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The Legal Basis of Aboriginal Title

Brian Slattery
Osgoode Hall Law School of York University, bslattery@osgoode.yorku.ca

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deals only with the extinguishment prior to the enactment of the *Constitution Act, 1982*. Rights claimed will arguably have been extinguished prior to 1982, and so this is not an unreasonable limitation.

20. *Supra*, footnote 6 at p. 54.
21. *Supra*, footnote 10 at p. 738.
22. *Supra*, footnote 8 at p. 404.
23. *Supra*, footnote 3.
24. *Supra*, footnote 20.
25. *Supra*, footnote 17 at p. 382.
26. *Supra*, footnote 10 at p. 746.
27. *Supra*, footnote 3, C.N.L.R. at p. 170.
28. Reported at (1986) 36 D.L.R. (4th) 246.
29. *Supra*, footnote 3, C.N.L.R. at p. 182.
30. [1991] 1 C.N.L.R. 146.
31. *Ibid.* at p. 151.
32. *Delgamuukw* at p. 236.
33. *Delgamuukw* at p. 80.
34. *Delgamuukw* at p. 208.
35. *Supra*, footnote 8 at p. 404.
36. *Supra*, footnote 8 at p. 334 and ff.
37. *Delgamuukw* at p. 236 and ff.
38. *Delgamuukw* at p. 239.
39. *Delgamuukw* at p. 241.
40. *Supra*, footnote 3, C.N.L.R. at p. 173.
41. *Supra*, footnote 10 at p. 748.
42. *Supra*, footnote 10 at p. 748.
43. *Delgamuukw* at p. 245.
44. *Delgamuukw* at p. 208.
45. *Supra* at p. 11.
46. *The Hamlet of Baker Lake et al. v. The Minister of Indian Affairs and Northern Development et al.* [1980] 1 F.C. 518.
47. *Ibid.* at pp. 557-558.
48. *Delgamuukw* at p. 226.
49. *Delgamuukw* at p. 227.
50. See for example *Sparrow*, *supra*, footnote 3 and *Guerin supra*, footnote 17.
51. *Delgamuukw* at p. 228.
52. Supra, footnote 2.
53. *Delgamuukw* at p. 228.

The Legal Basis of Aboriginal Title

by Brian Slattery
Osgoode Hall Law School

The judgment of the British Columbia Supreme Court in *Delgamuukw* v. *The Queen*[1] makes for instructive and sobering reading for anyone interested in the progress of aboriginal land claims in the courts. The opinion of Chief Justice Allan McEachern is long and complex and cannot be considered in its entirety here. I will limit myself to two important topics and attempt to give some sense of the difficulty and importance of the issues raised. I will deal first with the principal "unwritten" sources of aboriginal land rights, that is, sources that do not depend on statutes, regulations, proclamations, or other instruments passed by legislative bodies. I will then consider the significance of the main "written" source of aboriginal title: the *Royal Proclamation* issued by the British Crown on October 7, 1763.

Unwritten Sources of Aboriginal Title

In arguing an aboriginal land claim before a Canadian court, a First Nation may invoke at least three unwritten sources: 1) English common law; 2) customary law; and 3) Canadian common law. These are not the only possible sources; one could also, for example, invoke international law or natural law.[2] But they are the ones most relevant to a discussion of the *Delgamuukw* judgment.

To deal first with English common law, it might be argued that aboriginal land rights are supported by principles of English land law under which a person in factual occupation of land is presumed to have valid title to it. A sophisticated argument of this type has been developed by Professor Kent McNeil in his important work, *Common Law Aboriginal Title*.[3]

The appeal of this approach is that it invokes a body of law that, for most Canadian lawyers and judges, is as solid and comfortable as a familiar armchair. It also directly confronts and turns on its head a point sometimes made against the existence of aboriginal title: that such a title is incompatible with a basic principle of English property law under which all valid titles to land must be shown to originate in the Crown.[4] And, of course, English common law was introduced

into British Columbia at an early stage in its colonial history, so the argument is highly relevant to land claims in the Province.

Nevertheless, the argument from English common law should probably be viewed as supplementary to other approaches available to aboriginal peoples in British Columbia.[5] Used in isolation, it might be misinterpreted as conceding tacitly that aboriginal customary law had been superseded by English law, a point that most First Nations would be anxious to deny. Further, the argument operates at a high level of abstraction and does not take much account of the long history of relations between the First Nations of North America and incoming European powers. It does not come to terms, then, with the argument, considered below, that certain distinctive principles emerged in that historical context that may bind a modern Canadian court. At any rate, the argument from English common law was apparently not advanced by the plaintiffs in *Delgamuukw* and is not discussed in the judgment, so I will leave it to one side.

The second approach to aboriginal title relies, not on English law, but on the customary law of the aboriginal people in question. It maintains that a Canadian court should recognize and give direct effect to any land rights flowing from that custom. The contention is that aboriginal land rights and the customary laws supporting them survived the First Nation's entry into British Columbia, and, unless extinguished by competent legislation, should be accepted by the courts.

This argument has the attractive feature of urging direct recognition of customary legal conceptions, without attempting to ground them in English law or assimilating them to English principles and concepts. However, the approach has its own drawbacks. Proving customary land law in court may not be a simple matter. The land use patterns of many First Nations changed in creative response to initial European trade and settlement, and they have continued to change and adapt ever since. This fact, when coupled with the frailty of human memory, the porous nature of law, and the fractious tendencies of legal experts in any society, may result in witnesses giving differing accounts of important features of customary law, which may leave a court nonplussed or unimpressed.

This seems to have been the result in the *Delgamuukw* case. The court commented:

> It became obvious during the course of the trial that what the Gitksan and Wet'suwet'en witnesses describe as law is really a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves. . . . there always seemed to be an aboriginal exception which made almost any departure from aboriginal rules permissible. In my judgment, these rules are so flexible and uncertain that they cannot be classified as laws.[7]

The court might perhaps have paused to reflect that a similar charge has often been levelled against the loose collection of precedents known as English common law, a charge, incidentally, that a reading of the *Delgamuukw* judgment does little to dispel. Chief Justice McEachern makes much of the differing opinions of aboriginal witnesses on the nature of certain customary institutions.[8] It would be interesting to apply the same standards to the range of views exhibited by Canadian judges on certain questions of Anglo-Canadian property law.

However, the court does not rest content with these doubtful comments on the variability of custom. It indulges in more far-reaching conclusions:

> I do not accept the [plaintiffs'] ancestors "on the ground" behaved as they did because of "institutions." Rather I find they more likely acted as they did because of *survival instincts* which varied from village to village.[9]

This viewpoint dovetails with a general sentiment expressed by the court early in the judgment:

> . . . it would not be accurate to assume that even pre-contact existence in the territory was in the least bit idyllic. The plaintiffs' ancestors had no written language, no horses or wheeled vehicles, slavery and starvation were not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbes, that aboriginal life in the territory was, at best, "nasty, brutish and short."[10]

These passages speak volumes about the court's largeness of spirit and overall grasp of the issues. That the court should seriously think that a human society can function by instinct alone or that horses and wheeled vehicles are somehow relevant to questions of aboriginal title is surprising and regrettable.

There is a second and perhaps more serious difficulty with the customary law approach. In resorting to a Canadian court, aboriginal claimants ordinarily seek recognition of a set of rights that will in some sense "fit" into the overall legal and constitutional structure of the country. So, it will be necessary at certain points to describe customary rights in terms compatible with the general legal system, and more particularly to specify how the rights interact with those recognized under the general law.

Thus, a court may want to know whether customary land rights amount roughly to "ownership," or "usufruct," or "license," how they interact with any underlying title of the Crown (if such exists), whether they can be conveyed or leased to outsiders, whether they can be abandoned or lost through escheat, whether they can be extinguished or modified by prerogative act or ordinary legislation, and so on.

But here a difficulty may arise. The claimants' traditional conceptions may be inimical to presuppositions woven tightly into modern European land systems. For example, an aboriginal group may allege (as was done in *Delgamuukw*) that they hold land rights amounting to "ownership." However, the evidence may perhaps disclose that under customary law the notion that land could be "owned" in some absolute sense and freely transferred to others was unknown. To the contrary, it may have been thought that the land is far greater than the people that inhabit it, so that it would be truer to say that the people belong to the land than the land to them. Again, the land may traditionally have been viewed as given to a people by the Creator and held by them as a sacred trust for future generations, so that to alienate the land would betray this trust.

Some of these ideas can be seen, for example, in the statement by the aboriginal spokesman, Black Hawk:

> My reason teaches me that land cannot be sold. The Great Spirit gave it to his children to live upon, and cultivate as far as necessary for their subsistence; and so long as they occupy and cultivate it, they have the right to the soil — but if they voluntarily leave it, then any other people have the right to settle upon it. Nothing can be sold, but such things as can be carried away.[11]

It may be difficult to persuade a judge that aboriginal conceptions of this kind amount roughly to "ownership" in the English sense, or indeed to other substantive property rights known to English law.

A further drawback of the customary law approach is that it may unwittingly lend support to the view that aboriginal title is confined to traditional practices on lands occupied prior to European contact. Chief Justice McEachern embraces just this viewpoint. "In this judgment", he states,

> I propose to use the term "aboriginal rights" to describe rights arising from ancient occupation or use of land, to hunt, fish, take game animals, wood, berries and other foods and materials for sustenance and *generally to use the lands in the manner they say their ancestors used them.*[12]

This apparently innocuous approach in fact leads to radical conclusions, which the court does not shrink from adopting:

> With regard to new lands used after contact for commercial trapping, . . . it is my view that such would not be an aboriginal use and those new lands would not be aboriginal lands even if they were also used for sustenance after contact. This is because, firstly, commercial trapping is not an aboriginal practice, and secondly because the use of these new lands, even partly for aboriginal purposes under European influences after contact, does not constitute the kind of indefinite long time use which is required for aboriginal rights. In such matters a user period of 20 to 50 years or so is of no importance.[13]

On this view, it would not be permissible, for example, for a group that traditionally practiced fishing, hunting, and gathering to turn to farming, lumbering, or cattle-ranching in the post-contact era. A First Nation would be permanently caught in an anthropological time-warp, like the inhabitants of some bizarre planet in a Star Trek episode, incapable of responding to changes in their social and economic environment.

The third approach to the question of aboriginal title attempts to strike a middle path between the two positions just considered and to avoid the pitfalls of both.[14] It argues that in Canada (as in the United States), aboriginal title is grounded in a body of practice that developed in North America during the first two centuries of British settlement, roughly in the period 1600-1800. During this time, the basic legal principles governing Britain's acquisition and government of overseas territories were being worked out. These principles were drawn for the most part from official practice, as understood in light of basic values and principles implicit in constitutional and international law.

Throughout this period, British and colonial officials entered into extensive relations with First Nations located in eastern and midwestern America, relations that dealt with such matters as peace, alliance, trade, territory, land cessions, and criminal infractions. In the course of these dealings, certain customary practices developed. These practices, and the basic principles and values implicit in them, were influenced by both aboriginal and British conceptions. While drawing on both, they were a genuinely new development, appropriate to the new situation in which the parties found themselves, and responsive to the various needs and outlooks of First Nations, settlers, and imperial officials.

These practices, it is argued, gradually crystallized into a body of

fundamental common law governing relations between aboriginal nations and settler communities. This process was complete by the second half of the 18th century, when the Indian question came to a head under the pressure of Franco-British rivalry. The resulting body of fundamental law became applicable to French Canada when it was gained by the British in the period 1759-1763, and was partially reflected in the text of the *Royal Proclamation, 1763*, issued by the Crown to make plain its intentions toward Indian nations in the wake of the French defeat. Aboriginal common law also extended to the western reaches of Canada as these areas fell under British rule; in this way it came to apply to the areas now contained in British Columbia.

The common law of aboriginal rights has been recognized in a series of leading judicial decisions, both in Canada and the United States.[15] Branches of this law govern the status and interpretation of First Nation treaties with the Crown, the force of native customary law and its interaction with English and French law, the governmental powers of First Nations, and the rights of aboriginal peoples to the lands they occupy. This last branch of the law is usually known as the law of aboriginal title.

Under standard doctrines, the law of aboriginal rights could in principle be modified by a competent legislature, such as the Imperial Parliament, or local colonial legislatures empowered to deal with such matters. Whether a local legislature actually had this power is a matter for detailed investigation in each case. There is the possibility that the powers of local legislatures were limited by the *Royal Proclamation, 1763*, which laid down a consensual procedure for the acquisition of aboriginal lands. The Proclamation did not limit the powers of the Imperial Parliament at Westminster, which could have repealed or overridden it. But, on one view, the same was not true of local colonial legislatures in North America, which were bound by its terms.[16] We will come back to the Proclamation later.

Under common law, First Nations held a legal title to the lands in their possession, whether these were village sites, cultivated fields, fishing stations, hunting and gathering grounds, or lands held for strategic or religious purposes. This title imported rights of exclusive use and possession that, on a quasi-feudal model, formed a burden on the ultimate title of the Crown. The aboriginal title could not be ceded or sold to private individuals in the settler communities. It could only be transferred to the Crown or its representatives by a voluntary public cession.

Aboriginal title, like any other property right, could be modified

or extinguished by acts of a competent legislature, in the absence of constitutional restraints. However, as just noted, the powers of local Canadian legislatures to accomplish this were perhaps limited by the *Royal Proclamation, 1763*. This limitation may have ended in 1867 with the passage of the *Constitution Act, 1867*, section 91(24) of which awarded to the Federal Parliament exclusive jurisdiction over "Indians, and Lands reserved for the Indians." Any remaining limits on federal authority presumably disappeared upon the passage of the *Statute of Westminster, 1931* by the British Parliament. However, under the *Constitution Act, 1867*, provincial legislatures apparently lacked the power to extinguish aboriginal land rights, whether by legislation or treaty. Since 1982, section 35 of the *Constitution Act, 1982* has placed important constitutional limits on the legislative powers of both federal and provincial authorities to affect aboriginal rights.[17]

This third approach has several distinctive features. There is no need for a First Nation to show that it traditionally claimed "ownership" over its lands or that it had proprietary conceptions resembling those known to European property systems. The basis of aboriginal title is not native custom but the common law of aboriginal rights, which applies uniformly to all First Nations, regardless of their size, social organization, stage of technological development, or customary laws. So long as a First Nation actually occupied the lands in question, by living on them or making use of them, then the Nation held aboriginal title to them.

A second feature of this approach is equally important. It denies that aboriginal title is confined to practices followed upon European contact or that the boundaries of aboriginal lands were frozen at that time. Thus, a group that originally engaged mainly in hunting and fishing for subsistence might turn to commercial hunting and fishing, or indeed to agriculture, forestry, or tourism. And a group might migrate from one area to another, in response to demographic, social, or economic pressures, so long as the new lands were not under Crown occupation. In the absence of restrictive legislation applying to aboriginal lands, there was nothing in the common law of aboriginal title to prevent an aboriginal people from making whatever use of their lands they saw fit or from moving to other available lands.[18]

It should be stressed that the third approach does not suggest that the common law of aboriginal title superseded the customary land laws of First Nations. To the contrary, these systems of law and practice continue to exist and to develop along their own lines. However, customary law operates only *within* the group, determining

the relative rights of group members to their lands. It does not affect the title held by the group as a whole in its relations with the Crown and the outside world.

On this view, the law of aboriginal title operates as an overarching body of law, bridging the gap between aboriginal land systems on the one hand and English (or French) land systems on the other. Neither side is subordinate to the other; each operates within its own sphere of influence. The status of each system and their interrelations are regulated by this higher level of law, which owes its origins to the interactions of British and First Nations over a long period of time, and draws on the legal conceptions and interests of both sides.

This approach allows us to steer a middle course between the view that aboriginal land rights are governed entirely by customary law, and the opposing view that English law (or French law in Quebec) is paramount. Unfortunately, the court in *Delgamuukw* does not opt for a middle position of this kind. In a striking passage, Chief Justice McEachern states:

> I am sure that the plaintiffs understand that although the aboriginal laws which they recognize could be relevant on some issues, I must decide this case only according to what they call "the white man's law" . . .[19]

It is not entirely clear what is meant here by "the white man's law," but on any view the expression is misleading and inappropriate. It suggests that the laws of one racial group (people of European descent) occupy a privileged position in Canada and apply to indigenous peoples to their disadvantage and to the exclusion of their own laws. Implying, as it does, a kind of inherent racial bias in Canadian law, the phraseology must be regretted.

If this were a mere matter of language, it would hardly merit extensive comment, especially since the judge seems to be adopting an expression used by the plaintiffs. But the matter goes deeper than that. It reflects a fundamental misapprehension on the part of the court as to the nature of the case and the sort of law that governs it.

It is worth reiterating that Canadian courts are not in any context bound to apply "the white man's law." They are bound to apply the *law*. And that law is the law of all Canadian citizens, of whatever colour, race, or ethnic origin. The law of Canada is an amalgam of laws emanating from many sources and includes the customary laws of aboriginal Canadian nations. More to the point, it includes the common law of Canada, which, as the Supreme Court of Canada has recognized, is the source of the law of aboriginal rights.[20] This fundamental body of law is neither English nor aboriginal in origin:

it is a form of intersocietal law that evolved from long-standing practices linking the various communities. As such, it is the keystone of our common Constitution.

The Royal Proclamation of 1763

I would now like to turn to the *Royal Proclamation, 1763* and consider its relevance to aboriginal land claims in British Columbia. In *Delgamuukw*, the court denies that the Proclamation has any relevance, holding that it has never applied to the lands in the Province. Although a number of reasons are given in the judgment, three factors seem to play an especially influential role.

First, as a matter of historical fact, British Columbia was obviously not under actual British rule at the time the Proclamation was issued, not having been settled or even explored by the English. So, maintains the court, the Crown had no *authority* to legislate for British Columbia in 1763 and the Proclamation cannot have taken effect there.[21]

Even assuming this problem could be surmounted, a second difficulty arises. According to the court, the Proclamation's terms only applied within certain "Indian Territories" designated in the document; they did not apply generally throughout British territories in North America.[22] However, on the court's view, the Indian Territories did not extend farther west than the Mississippi River, and did not include British Columbia.[23] So the Proclamation cannot have applied there.

A third objection impressed the court. The Indian Part of the Proclamation begins with this preamble:

> And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that *the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection*, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds; . . .[24]

Most of the Proclamation's subsequent provisions use the phrase "the said Indians," thus referring back to the description given in the preamble. This description, argues the court, refers exclusively to Indians who were actually connected with the Crown or lived under its protection at the time the Proclamation was issued. It does not apply to Indians who gained this status only later. However, in 1763,

rules the court, the Indian Nations of British Columbia were not connected with the Crown and did not live under its protection. So, they fell outside the Proclamation's scope.[25]

To sum up, the first objection questions whether the Crown had the *authority* in 1763 to legislate for British Columbia, even assuming that the Proclamation's language could be construed as extending there. The second and third objections, by contrast, query whether the *terms* of the Proclamation actually extend to British Columbia, even assuming that the Crown had the power to legislate there. The two issues are linked in various ways, but for analytical purposes it is useful to keep them separate.

Let us consider first the question of the Crown's authority to legislate for British Columbia in 1763. How should we go about resolving this question? One approach, tacitly favoured by the court, is to say that the Crown's authority is limited to territories over which it holds a clear international title. On this view, its capacity to deal with British Columbia in 1763 would be very much in doubt, given the absence of British exploration, settlement, and governmental institutions there.

However, British courts have traditionally taken a different approach to these sorts of questions. They have held that as a matter of constitutional law the Crown has the power to determine the territorial extent of its own dominions, and its views on this matter cannot be questioned in domestic courts. Where the Crown officially lays claim to a certain territory, the courts are bound to defer to the claim, however doubtful it may be under standard international criteria.[26]

According to this doctrine, then, the question to be decided by the court in *Delgamuukw* is not whether the Crown had explored, settled, or established effective rule in British Columbia prior to 1763 (the answer to which is clearly negative), but whether by that time the Crown had officially *laid claim* to the unknown western reaches of North America, either in its own right or by succession to previous French claims. If so, a Canadian court could not challenge the Crown's authority to apply the Proclamation to British Columbia in 1763.

Oddly, Chief Justice McEachern does not take this traditional approach into account, as is evident in the following passage, where he assesses the historical evidence:

> While the evidence is not conclusive, and I have no doubt Mr. Rush is right when he argues more was known on the ground, it is my conclusion that precious little was known by governments in Europe in 1763 about the western half of North America. The plaintiffs argue for French sovereignty over all of Northern America, other than Rupert's Land, based in part on the 1671 Sault Ste. Marie Proclamation of Saint-Lusson, the establishment of the Posts of the Western Sea in the early to mid 1700's, and the travels of La Verendrye in the 1730's and 1740's. But the fact remains, unquestionably, that there was no French or British discovery, let alone occupation or other assertion of sovereignty over any part of what is now British Columbia prior to 1763.
>
> The French may have had a better claim to (but practically no presence on) the Canadian prairies based upon exploration or discovery even though Kelsey in the service of the Hudson's Bay Company seems to have been the first European to visit the real west, reaching present day Saskatoon in 1690. I am unable to conclude that France ceded the prairies or anything west of the Mississippi, let alone British Columbia, to Great Britain by the Peace of Paris in 1763.
>
> For these reasons it cannot be said that those vast areas were British possessions at the time of the Royal Proclamation, 1763.[27]

Although the court makes passing reference here to European claims of sovereignty, it bases its conclusion primarily on the lack of French and British exploration and occupation. By contrast, under the traditional approach, the crucial question is whether prior to 1763 the British Crown had launched or adopted official *claims* to the western sectors of North America.

It is hardly possible here to review the voluminous evidence regarding the Crown's territorial pretensions in America from the earliest days of exploration up to 1763. Suffice it to say that it was common imperial practice to claim first and make good the claim later. From the early 1600s onwards, both the British and French advanced sweeping territorial claims extending indefinitely westward to the Pacific, a number of which encompassed the areas now within British Columbia.[28] These claims were no doubt inadequate in international law to establish sovereignty, for in most cases they were not backed up by an effective presence. But under the standard British approach, they would appear sufficient to establish the Crown's authority for purposes of a domestic court.

Nevertheless, this approach is itself open to criticism. Whatever the position in British law, it would appear somewhat chauvinistic and mechanical for a modern Canadian court to apply without a murmur even the most outlandish claims made by the Crown in the past, without regard to the true international position, and in particular without regard to the sovereignty of First Nations. The latter factors,

it would seem, should temper and inform a Canadian court's reconstruction of this country's past and lead judges to assess the Crown's historical claims with a healthy dose of scepticism.[29]

However, even if this more balanced approach were adopted, it would not affect the argument advanced here. Whatever the general standards by which the Crown's historical claims should be assessed in the courts, it is surely not open to the Crown to repudiate its own past claims with a view to denying people the benefit of promises that accompanied the claims. That is, the Crown is estopped by its old territorial claims from denying its own competence in relation to British Columbia in 1763.

Indeed, the Proclamation can hardly be understood apart from expansionist imperial policies. At the time it was issued, Britain was attempting to secure some modicum of authority over western American territories claimed under its own ancient Charters, now buttressed by the cession of French claims. As part of this strategy, the Crown issued the Proclamation, recognizing the native inhabitants as allied and protected nations and undertaking to protect their lands against the inroads of settlers and speculators. The Crown's territorial pretensions in the West were qualified by the guarantees it held out to First Nations. Having now made good its pretensions, the Crown should not be heard to deny the validity of its original undertakings.

Of course, this still leaves open the question whether the Proclamation, on a true interpretation of its terms, actually covered areas as far west as British Columbia. This second issue will now occupy our attention. As noted earlier, it is possible to argue that the beneficial provisions of the Proclamation applied only within the "Indian Territories" described in the document, which, on the court's view, did not extend further west than the Mississippi River. There are two sub-issues here. One concerns the extent of the Indian Territories; the other whether the Proclamation's provisions were in fact confined to those Territories. We will discuss the first question before moving on to the second, ultimately more crucial question.[30]

As described in the Proclamation, the Indian Territories include all lands lying west of the Appalachian watershed, *except for* those included within Quebec, East Florida, West Florida, and Rupert's Land, the latter being the region granted to the Hudson's Bay Company.[31] At first sight, then, the Indian Territories would seem to include the lands now located within British Columbia, because the latter are west of the Appalachians and do not fall within any of the colonies named. However, it was argued in *Delgamuukw* that

under the Treaty of Paris (1763) British sovereignty ended at the Mississippi River, and further that the headwaters of the Mississippi met up with the southern limits of Rupert's Land at a point west of the Great Lakes. Since Rupert's Land was explicitly excluded from the Indian Territories, the effect was to render the Indian Territories a self-contained unit sealed off just beyond the Great Lakes.[32]

In fact there is strong historical evidence, accepted by the Privy Council in its decision in the *Ontario Boundaries Case* (1884), that the southern boundary of Rupert's Land was located well to the north of the Mississippi headwaters.[33] So, even if the Indian Territories are viewed as a single indivisible unit, they would seem to spread westward through the gap between the Mississippi and Rupert's Land.

But leaving this question aside, we should remember that the Indian Territories are described in a residual fashion, as taking in all lands west of the Appalachian watershed, *except for* Quebec, the Floridas, and Rupert's Land. The Indian Territories constitute *whatever trans-Appalachian lands are left over* once the latter colonies are subtracted. This residue appears to include the far western territories claimed by the Crown in 1763, regardless of whether these join up physically with the portions of the Indian Territories lying east of the Mississippi. There is nothing in the Proclamation to suggest that the Indian Territories constitute a single, undivided unit. To the contrary the text speaks in the plural of "all the Lands and Territories" not falling within Quebec, the Floridas, and Rupert's Land, "*as also* all the Lands and Territories" west of the Appalachians.[34]

However, the question of the geographical extent of the Indian Territories should not distract us from a second, more crucial question. Does the Proclamation only apply within those Territories, as the court seems to assume, or does it have a more general application? In the latter case, the boundaries of the Indian Territories become largely irrelevant.

An attentive reading of the Proclamation's text makes it clear, I suggest, that the document's protective measures are not confined to the Indian Territories. Many provisions of enduring interest apply more generally throughout the North American lands claimed by the Crown. A detailed verification of this point is beyond the scope of this paper.[35] However, the crux of the argument can be given quite briefly.

After describing the Indian Territories, the Proclamation goes on to declare that these Territories are closed to settlement and land purchases "for the present." The latter phrase clearly indicates the temporary nature of the provision; and in fact the limits of the

Territories were subsequently modified by detailed treaties with various Indian nations and changes in colonial boundaries.[36] The Proclamation then proceeds to order the removal of all persons who have settled either within the Indian Territories "or upon any *other* Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid . . .".[37] This provision explicitly covers lands located outside the Indian Territories. Its effect is to provide permanent protection to unceded Indian lands throughout the territories claimed by the Crown in North America.

The Proclamation next refers to the great frauds and abuses formerly associated with purchases of Indian lands, to the prejudice of British interests and the great dissatisfaction of the Indians. In order to prevent such irregularities in future, and "to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent," the Crown strictly forbids private persons from making purchases of "*any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement . . .*," and requires that such lands be purchased only by the Crown or its representatives in a public assembly.[38] These important permanent provisions apply generally to British colonies in America, not just the Indian Territories, and reinforce the common law requirement of a purchase of Indian land.

So, the view that the Proclamation's terms are confined to the Indian Territories is not supported by the actual terms of the instrument. In fact, the most important permanent provisions of the Proclamation have a general application throughout the areas claimed by the Crown.

Nevertheless, it can still be argued that, whatever the Proclamation's territorial scope, its protective effect is confined to First Nations actually connected with the Crown or living under its protection in 1763. This third argument, as seen earlier, is based on the wording of the preamble, which, it is said, refers only to a specific group of Indian nations holding relations with the Crown when the Proclamation was issued.

In considering this issue, it is useful to remember that as a general rule legal provisions create "open" or "floating" categories that apply to any persons, actions, or things that fall within their scope at any time after enactment; they are not limited to entities existing at the moment the provision is passed. In other words, most enactments are "prospective" in their operation. They do not speak once and for all at the moment of their passage but continue to speak throughout their lives.

To take an obvious example, the *Criminal Code* does not govern only persons living at the time it was first issued, otherwise it would require constant reenactment. By the same token, a scientist charged with murdering someone in a remote research station in Canada's far north would presumably not gain much headway by arguing that when the *Criminal Code* took effect the area in question did not belong to the Crown. The court would quite properly reply that, even assuming that the territory was not part of Canada when the *Code* took effect, the *Code* automatically became applicable to the area whenever it fell under Canadian sovereignty for domestic purposes.

Now it is clearly possible to argue that the Proclamation creates a sort of "charter group" of Indian nations that enjoy special privileges and protection by reason of their connection with the Crown on the 7th day of October, 1763, and that Indians who entered into relations with the Crown even a single day later would not benefit from the Proclamation's terms. There is nothing in the wording of the document that directly rules out this interpretation. And, of course, certain legal provisions do precisely this sort of thing, as where a legislative amnesty is given to all illegal immigrants living in the country on a certain date. However, provisions of this kind are quite unusual and are normally couched in quite specific language.

Is it sensible to read the Proclamation in this restrictive way? The text itself is relatively neutral, speaking of "the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection." While arguments one way or the other might be made, the language itself does not seem strong enough to warrant firm conclusions. So, it is helpful to consider whether there is good reason to think the Crown intended to discriminate among Indian Nations on the basis of the date they fell under its protection.

In *Delgamuukw*, the court argues that such reasons exist and rejects the submission favouring a prospective interpretation. Here is the relevant passage:

> I am unable to accept this submission. The tenor of the Proclamation in its historical setting clearly relates to the practical problems facing the Crown in its then American colonies. Two of the Indian clauses of the Proclamation actually state that they are prescribed for "the present", and a fair reading of the document makes it clear that it relates to and applies for the use of the *said* Indians, who are those with whom the Crown was connected, etc., and over whom the Crown then exercised sovereignty. It must be remembered that Britain had just obtained sovereignty of all of North America east of the Mississippi, but its new

> and old colonial governments had jurisdiction over peoples and territories which were much more limited. It is the Indians in these extra lands which were included within the reach of the Proclamation. The Crown had no connection with the Indian people west of the Rockies who owed the Crown no actual or even notional allegiance, and were in no way under its protection.[39]

With respect, it is not clear what bearing these considerations have on the question of the Proclamation's prospective application. It is beyond contest that the Crown had no actual links with the First Nations of British Columbia in 1763; the question is whether this fact is legally relevant, given the Proclamation's wording. Again, while there can be no doubt that the Proclamation was motivated by practical problems facing the Crown in 1763, there is no reason to think that the Crown viewed the question of Indian lands as peculiar to that era. To the contrary, the problem of preventing unlawful seizures and purchases of such lands had long been recognized. It had prompted repeated legislation in most of the American colonies over the previous century, and continued to bedevil relations with First Nations throughout the next century. While some of the Proclamation's provisions were clearly meant to be temporary, notably those related to the "Indian Territories," others were just as clearly permanent. If the Crown really wanted to convince Indian Nations "of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent," establishing a cut-off date of October 7, 1763 would not seem the way to go about it.[40]

However, even if we wish to read the Proclamation in this narrow way, that is not an end of the matter. The question of which First Nations were under the Crown's protection in 1763 should surely be resolved by reference to British territorial claims at that date. The Crown cannot both lay claim to the western reaches of North America and deny that the local inhabitants are under its protection. The two go together.

So, in summary, the case for the Proclamation's application to British Columbia is rather stronger than the court seems prepared to concede. First, there is good reason to think that the Crown claimed authority over the western reaches of Canada in 1763 and that the Proclamation should be upheld on this basis. Second, British Columbia seems to fall within the "Indian Territories" described in the text; but, in any case, the Proclamation's more important permanent provisions have a general application, not limited to those Territories. Finally, even if the Proclamation did not apply to British Columbia when first issued, it became applicable whenever the region fell under the Crown's protection.

Conclusion

As our discussion has suggested, the decision in *Delgamuukw* unfortunately does little to advance our understanding of aboriginal land claims in British Columbia or contribute to the solution of the important legal and constitutional issues they raise. But, if the judgment is a disappointing one, it would be wrong to lay all the blame on its author. Some portion of the judgment's shortcomings can be attributed, I think, to the failure of the parties to present to the court a carefully selected set of legal issues that fall within the terms of current precedents and are amenable to judicial treatment without massive historical and anthropological documentation. Chief Justice McEachern complained in his judgment that he was not a Royal Commission, and lacked the staff and resources of such a body, implying that he was swamped by the sheer volume of material and argument.[41] On this point, at least, the learned judge seems right.

Notes

1. Judgment delivered on March 8, 1991, by Chief Justice Allan McEachern of the British Columbia Supreme Court; reported in (1991), 79 Dominion Law Reports (4th) 185 (B.C.S.C.). The decision is now being appealed to the British Columbia Court of Appeal.
2. I have attempted to deal with these sources in "Aboriginal Sovereignty and Imperial Claims," (1991) *Osgoode Hall Law Journal* (forthcoming).
3. (Oxford: Clarendon Press, 1989).
4. See, for example, the judgment of the Supreme Court of the Northern Territory of Australia in *Milirrpum v. Nabalco Pty.* (1971), 17 Federal Law Reports 141; for discussion, see McNeil, *Common Law Aboriginal Title*, *supra*, note 3, esp. at pp. 290-97, and Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon, Sask.: University of Saskatchewan Native Law Centre, 1983), at pp. 12-16.
5. This seems to be McNeil's own view; see *Common Law Aboriginal Title*, *supra*, note 3, pp. 193-96.
6. See discussion in McNeil, *Common Law Aboriginal Title*, *supra*,

note 3, pp. 161-92.

7. *Supra*, note 1, at p. 447 (typographical error corrected).
8. See *ibid.*, at pp. 447-49.
9. *Ibid.*, at p. 441, (emphasis added).
10. *Ibid.*, at p. 208 (typographical error corrected). See comments of a similiar tenor at pp. 222 and 229.
11. Quoted by George S. Snyderman, "Concepts of Land Ownership Among the Iroquois and Their Neighbours," in William N. Fenton, ed., *Symposium on Local Diversity in Iroquois Culture*, Smithsonian Institution, Bureau of American Ethnology, Bulletin 149 (Washington: United States Government Printing Office, 1951), at p. 16.
12. *Supra*, note 1, at p. 209 (emphasis added). See also p. 458.
13. *Ibid.*, at p. 439.
14. The following summarizes an argument presented more fully in Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 *Canadian Bar Review* 727.
15. See especially: *Johnson v. M'Intosh* (1823), 8 Wheaton 543 (United States Supreme Court); *Worcester v. Georgia* (1832), 6 Peters 515 (United States Supreme Court); *Connolly v. Woolrich* (1867), 11 Lower Canada Jurist 197 (Quebec Superior Court); *Calder v. Attorney-General of British Columbia* (1973), 34 Dominion Law Reports (3d series) 145 (Supreme Court of Canada); *Guerin v. The Queen* (1984), 13 Dominion Law Reports (4th series) 321 (Supreme Court of Canada); *Roberts v. Canada* (1989), 57 Dominion Law Reports (4th series) 197 (Supreme Court of Canada); *R. v. Sioui* (1990), 70 Dominion Law Reports (4th series) 427 (Supreme Court of Canada); and *R. v. Sparrow* (1990), 70 Dominion Law Reports (4th series) 385 (Supreme Court of Canada).
16. The arguments and authorities are reviewed in Brian Slattery, *The Land Rights of Indigenous Canadian Peoples* (Saskatoon: University of Saskatchewan Native Law Centre, 1979), pp. 314-28; for a brief discussion, see Slattery, "Understanding Aboriginal Rights," *supra*, note 14, at pp. 774-75.
17. These points are pursued in greater detail in "Understanding Aboriginal Rights," *supra*, note 14, pp. 774-82. On the interpretation of section 35, see the Supreme Court of Canada's important decision in *R. v. Sparrow*, *supra*, note 15.
18. For a fuller discussion, see Slattery, "Understanding Aboriginal Rights," *supra*, note 14, at pp. 741-42, 746-48, 755-69.
19. *Supra*, at p. 201.

20. See especially the *Guerin* and *Roberts* cases, cited *supra*, note 15.
21. *Supra*, note 1, at p. 304.
22. This seems to be the premise of the court's discussion at *ibid.*, pp. 303-06, however, with respect, the reasoning in this section is not altogether clear.
23. *Ibid.*, at pp. 303-04.
24. Emphasis added. All quotations of the Proclamation in this paper are taken from the official text reproduced in Clarence S. Brigham, ed., *British Royal Proclamations Relating to America*. Vol. 12, *Transactions and Collections of the American Antiquarian Society* (Worcester, Mass.: American Antiquarian Society, 1911), pp. 212-18.
25. *Supra*, note 1, at pp. 304-06.
26. See authorities and discussion in Slattery, *Land Rights of Indigenous Canadian Peoples*, *supra*, note 16, at pp. 63-5, and McNeil, *Common Law Aboriginal Title*, *supra*, note 3, at pp. 111-12.
27. *Supra*, note 1, at pp. 292-93.
28. The evidence is reviewed in detail in Slattery, *Land Rights of Indigenous Canadian Peoples*, *supra*, note 16, at pp. 175-90.
29. The argument is made at greater length in Slattery, "Aboriginal Sovereignty and Imperial Claims," *supra*, note 2. For discussion of related matters, see: John D. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia* (Doctoral Dissertation: Cambridge University, 1985; reprinted, University of Saskatchewan Native Law Centre: Saskatoon, 1985); Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991), 29 *Alberta Law Review* 498; Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991), 36 *McGill Law Journal* 308; Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991), 36 *McGill Law Journal* 382.
30. The following summarizes the discussion in *Land Rights of Indigenous Canadian Peoples*, *supra*, note 16, pp. 268-82.
31. The Proclamation's wording is this: "And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under Our Sovereignty, Protection, and Dominion, for the Use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three New Governments [i.e. Quebec, East Florida, and West Florida], or within the Limits of the Territory granted to the Hudson's Bay Company

[i.e. Rupert's Land], as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West, as aforesaid [i.e. the Appalachian watershed]; . . . ."

32. *Supra*, note 1, at pp. 303-04.
33. See the detailed treatment in Kent McNeil, *Native Rights and the Boundaries of Rupert's Land and the North-Western Territory* (Saskatoon: University of Saskatchewan Native Law Centre, 1982). For a briefer discussion, see Slattery, *Land Rights of Indigenous Canadian Peoples*, *supra*, note 16, at pp. 149-56.
34. Emphasis added.
35. See generally Slattery, *Land Rights of Indigenous Canadian Peoples*, *supra*, note 16, at pp. 191-349.
36. See: Louis De Vorsey Jr., *The Indian Boundary in the Southern Colonies, 1763-1775* (Chapel Hill, N.C.: University of North Carolina Press, 1966); Slattery, *Land Rights of Indigenous Canadian Peoples*, *supra*, note 16, at pp. 329-34.
37. Emphasis added.
38. Emphasis added.
39. *Supra*, note 1, at pp. 305-06.
40. The question of the Proclamation's prospective application is examined in detail in Slattery, *Land Rights of Indigenous Canadian Peoples*, *supra*, note 16, pp. 329-49.
41. *Supra*, note 1, at p. 202.