MARSHALL AND BERNARD: IGNORING THE RELEVANCE OF CUSTOMARY PROPERTY LAWS

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This brief comment on the recent decision of the Supreme Court of Canada in *R. v. Marshall; R. v. Bernard*[1] focuses on that part of the judgment dealing with aboriginal title. I argue that the majority opinion is seriously flawed insofar as it undermines the significance of aboriginal laws as a way of proving the existence of an aboriginal title. By doing so the judgment fails to give adequate weight to the aboriginal perspective on the source and nature of aboriginal title, thereby compromising the reconciliation project that lies at the heart of the Supreme Court of Canada's jurisprudence on s. 35 of the *Constitution Act, 1982*. I begin with some observations on teaching aboriginal title and then turn to examine how the majority opinion comprehensively undermines the significance of aboriginal customary laws. I examine the way in which the court describes and applies the "aboriginal perspective" on title while ignoring or at least downplaying the view that aboriginal title is *sui generis*.

Teaching the doctrine of aboriginal title

When John Borrows and Leonard Rotman produced their first edition of *Aboriginal Legal Issues, Cases, Materials and Commentary*[2] a few years ago I adopted it as the text for a course I teach on aboriginal law.[3] But unlike the authors, who begin their book with the topic of Aboriginal Title, I start the course with the subject matter of Chapter 6, "Governance" (re-framed in my course in terms of self-determination and self-government). I also supplement Borrows and Rotman's treatment of governance with

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[1] 2005 SCC 43 [*Marshall and Bernard*].

[2] Butterworths, 1998. Now in its second edition (Toronto: Lexis-Nexis Butterworths, 2003) but still organized in the same manner with aboriginal title at the beginning and "governance" two thirds of the way through the book.

[3] Like most such courses in Canadian law schools, the course focuses on the application of settler law to indigenous peoples; it is not a course on the laws of indigenous societies.

the Opening Statement of Counsel in the *Delgamuukw* case[4] as well as with some international legal materials dealing with the right of self-determination. I start the course this way because I want to emphasise for the students that an aboriginal title cannot exist in the abstract but needs to be seen as part and parcel of an overall indigenous legal system, a system of legal relationships between people, and between people, land, resources and territory. Aboriginal title is then, a subset, a necessary implication, of the self-governing status of indigenous peoples prior to the acquisition of sovereignty by the Crown. Justice Judson recognized this in *Calder* in referring to the Indians as being there, "organized in societies and occupying the lands as their forefathers had done."[5]

Framing the issue in this way helps locate the body of aboriginal law and the doctrine of aboriginal title firmly within the framework of human rights law and the law of self determination of all peoples.[6] The statement of counsel in *Delgamuukw* serves similar purposes, drawing attention to the problem of forum and the hegemonic nature of legal discourse. Why must the Gitksan and Wet'suwet'en sue in Her Majesty's courts? Why is the onus on the Gitksan and Wet'suwet'en to prove their title and not on the Crown to prove its title? What fora, if any, exist for resolving inter-societal disputes? But framing the issue this way also helps to make the point that how we conceptualize aboriginal title affects how plaintiffs seek to prove the existence of an aboriginal title. Counsel may lead evidence of actual physical possession or control; additionally counsel may assert, as they did in memorable terms in *Delgamuukw,* that they assume the unenviable task of leading evidence in Her Majesty's Courts to prove the existence of a civilization. As part of that challenge, counsel will lead evidence of the existence of a legal system including a system of property laws.

In its judgment in *Delgamuukw,*[7] the Supreme Court recognized these two ways of proving title and accepted that they might operate conjunctively and cumulatively rather than as mutually exclusive alternatives. I refer here to those well known passages of Chief Justice Lamer's opinion dealing with "the test for the proof of aboriginal title."[8] In these passages the Chief Justice concluded that one of the implications of having to take account of the aboriginal perspective is that the Court cannot look only to the

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[4] Reproduced in [1988] 1 C.N.L.R. 14, "Gitksan-Wet'suwet'en Land Title Action".

[5] *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313 at 328.

[6] This is not say that the language of property and title cannot be framed in human rights terms, as was so ably demonstrated by the decision of the Inter American Court of Human Rights in *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgment of August 31, 2001, Series C, No. 79. However, as Canada has chosen not to include explicit constitutional recognition of the right to property, claims to title are not so readily recognizable as human rights claims as is the basic claim to self-determination.

[7] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*].

[8] *Ibid.* at paras. 147-48. These passages contain some of the very few reference in the Supreme Court's jurisprudence to the *laws* of Aboriginal peoples. More often, and the majority judgment in *Marshall and Bernard* as I discuss below is certainly a case in point, the Court prefers language that is less normatively explicit e.g. customs, practices or perspectives.

common law's emphasis on physical occupation as proof of possession which in turn may ground title,[9] but the Court must also have regard to aboriginal laws in relation to land:

> the source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy. Indeed, there is precedent for doing so. In *Baker Lake* ... Mahoney J. held that to prove aboriginal title, the claimants needed both to demonstrate their "physical presence on the land they occupied" (at p. 561) and the existence "among [that group of] ... a recognition of the claimed rights ... by the regime that prevailed before" (at p. 559).
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> This approach to the proof of occupancy at common law is also mandated in the context of s. 35(1) by *Van der Peet.* In that decision ... I held ... that the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty required that account be taken of the "aboriginal perspective while at the same time taking into account the perspective of the common law" and that "[t]rue reconciliation will, equally, place weight on each". I also held that the aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples ... *As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.* (emphasis added)[10]

In my course, I also supplement the second edition of Borrows and Rotman with extracts from the High Court of Australia's decision in *Mabo v. Queensland (No. 2).*[11] I want Canadian students to read *Mabo,* and especially extracts from Justice Brennan's opinion, for several reasons. First, I want students to reflect on the relationship between domestic law and international law and the role that international

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[9] *Ibid.* at para. 149 and referring to Kent McNeil, "The Meaning of Aboriginal Title" in Michael Asch ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) at 135-54.

[10] *Ibid.* at paras. 147-48.

[11] *Mabo v. Queensland (No. 2)* (1991-1992), 175 C.L.R. 1, included in the first edition but omitted from the second.

human rights law plays in having us re-frame questions of domestic aboriginal law.[12] Second, I want students to read Justice Brennan's judicial trashing (with the aid of the Advisory Opinion of the International Court of Justice in the *Western Sahara* case[13]) of the racist doctrine of *res nullius* and the related concept of acquiring title non-derivatively by peaceful settlement. And third, I want students to read those passages of Brennan's judgment in which he suggests that the source and content of aboriginal title is founded in the laws and customs of the aboriginal people concerned.

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.[14]
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> ... once it is acknowledged that an inhabited territory which became a settled colony was no more a legal desert than it was "desert uninhabited" in fact, it is necessary to ascertain by evidence the nature and incidents of native title. Though these are matters of fact, some general propositions about native title can be stated without reference to evidence.[15]
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> Native title, though recognized by the common law, is not an institution of the common law...[16]
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> Australian law can protect the interests of members of an indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as it is practicable to do so). Once traditional native title expires, the Crown's radical title expands to a full beneficial title, for then there is no other proprietor than the Crown.[17]

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[12] This provides an opportunity to discuss *Mabo v. Queensland (No. 1)* (1988), 166 C.L.R. 186 and the Australian implementing legislation for the Convention on the Elimination of All Forms of Racial Discrimination.

[13] [1975] I.C.J.R. 12.

[14] *Ibid.* at para. 64. This passage was referred to with approval by Chief Justice Lamer in *R. v. Van der Peet,* [1996] 2 SCR 507 at para. 40.

[15] *Ibid.*

[16] *Ibid.* at para. 65.

[17] *Ibid.* at para. 66.

> Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land. It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains.[18]

Now I realize that it is possible to criticise this "aboriginal laws approach" (and here I think of Kent McNeil's excellent work[19]) if it forms the sole measure of the source and content of title on the grounds that such an approach may diminish the content of an aboriginal title once established. It might, for example, make it very difficult for an aboriginal plaintiff to establish title to petroleum unless it could establish the existence of customary laws in relation to that substance. Indeed it seems fairly clear that the Supreme Court in *Delgamuukw* recognized this problem and suggested that it was possible to rely, as we have seen in the quotations above, on both aboriginal laws and the physical fact of prior possession for the source, proof and content of aboriginal title.[20] Indeed, the court developed a fairly thick concept of aboriginal title in *Delgamuukw* subject only to the paternalistic doctrine of inherent limits on the use of that title.

But what does all of this have to do with the Supreme Court's judgment in *Marshall and Bernard*? In this short comment I argue that the majority judgment in *Marshall and Bernard* comprehensively denies the significance of the customary laws of indigenous peoples and renders them virtually irrelevant in proving the existence of an aboriginal title. As such the decision is inconsistent with the Court's earlier decision in *Delgamuukw*. By ignoring or downplaying the significance of indigenous legal systems, the judgment undermines the fundamental goal of reconciliation and calls into question the conceptual underpinnings of aboriginal title in Canadian law. By emphasising the facts of possession rather than the recognition of a pre-existing system of laws, the judgment decontextualizes and trivializes the concept of aboriginal title. Finally, the judgment raises the spectre, hinted at in the separate concurring opinion of Justice LeBel, that the Court has revived a version of the *terra nullius* doctrine.[21] In support of

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[18] *Ibid.* at para. 83, # 6.

[19] See in particular McNeil, *supra* note 9; Kent McNeil,"The Post-*Delgamuukw* Nature and Content of Aboriginal Title" in *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, 2001) at 102-35. McNeil's comments on the position of the Australian High Court, "The Relevance of Traditional Laws and Customs to the Existence and Content of Native Title at Common Law" are reproduced in the same volume at 416-63. I have examined this question at some length, relying extensively on McNeil, in "Aboriginal Title to Petroleum: Some Comparative Observations on the Law of Canada, Australia and the United States" (2004) 7 Yearbook of New Zealand Jurisprudence 111.

[20] And certainly it seems fairly clear that the content of aboriginal customary laws does not control the content of aboriginal title in Canada. See especially *Delgamuukw* at paras. 118 *et seq.*

[21] *Marshall and Bernard, supra* note 1 at paras. 127 and 134.

these claims, I examine the language that Chief Justice McLachlin uses to describe the normative ordering of indigenous societies, and I then examine how the Chief Justice actually uses "the aboriginal perspective" in assessing whether the Mi'kmaq are able to establish an aboriginal title based on the watershed approach endorsed by the New Brunswick Court of Appeal in *Bernard*. The section concludes with some observations on the consistency of the judgment with the *sui generis* principle which, until now, seemed to be an important and central part of the Supreme Court's jurisprudence on aboriginal title.

Language

The language used by Chief Justice McLachlin to describe the "perspective" of indigenous societies seems deliberately designed to deny the normative significance of that perspective. By contrast the perspective of settler society is consistently and exclusively framed in terms of law and legal system. In general the majority judgment refuses to use the term "law" in the context of indigenous societies, preferring instead to use language that is either not normally associated with norms or which carries the connotation of soft norms rather than hard norms. For example, while acknowledging the need to take account of the views of both indigenous and settler society in resolving questions of aboriginal title, the majority judgment refers, in the case of settler society, to the "perspective of the common law"[22] while the similar references to indigenous society adopt the language of "aboriginal perspective"[23] or "aboriginal practice",[24] "pre-sovereignty practice", "aboriginal culture"[25] or even uses.[26] The implication is clear that, while such practices may be "facts", they have no normative significance save what the common law chooses to accord them.

Other aspects of the contrasting treatment of the aboriginal versus settler perspective serve to devalue the significance of the indigenous legal system. For example, while the common law is described as a "complicated matrix of legal edicts and conventions" that has evolved over centuries, "the search for aboriginal title ... takes us back to the beginnings of the notion of title."[27] The implication here is that the aboriginal legal system is primitive and cannot evolve. Similarly, the common law is

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[22] *Ibid.* at paras. 45-47. In some cases the judgment refers to the common law and in other cases *European* common law. What is this "European common law" of which she speaks? And how does it differ from the "European template" which McLachlin expressly states at para. 49 that she is *not* applying to resolve the question of title?

[23] *Ibid.* at paras. 46 and 47.

[24] *Ibid.* at para. 48. And see in particular at paras. 53 and 54 that "aboriginal *practices* correspond to different modern rights" and that one of these modern rights, "aboriginal title ... is established by aboriginal practices that indicate possession similar to that associated with title at common law."

[25] *Ibid.* at para. 61.

[26] *Ibid.* at para. 38 where the court suggests that some uses (e.g. hunting and fishing) accord rights.

[27] *Ibid.* at para. 61. Whose notion of title is this? That of the common law?

described as "modern" while aboriginal practice is described as "ancient",[28] and finally, recognition of the aboriginal perspective requires "sensitivity" while recognition of the perspective of settler society requires "fidelity to the common law concepts involved."[29] These fairly crude dualisms call into question McLachlin's claim (at para. 68) that the court has successfully resisted making "facile assumptions based on Eurocentric traditions of gathering and passing on historical facts."[30]

This overall approach in the majority opinion was clearly of concern to Justices LeBel and Fish. In their separate concurring opinion, written by Justice LeBel, they argued that the Court must give greater weight to "aboriginal conceptions of territoriality, land-use and property" than to common law concepts as "otherwise, we might be implicitly accepting the position that aboriginal peoples had no rights in land prior to the assertion of Crown sovereignty because their views of property or land use do not fit with Euro-centric conceptions of property rights."[31] Consequently, Justice LeBel treated the normative ordering of the two societies, settler and indigenous, more even-handedly[32] than did the majority, and recognized the importance of aboriginal customary laws:

> Aboriginal title has been recognized by the common law and is in part defined by the common law, but it is grounded in aboriginal customary laws relating to land. The interest is proprietary in nature and is derived from inter-traditional notions of ownership ....[33]

Taking account of the aboriginal perspective but ignoring the role of indigenous laws

Having shown that the majority opinion diminishes the significance of indigenous laws by the language it uses to describe the normative ordering of indigenous societies, what role does the majority opinion foresee for the "aboriginal perspective"? Given the emphasis in the jurisprudence post-*Van der Peet*[34] on reconciliation as the purpose for s. 35, requiring courts to take account of the perspectives of both aboriginal and settler society, the majority in *Marshall* and *Bernard* could hardly ignore the minority's charge. And indeed it does not do so and on several occasions reiterates the significance of the aboriginal perspective. But the key question for our purposes is what did the majority mean by this; what work do they expect the aboriginal perspective to do?

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[28] *Ibid.* at para. 77. And see also para. 53 where *aboriginal practices* are contrasted with *modern rights*.

[29] *Ibid.* at para. 70.

[30] *Ibid.* at para. 68.

[31] *Ibid.* at para. 127.

[32] See especially *Ibid.* at para. 139 where Lebel notes that "The aboriginal perspective on the occupation of their land can also be gleaned in part, but not exclusively, from pre-sovereignty systems of aboriginal law."

[33] *Ibid.* at para. 128.

[34] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 31. *Haida Nation v. British Columbia (Ministry of Forests)*, [2004] 3 S.C.R. 511 [*Haida Nation*].

My claim here is that while the court recites the relevant approach it pays little more than lip service to the importance of considering the aboriginal perspective precisely because the majority opinion decontextualizes the aboriginal practices from their normative setting. This is evident in the way that the majority describes its task:

> The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right. The question is whether the aboriginal practice at the time of assertion of European sovereignty... translates into a modern legal right, and if so, what right? This exercise involves both aboriginal and European perspectives. The Court must consider the pre-sovereignty practice from the perspective of the aboriginal people. But in translating it to a common law right, the Court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it. This exercise in translating aboriginal practices to modern rights must not be conducted in a formalistic or narrow way. The Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the common law right. The question is whether the practice corresponds to the core concepts of the legal right claimed.[35]

By focusing on aboriginal practices and yet at the same time failing to inquire into the normative context of that practice, the majority opinion denies the indigenous society and culture any opportunity to influence the translation process that the court describes. Translation becomes a one way street in which, despite protestations to the contrary,[36] aboriginal practices are forced into existing common law categories and reconciliation is little more than a judicial conclusion or label for the process and its outcome, rather than a balancing of views or a rapprochement.[37] Thus, for the majority, taking the aboriginal perspective seriously seems to mean little more than this: that in the event of doubt as to which category of common law right best matches the aboriginal practice, the Court will give the benefit of the doubt to the aboriginal practice. Quite what this might mean in any particular case is far from clear but it does seem as though a "generous view" will not shift the burden of proof onto the Crown[38] and will not permit

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[35] *Marshall and Bernard, supra* note 1 at para 48.

[36] See for example, *ibid.* at para. 49 to the effect that "[t]o determine aboriginal entitlement one looks to aboriginal practices rather than imposing a European template"; see also paras. 48 and 50.

[37] See the summary offered *ibid.* at para. 51 where the majority opinion suggests that the process of examination of the aboriginal practice and translation into a modern right "reconciles the aboriginal and European perspectives".

[38] For example, one might imagine a more generous approach in which proof of the territorial ambit of indigenous property laws could be taken as proof of exclusive use and therefore aboriginal title unless the Crown could establish that the content of such laws was necessarily more limited.

a "pre-sovereignty aboriginal practice" to "be transformed into a different modern right."[39]

The majority opinion offers further guidance as to how the aboriginal perspective might be operationalized when the court considers three specific issues that "evoked particular discussion", the first of which is the concept of exclusion.[40] Having concluded that the concept of exclusion is part of the core common law or European idea of title (not apparently because that has been proven before the court but because it can just be "assumed by dint of law"[41]), how might an indigenous society establish such exclusive use? The majority admits that this poses some challenges:

> Determining whether it was present in a pre-sovereignty aboriginal society, however, can pose difficulties. Often, no right to exclude arises by convention or law. So one must look to evidence. But evidence may be hard to find. The area may have been sparsely populated, with the result that clashes and the need to exclude strangers seldom if ever occurred. Or the people may have been peaceful and have chosen to exercise their control by sharing rather than exclusion. It is therefore critical to view the question of exclusion from the aboriginal perspective. To insist on evidence of overt acts of exclusion in such circumstances may, depending on the circumstances, be unfair. The problem is compounded by the difficulty of producing evidence of what happened hundreds of years ago where no tradition of written history exists.
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> It follows that evidence of acts of exclusion is not required to establish aboriginal title. All that is required is demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so. The fact that history, insofar as it can be ascertained, discloses no adverse claimants may support this inference.[42]

What seems remarkable about this passage is that the only reference to law occurs in the second sentence where the court states, somewhat ambiguously that "[o]ften, no right to exclude arises by convention or law." What did the majority mean by this? Did they offer this as a general observation on the property laws of indigenous societies in much the same way as Chief Justice Lamer articulated the concept of

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[39] *Ibid.* at paras. 50 and 77.

[40] *Ibid.* at paras. 63 *et seq.*

[41] *Ibid.* at para. 64. I cannot read this phrase without recalling the "because it makes sense" comment of Chief Justice Lamer in *Delgamuukw* in the context of settler sovereignty being the critical date for establishing title and John Borrows' devastating critique of that assumption in "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall L.J. 537.

[42] *Ibid.* at paras. 64-65.

implied limitations on aboriginal title in *Delgamuukw*? Did they mean that counsel led no evidence as to the content of Mi'kmaq property laws in this case? Did they mean that the accused proved the existence of these laws, but failed to prove that the right to exclude formed part of the content of those laws?

Whatever interpretation one puts on this phrase, it does seem clear that if the aboriginal society cannot rely on the content and territorial application of its customary laws as a basis for title it will have a hard time satisfying the court, outside an area of intensive and permanent settlement, of its exclusive possession and therefore of title. While the majority acknowledges that it would be unfair to insist upon overt acts of exclusion, it still requires the "demonstration of effective control of the land ... from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so." And this demonstration of effective control must relate to "definite tracts of land" [43] – a task which is likely to impose a huge evidentiary burden on First Nations and other aboriginal peoples whether proceeding as plaintiffs in an action commenced by statement of claim or as the accused in a criminal or quasi-criminal case.

Sui generis

The majority's proposed translation process and the apparent rejection of the *sui generis* approach to aboriginal title further limits the role of the aboriginal perspective. Beginning with Justice Dickson's judgment in *Guerin*,[44] but drawing also on earlier decisions of the Privy Council,[45] the Supreme Court has, for the last twenty years or more, emphasised that various concepts in aboriginal law are *sui generis*.[46] The rationale for the *sui generis* approach lies in part in the different cultural context of aboriginal law and common law and the concern that efforts to explain and confine concepts of aboriginal law exclusively within the conceptual terminology of the common law will likely result in the non-recognition of the interests of aboriginal people. Chief Justice Lamer reaffirmed the central importance of the *sui generis* approach in *Delgamuukw* when he said:

> Aboriginal title has been described as *sui generis* in order to distinguish it from "normal" proprietary interests, such as fee simple. However, as I will now develop, it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it

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[43] *Ibid.* at para. 70. And what is a definite tract of land? A tract defined in accordance with aboriginal use of the land, or in accordance with the metes and bound descriptions that one sees in the numbered treaties, or in accordance with modern surveying conventions?

[44] *Guerin v. The Queen*, [1984] 2 S.C.R. 335. See also *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657.

[45] *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399.

[46] For treaties see *R. v. Sioui*, [1990] 1 S.C.R. 1025 at para. 42.

> must be understood by reference to both common law and aboriginal perspectives.
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> The idea that aboriginal title is *sui generis* is the unifying principle underlying the various dimensions of that title.[47]

The *sui generis* approach is not without its difficulties. It may, for example, afford a court more discretion in enforcing an aboriginal entitlement than might be available if the court were considering a cause of action based upon a traditional common law property right and cause of action. But that is no reason for rejecting the doctrine. The *Marshall and Bernard* majority seems to have rejected the *sui generis* approach to aboriginal title without even announcing that it was doing so, and certainly without providing any convincing rationale. How else can we explain that the majority judgment never once uses the language of *sui generis* but speaks instead of translating "facts found and thus interpreted into a modern common law right"?[48]

What then are the implications of rejecting, or at least not applying, a *sui generis* approach? I think that we can best understand this by asking about the translation metaphor and methodology that the court has apparently endorsed in determining whether an aboriginal people may be able to establish the existence of an aboriginal title. A key part of the court's methodology is the idea that before an indigenous people may lay claim to a property concept known to the common law, they must first be able to point to an existing property rights category of the common law and then establish that the claimed entitlement and the existing property rights category of the common law have a common core content.

Presumably, just as the *Van der Peet* test for establishing an aboriginal right contemplates that the claimant will be free to attempt to characterize the practice in question in order to bring it within the protection of s. 35, so also will a claimant be free to try to characterize both the analogous settler society property concept and the core content of the settler society right. But at the end of the day, in each case, the court will have the final say.[49] The selection of both the analogous common law concept and the core content of that concept will be a value-laden, subjective and normative exercise,[50] as is evident in examining the example of title and asking what might be the (alternative or supplementary) core contents of a common law or settler title. One might expect there to be broad[51] consensus on the proposition that the right to exclude is part of the

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[47] *Delgamuukw*, *supra* note 7 at paras. 112-13.

[48] *Marshall and Bernard*, *supra* note 1 at para. 69.

[49] *R. v. Pamajewon and Jones*, [1996] 2 S.C.R. 821.

[50] The majority in *Marshall and Bernard*, *supra* note 1 at paras. 48, 51 ("the process *determines* the nature and extent of the modern right") and 69 ("translate facts ... into a modern common law right") wishes to emphasise that the translation process may be an objective one or should at least be as objective as possible; but Hume taught us a long time ago that we can never derive an "ought" from an "is" as a matter of logic.

[51] Broad, but perhaps not universal for property and title have been and always will be essentially contested concepts. See in particular C.B. Macpherson's concluding essay in his *Property: Mainstream and Critical*

core content of a common law or settler title but that would hardly exhaust the possibilities. Other possible aspects of core content which might have important implications for the recognition or translation of an aboriginal title include the idea that title in the common law is a relative rather than an absolute notion. Common law approaches to title never required a plaintiff to establish an absolute title, merely a stronger claim than that of the defendant. Emphasis on the relativity of title might have served in this case to support the watershed approach to title that had obtained the support of the New Brunswick Court of Appeal.[52] Similarly, the idea that actual exclusive occupation by the title owner is not required either to prove or maintain title might be equally core to the concept of fee simple or other title. Indeed it is crystal clear that Anglo-Canadian law permits a person to own land and maintain an action in trespass vindicating their right of possession even if that person has never set foot on that land. Furthermore, the non-occupying titleholder will lose their title only in extreme cases through the operation of the doctrine of adverse possession. Emphasis on this approach to the core content of title in the present case might have required a more detailed interrogation of the contents of indigenous property laws.

We might also think about how a *sui generis* approach and an aboriginal perspective might influence the burden of proof in questions of aboriginal title. I commented at the outset that I want my students to read the opening statement of counsel in *Delgamuukw* because I want them to reflect on who has to prove what and in what forum. One way to think about this is to ask what evidentiary presumptions should flow from Judson's observations in *Calder* to the effect that when the settlers came to this continent they found a territory "organized in societies" – not just a territory that was occupied (a fact) but a territory that was occupied by peoples who governed themselves in accordance with laws. Might it not follow from this that once a First Nation or other aboriginal community establishes the ambit of its traditional territory, its relationships with its neighbours, and that it had a system of property laws in relation to its territory, then the onus should shift to the Crown to show why the First Nation's entitlement as a result of engaging the translation process should be something less than

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Positions (Toronto: University of Toronto Press, 1978) for a vastly different core content of the ideal of settler property law.

[52] And see also McLachlin C.J.C.'s summary of the trial's judge's assessment of the evidence at para. 79, where she refers to the trial judge as concluding that there were not enough Mi'kmaq to make sufficiently intensive use of inland areas. But sufficient for what? My colleague, Jonnette Watson Hamilton, who focused my attention on this paragraph, also notes, based on John G. Reid *et. al.*, *The "Conquest" of Acadia, 1710: Imperial, Colonial, and Aboriginal Constructions* (Toronto: University of Toronto Press, 2004) that at the relevant time the majority of the population was aboriginal and that the British and Acadians rarely moved from their small coastal communities to venture into Mi'kmaq territory. So, who had (more) effective control over these areas – the Mi'kmaq, the Acadians, or the British? The tiny British garrison was hardly in a position to establish effective control but neither it seems, according to Justice McLachlin, were the Mi'kmaq, simply because there were not enough of them. Putting aside the question of losses to disease introduced by European settlers and soldiers, the requirement seems to be one of an absolute intensity of use carrying the Lockean implication that absent a certain (European) intensity of use, the indigenous people did not really need these lands and they could therefore be made available to settlers.

title? Might that not do more justice to an aboriginal perspective and the honour of the Crown?

Conclusions

In its *Delgamuukw* decision the Supreme Court sketched out in the abstract a methodology for assessing claims to aboriginal title. The court proposed a vision of an aboriginal title with a large or thick content limited only by its inalienability (except to the Crown) and the paternalistic imposition of inherent limits on an aboriginal title.[53] Since then the critical outstanding question has been how this methodology would be applied in practice. Would it "allow" a First Nation or other aboriginal plaintiff to establish an aboriginal title (with such a large and generous content) throughout a traditional territory over which it asserted control, or would the recognition of such claims, in practice, be confined to permanent community sites? Both seemed plausible constructions; the emphasis in Chief Justice Lamer's opinion on the importance of the aboriginal perspective and the corollary implication that an aboriginal plaintiff should be able to rely upon aboriginal laws and customs to prove title seemed to offer the prospect of establishing broad territorial claims. And certainly this seemed to be Justice Daigle's approach in the New Brunswick Court of Appeal in *Bernard*. On the other hand Chief Justice Lamer had emphasised in *Delgamuukw*, *Adams*[54] and *Côté*[55] that some claims would be better viewed as aboriginal rights claims rather than title claims, especially where the intensity of use of particular territory did not support a claim of exclusive possession.

The majority opinion in *Marshall and Bernard* signals that broad territorial claims will not likely meet with success but will instead be re-framed or translated as more limited claims to aboriginal rights (provided of course that they are also able to meet the narrow "aboriginality" test of *Van der Peet*). The majority pays lip service to the importance of taking account of the aboriginal perspective but that perspective is a perspective that, in the majority's opinion, lacks a normative content. Does this mean that the majority has closed the door on the possibility of making broader territorial claims that go beyond permanent community sites and perhaps intensively used fishing locations? I think that this would be too pessimistic a reading of the case and one that would ignore the majority's own emphasis on the nature of the evidence in any particular case and its refusal to rule out the possibility that nomadic peoples could establish a title claim.[56] But proving broad territorial title will clearly be an uphill battle in which the weapons of categorization and classification will be wielded to advantage by the legal system of the settler society.

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[53] *Delgamuukw*, *supra* note 7 at paras. 128-30.

[54] *R. v. Adams*, [1996] 3 S.C.R. 101.

[55] *R. v. Côté*, [1996] 3 S.C.R. 139.

[56] *Marshall and Bernard*, *supra* note 1 especially at paras. 66 and 70.

Finally, what of the charge, hinted at by the minority opinion, that the majority's approach runs the risk of re-inventing a version of the *terra* or *res nullius* doctrine? Perhaps one way to answer this question is to ask what vision of the geography of property is implicitly endorsed by the majority's opinion? What would a map of this geography look like?[57] And how would that geography explain rights claims? What would be the jurisdictional basis (territory? citizenship?) of those rights claims?[58] Full answers to these questions would take us far beyond the scope of this comment but perhaps I can give my impression of that map. The map would show a few community sites and perhaps particularly valued and intensively used fishing sites marked in a solid colour, perhaps green, to represent lands that remained "owned" by the aboriginal peoples of Canada when the Crown, by some magic of the common law, acquired sovereignty.[59] The rest would be vast areas of white (rapidly becoming red or pink) that became, at one and the same time as the Crown acquired sovereignty, the waste lands of the Crown (because after all the common law abhors a vacuum when it comes to ownership). This is a map that looks to me suspiciously like a map of *terra nullius,* with just a few limited exceptions, and it is a vision that would have appealed to the likes of the Reserve Commissioners and the McKenna McBride Commissioners in British Columbia and perhaps even to Joseph Trutch, the former Commissioner of Lands for the colony and that province's first Lieutenant Governor.[60]

Perhaps I will have to fundamentally change the way in which I teach the law of aboriginal title in light of *Marshall and Bernard* and perhaps at the same time I will also have to change my understanding of the *St. Catherine's Milling Case*,[61] a case that I want to say stands, *inter alia*, for the proposition that unless and until the Crown acquires title from the aboriginal occupants of the land by treaty (i.e. Treaty 3 in the case of *St. Catherine's*) or by some other lawful means (e.g. pre-1982 extinguishment legislation that was sufficiently specific and passed by a competent government), the lands and the revenues associated with those lands and resources are not available to the

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[57] On the geography of property see Cole Harris' marvellous, *Making Native Space* (Vancouver: University of British Columbia Press, 2002).

[58] Is the *right* to harvest in a particular location just a "fact" or does it depend, as I would argue, on a customary legal system? And if the latter, what is the territorial ambit of that legal system?

[59] See *Haida Nation, supra* note 34 at para. 32 and discussing *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911.

[60] For details see Hamar Foster, "Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849-1927" in Hamar Foster and John McLaren, eds., *British Columbia and the Yukon: Essays in the History of Canadian Law*, Vol. VI (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1995) at 28 and Paul Tennant, *Aboriginal People and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990).

[61] *St. Catherine's Milling Co. v. R.* (1888), 14 A.C. 46, a decision that was strongly reaffirmed in *Delgamuukw*, along with the Privy Council's reading of the "interest other than that of the province" language of s.109 of the *Constitution Act, 1867*.

Crown in right of the province for the benefit of the consolidated revenue fund of the province.[62] Clearly, I have much re-thinking to do if I am to reconcile *Marshall and Bernard's* vision and understanding of aboriginal title with the kind of reconciliation that seemed possible after *Delgamuukw*.

[62] I derive some comfort from the even more recent decision of the full court in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69 where the court breathed new life into the "lands taken up" provisions of the Numbered Treaties covering much of what is now the prairie provinces. The unanimous opinion in *Mikisew Cree* was authored, like the majority judgment in *Marshall No. 1* [1999] 3 SCR 456, by Binnie J. It seems to me to be unfortunate that Binnie J. did not sit in *Marshall and Bernard*, leaving the Chief Justice as the only member of the *Marshall and Bernard* court to have also sat in *Marshall No. 1* (where of course she dissented). Justice Binnie might have been able to offer a different (and perhaps more authoritative) version of just what the majority meant in that case when it endorsed the view that the negative covenant recorded in the treaty text should be interpreted as affording a right to trade and as further implying a right to harvest natural resources to support that trading entitlement. But all of this relates to the treaty issues and I promised at the outset to confine my comments to one aspect of the aboriginal title issues.