall fishery. We can imagine that in relation to Aboriginal title this might spell out, for example, in *efforts* to include Aboriginal peoples in forestry operations where these might impact on tracts of Aboriginal title land. In light of the Aboriginal right to choose the ends to which the land can be put, the Crown may have to either consult with, or even seek the consent of, the Aboriginal peoples potentially affected by the contemplated legislative action. We might imagine that this would spell out, to return to the same example, in efforts to reach agreements over forestry operations before licensing these activities, agreements that attempt to take Aboriginal interests into account. Finally, in light of the third aspect of title, the Crown may have to compensate Aboriginal peoples for actions on its part, or which it facilitates, which negatively impact on the economic enjoyment of the land by the Aboriginal peoples in question.

The result is a framework which tells us much about the nature of Aboriginal title as it can be *exercised* by Aboriginal title-holders. Put quite simply, Aboriginal

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[68] This accounts for the manner by which the Crown must "grant priority" in the situation of an Aboriginal right lacking an internal limit. See the list of questions appropriate to this situation listed in *Gladstone, supra* note 2 at para. 64, and quoted by Lamer C.J. in *Delgamuukw, ibid.* at 1110.

[69] *Delgamuukw, ibid.* at 1112: "The exclusive nature of [A]boriginal title is relevant to the degree of scrutiny of the infringing measure or action."

[70] *Ibid.* at 1112.

peoples are restricted from exercising their rights to their lands to those uses which are "internally limited" *should they wish to do so free of interference from the Crown.* When they wish to step outside these sorts of uses, the actual power to determine the extent to which they can thereby use the land is in the hands of the fiduciary, the Crown, who determines the appropriateness of such activities in relation to the other "valid" interests of other "historic" users of this land (and even in light of the interests of others who might only now wish to come on this land to exploit its resources). While Aboriginal title-holders have a right to the exclusive use and occupation of Aboriginal title lands, the existence of the fiduciary relationship entails that control over the exercise of this right is by and large in the hands of the Crown.

At the end of the analysis, when the complete picture of Aboriginal title is before us, what might seem to have been a strong form of title, a title defined in terms of a *right to the exclusive use and occupation of land*, turns out to be a very peculiar form of title. While one might naturally surmise that such a right would straightforwardly encompass a certain degree of control over the land in question, the Court deploys fiduciary doctrine to fix the locus of direct control in the Crown. What is most startling, however, is the lack of any form of "control", indirect or otherwise, that Aboriginal title-holders actually enjoy, as Aboriginal title is subject to vast and sweeping powers of the Crown acting to further the interests not only of the beneficiaries, but of others within the broader community.

2. *Problems with the Doctrine of Crown Fiduciary Obligations in Relation to Aboriginal Lands*

The amount of land control actually in the hands of Aboriginal title-holders seems to be unduly limited. Why, as land owners, do Aboriginal peoples not have the sorts of powers, *vis-à-vis* their lands, that non-Aboriginal title-holders enjoy? The simple response is that they *ought* to enjoy, *in the least*, commensurate powers. The reason why they do not enjoy these sorts of powers lies buried in the very elements of *Delgamuukw* we have explored–in particular, in both the theoretical development of fiduciary doctrine pulled out of *Gladstone*, and the subsequent application of this variant of fiduciary doctrine to Aboriginal title.[71]

Problems, however, swirl around this outcome, problems which can be classified as simultaneously conceptual and "political". While the more fundamental problem lies in the peculiar development of fiduciary doctrine in *Gladstone*, we will explore these problems by first exploring how this variant was applied in *Delgamuukw*. Problems centering on the Court's misconstrual of fiduciary doctrine in the Crown-Aboriginal context will be explored in the final section, as we look to alternative pathways to mending deep colonial wounds. Since the application of fiduciary doctrine is inextricably intertwined with colonialism, it should be discussed in that context.

We can focus on two problems in the deployment of fiduciary doctrine in *Delgamuukw*. On the one hand the Court conceived of the fiduciary relationship arising out of contemporary Aboriginal title in a limited and unsatisfactory manner. On the other hand, the Court continued in its "protectionist" approach to Aboriginal issues in its application of fiduciary doctrine, once again revealing that it is not yet capable of

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[71] The ensuing discussion is premised on the suitability of applying fiduciary doctrine to the situation. Naturally, other options are available.

leaving behind its "Aboriginality" conceptualization of Aboriginal rights and title. We consider these problems in turn.

If we are to imagine Aboriginal peoples in Canada as having entered a relationship in which they have reposed trust in the Crown, in relation to the lands to which they were formerly sole possessors, we must be clear about what power has been transferred and what is now demanded of the fiduciary. The pre-existence of Aboriginal legal systems was acknowledged by the Court in *Delgamuukw*[72] (if only to serve a fairly minor purpose in establishing title).[73] These legal systems structured the relationships between Aboriginal communities and their lands, and in most, if not all, situations would have provided for a measure of exclusivity over traditional territories. A fiduciary is forbidden from acting in its own interests when acting on behalf of the beneficiaries to the relationship.[74] To allow this to happen would be to undercut entirely the theory underlying fiduciary doctrine, for it would destroy any possibility of the beneficiary reposing trust in the fiduciary. Only if it is clear that forbidding fiduciary self-interest is a requirement universally and absolutely imposed can the context for trust be developed. The mandate of the fiduciary is crystal clear–to act in the interests of the beneficiaries when deploying power(s) conferred to it at the establishment of the fiduciary relationship.

The Crown cannot, then, treat Aboriginal title as the Court suggests it may. If we are to make sense of the existence of a fiduciary relationship between the Crown and Canada's Aboriginal peoples in relation to Aboriginal land, we must imagine that the latter peoples have transferred *power* over their lands to the former entity. The sort of power transferred is clear, and the duty of the Crown is therefore likewise unambiguous. To suggest, simply because the Aboriginal parties transferred a substantial form of title, that the fiduciary is now in a position to devalue the interests of its beneficiaries, is quite plainly ludicrous. Why, one must ask, would the Aboriginal parties have ever entered into such a relationship? Is this how their trust is rewarded?

Some might argue that when the Crown is in a fiduciary relationship it is forbidden from acting in its own behalf,[75] but that it must, in certain circumstances, weigh and balance between conflicting duties.[76] It may have a duty to other elements

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[72] *Delgamuukw*, *supra* note 1 at 1082.

[73] While Aboriginal legal systems only serve to show the extent of exclusivity lying within a claim to title, they are implicitly introduced whenever the Aboriginal perspective is mentioned and when the Court discusses the notion of an inherent limit.

[74] *Parallel Paths*, *supra* note 31 at 149-99.

[75] See *e.g. Kruger* v. *R.* (1985), 17 D.L.R. (4th) 591 at 607, [1985] 3 C.N.L.R. 15 at 75 (C.A.). In this case, it was found that the Department of Indian Affairs was trying to work in the best interests of the Penticton Indian Reserve No. 1, but that this Department ran head on into the Department of Transport, which wanted reserve land in the interests of air transport. As Heald J. noted: "[T]he federal Crown was in a conflict of interest in respect of its fiduciary relationship with the Indians. The law is clear that '. . . one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside' and that 'Equity fashioned the rule that no man may allow his duty to conflict with his interest.'"

[76] *Parallel Paths*, *supra* note 31 at 18: "[T]here may be circumstances in which the Crown's fiduciary duty to Aboriginal peoples conflicts with its other responsibilities, such as the interest of the public at large. Where such potential conflict of interest situations exist, the Crown cannot simply ignore one interest in favour of the other. Rather, it must attempt to balance its competing responsibilities."

of society (again, the "broader community" enters the discussion), and it may, then, have to weigh off against this its fiduciary responsibilities to Aboriginal title-holders.

There are several problems, however, with this argument. Both rest on bearing in mind the nature of the power transferred. First, complicating the situation is the fact that the fiduciary relationship captures not only transfer of certain ownership interests from Canada's Aboriginal peoples to the Crown, but the transfer of both interests in enjoying this land and *control over this land.*[77] If, then, we are to conceive of the relationship as fiduciary in nature, we must hold the Crown to exercising *control* over this land *in the interests of Aboriginal title-holders.*

With the admission of the nature of Aboriginal title as encompassing a right to the *exclusive* use and occupation of land, and its deployment of fiduciary language in the context of Aboriginal title, the Court has committed itself to the view that Aboriginal peoples must be seen as transferring *control* over their lands to the Crown. In light of the *sort* of interest in the hands of the Crown, this precludes the Crown from doing as it might be licensed in other situations wherein a fiduciary duty conflicted with other responsibilities. Any other responsibilities it might have to those in the "greater community" are necessarily *separate* from those it owes Aboriginal title-holders–it simply cannot "weigh and balance" between these separate sets.

Second, it must be borne in mind that the historic interaction that created the fiduciary relationship is of a radically different kind from that commonly considered in relation to fiduciary doctrine. We must remain cognizant of the political context at issue, for neither the Crown nor the Aboriginal peoples were 'private' parties to the relationship established through the transfer of control over Aboriginal lands. Furthermore, in this historic movement the Crown did not take on itself the task of acting in the best interests of certain of its subjects. We are contemplating the establishment of a relationship between a *sovereign entity* and communities that are, prior to the establishment of the fiduciary relationship, *outside the political community* lying under this authority.[78]

If we put these two points together, we can appreciate the reason for separating Aboriginal interests in the land from those of other "valid" third party interests: Aboriginal title-holders have, if we accept the fiduciary picture, transferred their capacity to fundamentally *govern* their lands.[79] In this context, when there is a conflict between acting to further Aboriginal interests and meeting other Crown responsibilities, Aboriginal interests cannot be weighed and balanced "in the mix." This is simply not

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[77] *Territorial Sovereignty*, *supra* note 12. McNeil points out that in defining Aboriginal title as encompassing a right to the *exclusive* use and occupation of land, the Court has acknowledged that a notion of a substantial degree of control over the uses of land resides within the very concept of this title. Note also the judgment of Williamson J. in *Campbell* v. *British Columbia (AG)* (2000), 189 D.L.R. (4th) 333, 79 B.C.L.R. (3d) 122 (S.C.) at para 114: "On the face of it, it seems that a right to aboriginal title, a communal right which includes occupation and use, must of necessity include the right of the communal ownership to make decisions about that occupation and use, matters commonly described as governmental functions. This seems essential when the ownership is communal."

[78] *Sioui*, *supra* note 35 at 1052.

[79] See *Territorial Sovereignty*, *supra* note 12 and "An Analysis of *Delgamuukw*," *supra* note 47.

how Aboriginal peoples, if the powers transferred were returned, would settle such conflicts.[80]

It is difficult to say what led the Court into making the mistake of supposing that the Crown could weigh and balance Aboriginal and non-Aboriginal interests in the land as it goes about deciding how best to satisfy the interests of the beneficiaries. One might suggest that rather than consider that Aboriginal *control* over territory has been transferred, the Court has simply ignored this transfer, for only by ignoring this aspect of the Crown-Aboriginal relationship could the Court find that Aboriginal interests in their lands could be weighed and balanced "in the mix." This would seem to fly in the face of the remarks in *Delgamuukw* on the duties owed by the Crown in light of the nature of Aboriginal title as encompassing an exclusive right to use and occupy traditional lands, but finds some support in the fact that the Court is always quite careful to avoid suggesting that Aboriginal peoples ever constituted sufficiently formed sovereign entities to have had anything approaching governance rights over their lands. The second conceptual problem with fiduciary doctrine as it is employed in *Delgamuukw* concerns the continued presence of the doctrine of "Aboriginality." This doctrine surfaces in the distinction drawn between Aboriginal rights internally limited and Aboriginal rights lacking such limits. It was noted earlier that the only possible rationalization for this distinction lies in the desire of the Court to circumvent situations wherein it might seem called upon to force legislatures to treat those Aboriginal interests potentially impacting on third party interests in a "special" manner.[81]

What this distinction effectively accomplishes, however, is the limitation of full protection for Aboriginal rights to those practices internal to the culture– the very same practices protected under the *Van der Peet* test, frozen at the time of contact.[82] Not only does this make the scope of protected rights narrow (in relation to land), it cuts to the core of Aboriginal autonomy. Aboriginal peoples, to continue to be recognized as peoples with interests constitutionally protected, are forced by this doctrine to fit within a construction imposed by the Court.[83] Any attempt to advance interests which go beyond age-old measures to provide for subsistence, ceremony, or community use, is met with the power of the Crown to weigh these interests with other, third-party, concerns. The "squeeze" is on, for limiting claims to those rights which have inherent internal limits does little to forestall foreign intrusions on traditional territories, intrusion authorized by the Crown up to the point it interferes with the ability of the Aboriginal people to meet these internal community needs.[84]

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[80] In many cases this may not be a reliable means of assessing the actions of the fiduciary, but in this context it is more than sufficient. Some might suggest that Aboriginal peoples, given a general adherence to principles of sharing, would place their own interests "in the mix" with those of the others. But this would be situation-specific, and in the modern context, with the interests impacting on Aboriginal interests threatening to overwhelm Aboriginal communities, this is unlikely. Regardless, the notion of "sharing" would have to be understood from the Aboriginal perspective.

[81] It might be able to excuse, if not justify, such reasoning by studying the "dialogue" that takes place between the Crown and the Supreme Court. See Rudin, *supra* note 10 at 81.

[82] *Van der Peet, supra* note 2 at 548.

[83] See *e.g.* "An Analysis of *Delgammukw*," *supra* note 47 at 549.

[84] Actually the intrusion can go far beyond this, so long as the Crown is prepared to compensate the Aboriginal title-holders for the economic component of their title.

This completes the exploration into the nature of Aboriginal title, notably as it relates to the power of Aboriginal title-holders to control the uses to which the land might be put. Undoubtedly, the Court will have much more to say about the nature of Aboriginal title, especially with the numerous loose ends remaining,[85] and given the fact that what it does say in *Delgamuukw* can be classified as *obiter*.

Nonetheless, it is clear which direction the Court has struck out on. Aboriginal title is shaping up to be quite peculiar. Superficially, it seems to signal a step forward in the struggle to find an appropriate place for Aboriginal peoples in the contemporary world, for it would seem to recognize the strength of the claims to land control that Aboriginal peoples unquestionably enjoy. When viewed in light of both the conceptual and practical limits to its deployment, however, Aboriginal title deflates, becoming little more than a weak claim to continue to enjoy traditional activities in relation to the land, as much as they can over depleted and devastated lands. Of greatest concern is the location of power, *vis-à-vis* the land, in the Crown. Since the Court has conceived of the proper exercise of this power in such a manner as to ensure that Aboriginal responsibilities are thrown into the hopper with other interests in the use of the land, the capacity of Aboriginal peoples to meet these responsibilities seems completely undercut.

Hope for Aboriginal peoples clinging to their unique title claims must be placed on appealing to the integrity of the Court, asking that it reconsider its peculiar treatment of fiduciary doctrine in *Gladstone*.

IV. DRAWING OUT THE THREADS, AND WEAVING A PROPOSAL

Under the doctrine of Aboriginal title developed in *Delgamuukw*, Aboriginal peoples find themselves trapped with a weak form of land ownership. Understandably a great deal of confusion will ensue, as the reader of the judgment can quite easily come away with the notion that the Supreme Court has found a substantial form of title, one on which Aboriginal peoples could immediately rely as they position themselves in the modern world. As Aboriginal peoples find that the title to which they can lay claim can only be accessed through the Crown, where access can be limited as the Crown measures its duties as fiduciary against other "valid" interests in the land, undoubtedly Aboriginal title-holders will be driven to bargain away their deep spiritual connections to the land with agreements designed to maximize economic opportunity. In a highly suspect move, indeed a move with all the markings of a *colonial maneuver*, the Court has apparently none-too-gently pushed Aboriginal title-holders toward complete immersion in the non-Aboriginal world.

This should not, however, be the fate of Aboriginal title-holders, especially under the flag of fiduciary doctrine. Fiduciary doctrine as it applies in the context of Crown-Aboriginal relationships ought to be strengthened, not haphazardly, but in line with the underlying principles of strict fiduciary theory. This is at least one path open in the quest to overcome the deficiencies of the Court's ruling on Aboriginal title.

Recognizing the value in protecting the "continued efficacy of interdependent societal relations"[86] is not to condone imperialistic maneuvers. Avoiding sanctioning

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[85] See Hon. Mr. Justice D. Lambert, "*Van Der Peet* and *Delgamuukw*: Ten Unresolved Issues" (1998) 32 U.B.C. L. Rev. 249 [hereinafter "Ten Unresolved Issues"] for a discussion of some of the loose ends.

[86] *Parallel Paths*, *supra* note 31 at 199.

this sort of maneuver under fiduciary doctrine is not only possible, it is demanded by an appreciation of fiduciary theory, and its proper application. The historic interactions between Aboriginal title-holders and the Crown *can* be acknowledged as generating a fiduciary relationship. One *can* conceive of the control of Aboriginal land interests as being transferred from the title-holders to the Crown, and the exercise of this control conceived of as placing the Crown in the role of fiduciary. Once, however, the *true* nature of the power transferred is acknowledged, and the interests of the Aboriginal title-holders *properly* understood, the fiduciary duties on the Crown would be *vastly* different from those enunciated in *Delgamuukw*, and Aboriginal title-holders would enjoy the protection of their interests to which they are entitled. In particular, potentially infringing legislative activity going beyond the strict limits set by fiduciary doctrine, directed toward fundamental Aboriginal interests, would be subject to powerful Aboriginal challenges.

A. *Overcoming* Gladstone

As we explored the distinction drawn in *Gladstone* (between Aboriginal rights with internal limits and those lacking such limits), judicial explanations were forthcoming, but ultimately no justification for drawing this distinction could be found. Is it possible to find within fiduciary theory justification for the schism introduced in *Gladstone*, that between Aboriginal rights having or lacking "internal limits"? Is it possible that fiduciary theory could condone the lowering of requirements on a fiduciary on the basis of the potential interaction of the beneficiaries' enjoyment of their rights and the interests of third parties?

One might argue that the Court was simply trying to find that balance between the competing obligations of the Crown, for the governments of Canada must try to satisfy their competing obligations toward Aboriginal peoples and the general population. This matter was canvassed earlier. There is no licence to be found here for either the lessening or absolution of Crown fiduciary obligations (especially, one might suppose, when these are constitutionally entrenched). And yet this is what the construction in *Gladstone* would seem to ordain, for the lower demands on the Crown *vis-à-vis* Aboriginal claims lacking internal limits would seem to require of the Crown no more than that it treat Aboriginal peoples as one stake-holder amongst a community of stake-holders. With this lowering of the demands on the Crown, Aboriginal peoples do not find their interests "balanced" in any manner which suggests that the Crown is in a fiduciary position based on historic Crown-Aboriginal interactions. Rather, the fiduciary relationship is undercut, and replaced with nothing more than that we might suppose exists between any liberal democratic government and a sub-set of its population.

To be blunt, then, this distinction rests–conceptually speaking–on thin air. Political considerations can make sense of this move, but such considerations ought to have no place in fiduciary law. The fact that an impugned Aboriginal right without an internal limit might potentially impact on the activities of other resource users or land owners cannot act to seriously lower the bar for the fiduciary. The only conceptual link that exists is to the doctrine of "Aboriginality," for this distinction functions to limit the full exercise of Aboriginal rights to those that are internal to the community, which

means, effectively, the sorts of rights that have been found to be integral to the distinct culture of the people in question.[87]

As we noted in discussing problems with the Court's treatment of the *Gladstone* approach, the manner by which the approach is applied in *Delgamuukw* is equally questionable, for the process of application serves to radically limit the effectiveness of Aboriginal title, in effect reducing its impact on the contemporary world to (at most) an increase in the economic claim of Aboriginal title-holders. Rather than have a simple recognized right to the exclusive use and occupation of traditional territories, Aboriginal title-holders find themselves, as holders of *sui generis* title, forced to challenge the Crown to justify infringing their rights, where the remedy is, for the most part, economic. Any control over their land that would reflect that enjoyed on the basis of their historic occupation is lost, replaced with an anemic capacity to push the Crown to "consider" their interests, and possibly compensate them for economic loss.

This illustrates another major flaw in the Court's approach to fiduciary doctrine in the Canadian-Aboriginal context. The conflict of interest between the Crown acting in its most general capacity and the Crown acting as a fiduciary in relation to Canada's Aboriginal peoples cannot be ignored or downplayed. The courts must acknowledge this profound conflict, and deal with it from within fiduciary doctrine. It is not open to the courts to tinker with the underlying theory, attempting, as it were, to subvert equity (and thereby leading to suspicions that the courts are not capable of acting in a fair and objective manner).[88]

Readjusting the fiduciary doctrine propounded in *Gladstone* rests on a relatively simple (and, one might suppose, incontrovertible) initial maneuver. The Crown must be held to the normal constraints imposed on fiduciaries, and held to the sorts of remedies that would normally befall a finding of breach of the duties of such a fiduciary.[89]

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[87] This is not, then, really a matter of "Aboriginality" as it would be generally a matter of "internality." Any society, limited to the full exercise of rights to those that have built in limits, would be limited to rights which can only be exercised in the absence of other peoples. Hunting and fishing for food or social purposes naturally fit this category.

[88] As we noted earlier, the subversion of fiduciary doctrine can be seen in *Gladstone*, *supra* note 2 at 730, when the Court considered the sorts of "compelling and substantial objectives" that might justify the Crown in infringing Aboriginal rights. At this point the Court introduced the underlying theory animating all Aboriginal rights post-*Van der Peet*, *supra* note 2: the theory of reconciliation between Crown sovereignty and the prior presence of Aboriginal societies. See *Gladstone*, *supra* note 2 at 731 where the objectives condoned include "the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-Aboriginal groups." However, how are we to make sense of these as legitimate objectives? They are considerations that exist as the result of historic infringement of Aboriginal rights. There would be no need to consider "regional fairness" or "non-Aboriginal groups" if colonialism had not been the order of the day for generations. In its historic fiduciary position the Crown has continuously breached its duties toward Canada's Aboriginal peoples, and now the Court seems to be working within a white-washed version of this relationship as it attempts to justify a continuing pattern of infringement and dispossession. That the Supreme Court of the country can instigate such reasoning under the heading of fiduciary law calls into serious question its objectivity. See generally Rotman, *Hunting For Answers*, *supra* note 47.

[89] See Hutchins, et al, "When Do Fiduciary Obligations To Aboriginal People Arise?" (1995) 59 *Sask. L. R.* 97 [hereinafter "When Do Fiduciary Obligations Arise?"].

There are two keys to holding the Crown to its fiduciary obligations *vis-à-vis* Aboriginal peoples and their lands, even in light of its (sometimes) competing obligations to Canadian society. First, the Crown must be held to better judgment in determining the *nature* of Aboriginal interests in the land, and second, strict prescriptions governing potential conflicts of interest must be addressed in this context. In transferring (or losing) control and ownership over traditional territories Aboriginal peoples did not automatically accept the Euro-Canadian vision of the nature and value of the land. Both the governments of Canada and the courts of Canada are quite well aware of the sort of interests Aboriginal peoples have in their traditional territories.[90] To replace these interests with economic considerations is to disregard the fiduciary relationship that arose on the transfer of *power* and *control* over these lands. In acting, then, in matters which might impact on the exercise of Aboriginal interests in these lands–that is, in relation to land distribution, transfer, use and development–the Crown must be held to a simple strict standard of acting in the best interests of the Aboriginal title-holders, *as these interests are generally understood by the beneficiaries*. Note that this would apply as well to the context of treaty negotiations, requiring of the Crown that it do its *utmost* to further the interests of the Aboriginal title-holders in reaching a mutually acceptable agreement.

A movement back into line with strict fiduciary doctrine has the potential to vest Aboriginal peoples with substantial–though indirect–control over their traditional territories. So long as the Crown maintains its fiduciary role (and fiduciary doctrine dictates that the Crown cannot unilaterally dispose of its obligations–consent of the beneficiaries would be required),[91] it is bound to act in the best interests of Aboriginal title-holders. The Crown would be required to call upon the Aboriginal perspective in determining the nature of these interests, for it is not in its power to determine these unilaterally, especially when the wishes of the beneficiaries are known.[92] Insofar as Aboriginal peoples continue to profess the same sorts of interests in their lands as have traditionally animated their cultures and societies, the Crown would be bound to work toward furthering these interests in the contemporary world.[93] Any sign of breach of this duty would be occasion for the offended Aboriginal people to challenge the actions of the Crown, calling on it to justify its actions in line with standard fiduciary principles structuring both duties and the means by which duties can be met.

This would not substantially alter the determination of Aboriginal title from *Delgamuukw*, and would continue to limit the ability of Aboriginal peoples to directly determine the uses to which their traditional territories would be put. A delicate balance could be achieved, however, for while control over these territories would be in the

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[90] The federal government struck a Royal Commission on Aboriginal Peoples. The Report of this Commission, *RCAP, supra* note 5, provides an invaluable educational resource. Surely the government that asked for this Report, and the courts which have easy access, can make use of it.

[91] *Parallel Paths, supra* note 31 at 190-195.

[92] See *e.g. Guerin, supra* note 2.

[93] Even without inviting the Aboriginal perspective into the discussion, the conflict facing the Crown, and its abuse of this conflict, are clear. In *Parallel Paths, supra* note 31 at 271, Rotman points out that "insofar as [the requirement of the Comprehensive Claim Process that bands relinquish their Aboriginal rights in exchange for rights defined in claims settlements] does not serve the best interests of the Aboriginal peoples, but acts to their detriment, this amounts to a breach of the Crown's fiduciary duty."

hands of the Crown, it would be held strictly accountable for all actions which might impair the enjoyment of these lands by the title-holders.

1. *Difficulties in the Way of Progress, and a Final Suggestion*

Unfortunately, the Supreme Court appears to some to be under the sway of "politics," an especially troublesome situation given the comments it has itself made about the "honour" of the Crown.[94] Unless the Court can see its way to reinvoking clear principled fiduciary theory in its handling of Crown-Aboriginal relations, it will pull itself down in the eyes not only of Canada's Aboriginal peoples, but in the eyes of Canadians in general and of peoples around the world.

Even if the Court reassessed its position in *Gladstone*, and reconsidered the duties befalling the Crown as defined in *Delgamuukw*, the fact that fiduciary doctrine operates under the auspices of the courts makes this approach to Aboriginal land control less than optimal. Aboriginal peoples would have to *trust* in the ability of the courts to continuously uphold their interests in their lands on those occasions when the Crown apparently over-stepped its fiduciary position.[95] It must be kept in mind that this would require of the courts that they refrain from efforts to integrate Aboriginal communities into the greater economy (as the approach of the Supreme Court in *Delgamuukw* would have them do), and rather that they work to satisfactorily accommodate Aboriginal peoples' desires to maintain their ways of life. Undoubtedly this would often require that the courts seriously limit the Crown in its pursuit of the sorts of objectives Lamer

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[94] See, for example, numerous remarks in *Sparrow*, *supra* note 2 at 1109: "the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada is suggested by *Guerin v. The Queen,*" and later, "[t]he way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples" (*ibid.* at 1110), and, "the honour of the Crown [is at stake] in dealings with aboriginal peoples" (*ibid.* at 1079). Holding the Crown to such a standard, while suspiciously appearing to the neutral observer to fall far short of the same, is not conscionable.

[95] See Rudin, *supra* note 10, for an analysis of recent cases in Aboriginal law which paints a fairly realistic picture of a dialogue between the Crown and courts, a dialogue which rests on the perception of the courts that they cannot supercede the interests of the Crown, and that they must respond with tempered judgments when the governments of Canada signal that they have gone beyond what is politically acceptable.

A deeper explanation for this behaviour can be found in the analysis provided by Mary Ellen Turpel, in "Home/Land" (1991) 10 Can. J. Fam. L. 17. She argues at 19 that "the law functions in a colonial context as the discourse which officially defines and sanctions political and social 'reality' for Aboriginal peoples." It must, however, be kept in mind, she continues, that "the law is... subtle: sometimes it is clearly oppressive and, at other moments, it is murky" (*ibid.*). *Delgamuukw* would be one of those murky moments, as the law presents itself as the "guardian of those subject to it" (*ibid.*). Of course, in the larger picture, this is all *presentation*, carefully crafted to maintain colonial hegemony.

C.J. found to be legitimate in *Delgamuukw*.[96] Whether the courts would be able to maintain this position is questionable.

Finally, as operated in conjunction with the courts this approach would carry with it the high costs associated with litigation strategies. Even should successful deployment of the courts transfer legal costs to the Crown, the time and energy involved would be substantial.[97]

As a final suggestion, by no means made in jest, it might be argued that the problem of having what ought to be an independent judicial process (that of grappling with fundamental questions concerning Aboriginal title) becoming entangled in "political" considerations can best be addressed by having the Supreme Court consider whether the Canadian judicial system is in a fiduciary position *vis-à-vis* the legal interests of Canada's Aboriginal peoples. Should it be acknowledged to be in such a position, should it acknowledge a sequence of historic events encompassing the transfer of legal authority from Aboriginal nations to the Canadian state, a transfer which reposed Aboriginal trust in the legal machinery of the Canadian state, the result would be a fiduciary relationship between the Canadian judiciary and Canada's Aboriginal peoples, the consequences of which would be most interesting.

V. CONCLUSION

As this line of analysis has shown, the complete picture of Aboriginal title offered in *Delgamuukw*, one which includes the Court's discussion on the power of the Crown to infringe enjoyment of this title, rests on underpinnings which make the entire picture conceptually unstable and generally unacceptable (the Court's creation, Aboriginal title in Canadian law, is questionable both on moral and doctrinal grounds, and unacceptable in the eyes of Aboriginal peoples interested in preserving their spiritual connections to lands they conceive of as placed in their hands by the Creator). The doctrinal inconsistencies and ad hoc assumptions and arguments will inevitably carry over into future jurisprudence, perpetuating instability for years to come. The break between various pronouncements in *Delgamuukw* and principles of justice and morals (especially in relation to the "spin" on fiduciary doctrine carried over from *Gladstone*) will motivate ceaseless criticism, and prove fertile ground for charges of racism, judicial bias and politicalization. Finally, the characterization of Aboriginal title which makes it by and large ineffectual will be entirely unsatisfactory in the eyes of title-holders, for they have an interest not so much in releasing their claims to most of their territory in treaties, but in meeting their responsibilities in relation to the land to which they are inextricably connected. This feeling of dissatisfaction cannot help the governments of Canada as they strive to achieve "certainty."

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[96] As we see with the Innu and Northern Cree, for example, the development of hydroelectric projects would have the sort of detrimental impact on traditional ways of life that would likely make approval of this activity unjustifiable: see "When Do Fiduciary Obligations Arise?," *supra* note 89. If this infringing activity were to be justifiable some sort of compromise, other than merely attempting to pull the flooded-out peoples into the project or offering financial compensation, would have to be worked out.

[97] Absent a strengthening and revitalization of the injunction strategy the time element could frustrate Aboriginal title-holders trying to prevent infringing activity from undercutting their ways of life *today*.