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Exclusive Occupation and Joint Aboriginal Title

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I. INTRODUCTION

In *Tsilhqot'in Nation v British Columbia*,¹ the Supreme Court of Canada for the first time issued a declaration of Aboriginal title. The area to which the declaration applies is part of the traditional territory of the Tsilhqot'in Nation, amounting to the land within the claim area that they were able to prove, to the satisfaction of Justice Vickers at trial, had been in their exclusive occupation at the time of Crown assertion of sovereignty in 1846.²

The area claimed in the *Tsilhqot'in Nation* case was not subject to competing claims by other Aboriginal peoples.³ However, as is well known, overlapping claims by different Aboriginal groups are common in British Columbia,⁴ raising the issue of whether any of the claimants can have title to those areas. The problem is that Aboriginal

* I am very grateful to John Borrows, Julie Falck, Robert Hamilton, Mary Jane Mossman, Kathy Simo, and Kerry Wilkins for reading a draft of this article and providing very helpful feedback. Needless to say, any shortcomings or errors are entirely my own.

¹ [2014] 2 SCR 257 [*Tsilhqot'in Nation*].

² This is the year of the Washington (Oregon Boundary) Treaty between the United States and Great Britain, which extended the boundary between their claimed territories in the Pacific Northwest along the 49th parallel from the Rocky Mountains to the Pacific Ocean. Although the Supreme Court, in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*] and *Tsilhqot'in Nation*, *supra* note 1, accepted this as the date of the Crown's assertion of sovereignty over British Columbia, I think this date is problematic for most of the province because the Crown was not in effective control at the time: see Kent McNeil, “Negotiated Sovereignty: Indian Treaties and the Acquisition of American and Canadian Territorial Rights in the Pacific Northwest”, in Alexandra Harmon, ed, *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest* (Seattle: University of Washington Press, 2008), 35-55.

³ *Tsilhqot'in Nation*, *supra* note 1 at para 6; David M Rosenberg, “10 Reasons Why the Tsilhqot'in Succeeded”, paper delivered at the Affinity Institute Conference, The SCC *Tsilhqot'in* Decision: Significance, Implications, and Practical Impact, Vancouver BC, 26 September 2014, at 7.

⁴ See Map of Treaty Negotiations in British Columbia, online: https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-BC/STAGING/texte-text/trynega_1100100021019_eng.pdf; British Columbia Treaty Commission Annual Report 2014, online: http://www.bctreaty.net/files/pdf_documents/BCTC-Annual-Report-2014.pdf; Douglas R Eyford, *A New Direction: Advancing Aboriginal and Treaty Rights*, Report on Renewing Canada's Comprehensive Land Claims Policy, released 2 April 2015, online: <https://www.aadnc-aandc.gc.ca/eng/1426169199009/1426169236218>, at 65-69.

title depends on proof of *exclusive* occupation of land at the time of Crown sovereignty.⁵ How then, it may be asked, can any Aboriginal claimants have title to areas where claims overlap?

In some cases, this may be a matter of establishing appropriate boundaries based on the historical facts where there are competing claims. This is a common situation in both domestic property law and international law. When the parties agree on the location of the boundary, that usually resolves the matter, at least between the parties.⁶ Otherwise, the matter can be determined by a court, which can also happen where a boundary agreement has to be interpreted or an agreed boundary has to be located on the ground.⁷

There is, however, another possibility where Aboriginal claimants are concerned, namely joint Aboriginal title. In *Delgamuukw v British Columbia*,⁸ the Supreme Court envisaged this possibility, without much elaboration. My goal in this article is to develop the concept of joint Aboriginal title and suggest how it might apply to overlapping claims. I will start by discussing the requirement of exclusive occupation that the Supreme Court has applied to Aboriginal title and the Court's brief observations on joint title in *Delgamuukw*. I will then discuss how the common law has dealt with shared exclusivity in the context of real property rights apart from Aboriginal title. Next, I will examine American law on joint Aboriginal title. I will conclude by discussing how this concept of joint title might apply in Canada and be used to resolve at least some overlapping title claims.

In this article, I will not address the issue of how the Crown could acquire sovereignty over Aboriginal peoples and underlying title to their lands without their consent and without conquest.⁹ Likewise, I will leave aside the question of how

⁵ *Delgamuukw*, *supra* note 2 at paras 143, 155-57; *Tsilhqot'in Nation*, *supra* note 1 at paras 25-26, 47-49.

⁶ The boundary between the United States and Canada was settled in this way by a series of treaties between the United States and Great Britain, principally the Treaty of Paris (1783), the Convention of Commerce (1818), and the Washington (Oregon Boundary) Treaty, 1846: see Bruce Hutchison, *The Struggle for the Border* (Don Mills, ON: Longman Canada, 1970); Norman L Nicholson, *The Boundaries of the Canadian Confederation* (Toronto: Macmillan of Canada, 1979). Internationally, because of the importance of stability of boundaries, boundary treaties can be binding on third party states: see Malcolm N Shaw, *International Law*, 5th ed (Cambridge: Cambridge University Press, 2003), 417.

⁷ International examples are *El Salvador/Honduras (Land, Island and Maritime Frontier Dispute)*, ICJ Reports 1992, 351; *Libya/Chad*, ICJ Reports 1994, 6; *Botswana/Namibia* case, ICJ Reports 1999, 1045.

⁸ *Supra* note 2.

⁹ On this, see John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 *Osgoode Hall LJ* 537-96; Kent McNeil, "Factual and Legal Sovereignty in North America:

Aboriginal groups are to be defined and identified for the purpose of specifying the holders of Aboriginal title or other rights in relation to any particular lands.¹⁰ When referring to the title or rights holders apart from specific cases, I will therefore use the broad (and I hope neutral) term “Aboriginal group”, rather than terms like Aboriginal people, Aboriginal nation, Indigenous people, First Nation, etc., as use of any of these terms might beg the very question I wish to avoid at this time.¹¹

II. THE REQUIREMENT OF EXCLUSIVE OCCUPATION

In the *Delgamuukw* decision, the Supreme Court declined to issue a declaration of Aboriginal title because of the way the case had been pleaded and because the Court disapproved of the trial judge’s treatment of the oral histories of the Gitksan and Wet’suwet’en Nations.¹² Chief Justice Lamer nonetheless wrote a lengthy judgment on the sources, nature and content, proof, and constitutional protection of Aboriginal title.¹³ As mentioned earlier, Aboriginal title can be established by proof of exclusive occupation of land at the time of Crown assertion of sovereignty. Regarding exclusivity, Lamer CJ elaborated as follows:

Finally, at sovereignty, occupation must have been exclusive. The requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to exclusive use and occupation of

Indigenous Realities and Euro-American Pretensions”, in Julie Evans, Ann Genovese, Alexander Reilly and Patrick Wolfe, eds, *Sovereignty: Frontiers of Possibility* (Honolulu: University of Hawai’i Press, 2013), 37-59; Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014).

¹⁰ Note, however, that in both *Delgamuukw*, *supra* note 2, and *Tsilhqot’in Nation*, *supra* note 1, the Gitksan, Wet’suwet’en, and Tsilhqot’in Nations were found to be the appropriate Aboriginal title claimants. See especially the trial decision of Justice Vickers, *Tsilhqot’in Nation v British Columbia*, [2008] 1 CNLR 112 at paras 437-72, affirmed in this regard by the BCCA, *William v British Columbia*, [2012] 3 CNLR 333 at paras 51-57, 132-57 [*William*]. This issue also arises in some of the American cases discussed in Part IV *infra*.

¹¹ Although I prefer the internationally accepted term “Indigenous” rather than “Aboriginal”, in Canada “Aboriginal” is generally used in legal contexts because it is the term used in s 2 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), c 11, so to avoid confusion I have chosen to use it in this article.

¹² *Delgamuukw*, *supra* note 2 at paras 76-77, 107-08. Although the Court ordered a new trial, the case has not been retried.

¹³ See “The Post-*Delgamuukw* Nature and Content of Aboriginal Title” and “Aboriginal Title as a Constitutionally Protected Property Right”, in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001), at 102-35 [McNeil, “Post-*Delgamuukw*”] and 292-308.

land. Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title. The proof of title must, in this respect, mirror the content of the right. Were it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it.¹⁴

Lamer CJ made these remarks in the context of his discussion of the requirements for proof of Aboriginal title by a single Aboriginal group. In that situation, the group's occupation of land at the time the Crown asserted sovereignty must have been exclusive because, by his definition of Aboriginal title, the titleholders have "the right to exclusive use and occupation of the land".¹⁵ To me, this is not only logical but also in keeping with common law principles relating to possession and exclusivity,¹⁶ discussed below. I think the Supreme Court's decision to define Aboriginal title as encompassing the right of exclusive use and occupation was a major victory for Aboriginal peoples.¹⁷ The flip side of this, however, is that the *right* of exclusive occupation has to be based on the *fact* of exclusive occupation. As Lamer CJ pointed out, non-exclusive uses can give rise to more limited Aboriginal rights,¹⁸ but the exclusivity of Aboriginal title requires proof of exclusive occupation.

So what does exclusive occupation mean in the context of Aboriginal title? While my focus here is on the exclusivity requirement, it is important to point out that assessment of occupation has to take account of the way of life and traditional land uses of the Aboriginal people in question, as "the common law concept of possession must be sensitive to the realities of aboriginal society".¹⁹ Among other things, "one must take into account the group's size, manner of life, material resources, and technological abilities,

¹⁴ *Delgamuukw*, *supra* note 1 at para 155.

¹⁵ *Ibid* at para 117.

¹⁶ See also *R v Marshall*; *R v Bernard*, [2005] 2 SCR 220 at para 57 [*Marshall/Bernard*].

¹⁷ See 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), 135-54, where I argued against the more limited definition of Aboriginal title articulated by the majority of the British Columbia Court of Appeal in *Delgamuukw v British Columbia* (1993), 104 DLR (4th) 470, the decision appealed to the Supreme Court.

¹⁸ *Delgamuukw*, *supra* note 2 at para 159; see also paras 138-39.

¹⁹ *Ibid* at para 156.

and the character of the lands claimed”.²⁰ This is consistent with the approach taken by the Privy Council in appeals from Commonwealth countries where occupation of land was an issue. For example, in *Cadija Umma v S Don Manis Appu* (an appeal from Ceylon, now Sri Lanka), the Privy Council said that special weight had to be attached to local judges’ evaluation of the evidence of occupation because they were familiar “with the conditions of life and the habits and ideas of the people.”²¹ Taking local conditions into account is simply an aspect of the broader principle that occupation depends on all the circumstances, including the particular relationship the people concerned have with the land.²²

In *Tsilhqot’in Nation*, the Supreme Court unanimously affirmed and applied Lamer CJ’s approach to occupation in *Delgamuukw*, specifying that sufficiency of occupation “must be approached from both the common law perspective and the aboriginal perspective”.²³ Chief Justice McLachlin, who wrote the judgment, stated that “[t]he aboriginal perspective focuses on laws, practices, customs and traditions of the group”, and so “[t]he intensity and frequency of the use [of the land] may vary with the characteristics of the aboriginal group asserting title and the character of the land over which title is asserted.”²⁴ She elaborated as follows:

To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in

²⁰ *Ibid* at para 149, quoting Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 *Can Bar Rev* 727 at 758.

²¹ [1939] AC 136 at 141-42. See also *Wuta-Ofei v Danquah*, [1961] 3 All ER 596 (PC) [*Wuta-Ofei*]; *Powell v McFarlane* (1977), 38 P & CR 452 at 471 (Ch) [*Powell*]; *JA Pye (Oxford) Ltd v Graham*, [2003] 1 AC 419 (HL).

²² In *Lord Advocate v Lord Lovat* (1880), 5 App Cas 273 at 288 (HL), Lord O’Hagan stated: “The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests – all these things, greatly varying as they must, under various conditions, are to be taken into account in determining the sufficiency of a possession.” See also *Neill v Duke of Devonshire* (1882), 8 App Cas 135 at 165-66 (HL); *Sherren v Pearson* (1887), 14 SCR 581 [*Sherren*]; *Kirby v Cowderoy*, [1912] AC 599 (PC) [*Kirby*]; *Halifax Power Co v Christie*, (1915) 48 NSR 264 (NSSC) [*Halifax Power*]; *Powell*, *supra* note 21; *Partington v Musial* (1998), 519 APR 228 at 234 (NSCA). For discussion and further references, see Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), at 199-204 [McNeil, *Common Law Aboriginal Title*].

²³ *Tsilhqot’in Nation*, *supra* note 1 at para 34.

²⁴ *Ibid* at paras 35, 37.

acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.²⁵

The last sentence in this passage is particularly important because it indicates that control and exercise of exclusive stewardship can be used to prove title. So while physical presence and use can also be relied upon,²⁶ acts of control, stewardship, and any other acts communicating of an intention to hold the land for the Aboriginal group's own purposes are at least as relevant. This approach is also consistent with the common law approach to adverse possession,²⁷ though importantly the Court appropriately held that the standard for proving occupation sufficient for Aboriginal title is lower than that required for adverse possession, for the obvious reason that adverse possessors are known wrongdoers whereas Aboriginal groups are not.²⁸ Adopting the reasoning of Cromwell JA (as he then was) in his Nova Scotia Court of Appeal decision in *R v Marshall*,²⁹ McLachlin CJ agreed with his likening of "the sufficiency of occupation required to establish Aboriginal title to the requirements for general occupancy at common law. A general occupant at common law is a person asserting possession of land over which no one else has a present interest or with respect to which title is uncertain."³⁰ McLachlin CJ also explicitly rejected the site-specific approach to Aboriginal title taken by the Court of Appeal in the *Tsilhqot'in Nation* case,³¹ deciding instead that title can be territorial by relying again on Cromwell JA's decision in *R v Marshall*, which she quoted with approval:

Where, as here, we are dealing with a large expanse of territory which was not cultivated, acts such as continual, though changing, settlement and wide-ranging use for fishing, hunting and gathering should be given more weight than they

²⁵ *Ibid* at para 38.

²⁶ See *ibid* at para 42: "a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is 'sufficient' use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law."

²⁷ See cases cited in notes 21-22 *supra*.

²⁸ See Kent McNeil, "Aboriginal Title in Canada: Site-Specific or Territorial?" (2012) 91 *Can Bar Rev* 745-61 at 755-59 [McNeil, "Aboriginal Title in Canada"].

²⁹ 218 NSR (2d) 78 at paras 135-38. Notably, Cromwell JA's decision was overturned on appeal by the SCC in a judgment authored by McLachlin CJ: *Marshall/Bernard*, *supra* note 16.

³⁰ *Tsilhqot'in Nation*, *supra* note 1 at para 39. See also McNeil, *Common Law Aboriginal Title*, *supra* note 22 at 197-204.

³¹ *William*, *supra* note 10. For a critique of this aspect of the BCCA's decision, see McNeil, "Aboriginal Title in Canada", *supra* note 28.

would be if dealing with enclosed, cultivated land. Perhaps most significantly ... it is impossible to confine the evidence to the very precise spot on which the cutting was done: Pollock and Wright [*infra* note 51] at p. 32. *Instead, the question must be whether the acts of occupation in particular areas show that the whole area was occupied by the claimant.*³²

Regarding the exclusivity requirement, in *Delgamuukw* Chief Justice Lamer once again emphasized the necessity to take “the realities of aboriginal society” into account:

As with the proof of occupation, proof of exclusivity must rely on both the perspective of the common law and the aboriginal perspective, placing equal weight on each. At common law, a premium is placed on the factual reality of occupation, as encountered by the Europeans. However, as the common law concept of possession must be sensitive to the realities of aboriginal society, so must the concept of exclusivity. Exclusivity is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of aboriginal title with caution. As such, the test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty.³³

The Chief Justice seems to have regarded “the intention and capacity to retain exclusive control” as a key element.³⁴ If this is demonstrated, the presence of other Aboriginal groups on the land would not necessarily negate exclusivity because they could have been trespassers or have entered the land with the permission of the Aboriginal title claimants.³⁵ In this context, if the claimants had trespass laws or laws allowing for the granting of permissive entry, those laws would be further evidence of their exclusive control over the land.³⁶

³² *R v Marshall*, [2004] 1 CNLR 211 (NSCA) at para 138, quoted in *Tsilhqotin Nation*, *supra* note 1 at para 40 [my emphasis]. In *Tsilhqot'in Nation* at para 43, McLachlin CJ said that “this Court in *Marshall*; *Bernard* did not reject a territorial approach”. See also para 56 and the quotation in note 26 *supra*. In his concurring judgment in *Delgamuukw*, *supra* note 2 at para 196, La Forest J stated: “Some would also argue that specificity requires exclusive occupation and use of the land by the aboriginal group in question. The way I see it, exclusivity means that an aboriginal group must show that a claimed territory is indeed its ancestral territory and not the territory of an unconnected aboriginal society.”

³³ *Delgamuukw*, *supra* note 2 at para 156.

³⁴ *Ibid*, quoting McNeil, *Common Law Aboriginal Title*, *supra* note 22 at 204.

³⁵ This corresponds with the common law in other contexts where the presence of occasional trespassers does not negate exclusive occupation: see *Sherren*, *supra* note 22 at 586, 595; *Fowley Marine v Gafford*, [1968] 2 WLR 842 at 856 (CA); *Earle v Walker* (1971), 22 DLR (3d) 284 at 287 (Ont CA); *Wallis's Holiday Camp v Shell-Mex*, [1975] QB 94 at 115-17 (CA). See also *Red House Farms Ltd v Catchpole* (1976), 244 EG 295 (CA), leave to appeal to the HL refused, where giving permission to others to hunt on land was evidence of occupation. This case was cited with approval by McLachlin CJ in *Marshall/Bernard*, *supra* note 16 at para 54.

³⁶ *Delgamuukw*, *supra* note 2 at para 157. See also per La Forest J at para 196.

The Supreme Court revisited the issue of exclusivity of occupation in 2005 in *R v Marshall; R v Bernard*.³⁷ Delivering the majority judgment, Chief Justice McLachlin affirmed that “[e]xclusive occupation means ‘the intention and capacity to retain exclusive control’, and is not negated by occasional acts of trespass or the presence of other aboriginal groups with consent.”³⁸ Commenting on the meaning of exclusion, or what she referred to as “exclusive control”,³⁹ she elaborated:

The right to control the land and, if necessary, to exclude others from using it is basic to the notion of title at common law. In European-based systems, this right is assumed by dint of law. 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.⁴⁰

In light of these difficulties, she concluded:

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. This is what is meant by the requirement of aboriginal title that the lands have been occupied in an exclusive manner.⁴¹

In *Tsilhqot’in Nation*, Chief Justice McLachlin repeated the observations on exclusivity made in *Delgamuukw* and *Marshall/Bernard*, affirming that “[e]xclusivity should be understood in the sense of intention and capacity to control the land.”⁴² She remarked that “[w]hether a claimant group had the intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge and depends on

³⁷ *Supra* note 16.

³⁸ *Ibid* at para 57, quoting *Delgamuukw* at para 156.

³⁹ *Marshall/Bernard*, *supra* note 16 at para 63.

⁴⁰ *Ibid* at para 64.

⁴¹ *Ibid* at para 65.

⁴² *Tsilhqot’in Nation*, *supra* note 1 at para 48.

various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question.”⁴³ She concluded:

The trial judge found that the Tsilhqot’in, prior to the assertion of sovereignty, repelled other people from their land and demanded permission from outsiders who wished to pass over it. He concluded from this that the Tsilhqot’in treated the land as exclusively theirs. There is no basis upon which to disturb that finding.⁴⁴

I think it is significant that the evidence McLachlin CJ seems to have regarded as more important in this context was evidence of control, not evidence of use. This is consistent with the common law, where expression of an intention to own and control, even where there is scant or no use of the land, can amount to occupation resulting in title.⁴⁵

Turning our attention to the issue of shared exclusivity and joint Aboriginal title, Chief Justice Lamer’s observations in *Delgamuukw* need to be quoted in full:

In their submissions, the appellants pressed the point that requiring proof of exclusive occupation might preclude a finding of joint title, which is shared between two or more aboriginal nations. The possibility of joint title has been recognized by American courts: *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941). I would suggest that the requirement of exclusive occupancy and the possibility of joint title could be reconciled by recognizing that joint title could arise from shared exclusivity. The meaning of shared exclusivity is well-known to the common law. Exclusive possession is the right to exclude others. Shared exclusive possession is the right to exclude others except those with whom possession is shared. There clearly may be cases in which two aboriginal nations lived on a particular piece of land and recognized each other’s entitlement to that land but nobody else’s. However, since no claim to joint title has been asserted here, I leave it to another day to work out all the complexities and implications of joint title, as well as any limits that another band’s title may have on the way in which one band uses its title lands.⁴⁶

In his concurring judgment, Justice La Forest also acknowledged the possibility of joint title, stating even more briefly:

I recognize the possibility that two or more aboriginal groups may have occupied the same territory and used the land communally as part of their traditional way of

⁴³ *Ibid.*

⁴⁴ *Ibid* at para 58.

⁴⁵ See especially *Kirby*, *supra* note 22; *Halifax Power*, *supra* note 22; *Wuta-Ofei*, *supra* note 21. In each of these cases, giving notice to others of an intention to own and control the land through paying taxes or marking boundaries was sufficient to establish occupation and title.

⁴⁶ *Delgamuukw*, *supra* note 2 at para 158. Note, however, that while Lamer CJ was correct in stating that the “possibility of joint title has been recognized by American courts”, the case he cited, *United States v Santa Fe Pacific Railroad Co*, 314 US 339 (1941) [*Santa Fe Pacific Railroad*], did not deal with joint title. See discussion of American law in Part IV *infra*.

life. In cases where two or more groups have accommodated each other in this way, I would not preclude a finding of joint occupancy.⁴⁷

In *Marshall/Bernard*, McLachlin CJ referred to the paragraph on joint title from Lamer CJ's judgment in *Delgamuukw* and affirmed without elaboration that "[s]hared exclusivity may result in joint title."⁴⁸ She did not mention joint title in *Tsilhqot'in Nation*, no doubt because shared exclusivity was not an issue in that case.⁴⁹ We therefore need to examine more closely the two sources of authority for shared exclusivity and joint title mentioned by Lamer CJ in *Delgamuukw*, namely the common law and American law.

III. SHARED EXCLUSIVITY IN THE COMMON LAW

In the common law, possession is exclusive in the sense that there can be only one possession of the same parcel of land at any given time. If two persons are in dispute over the possession of a parcel of land, they cannot both have possession.⁵⁰ In this situation, a court has to choose between them, draw a boundary, or decide that neither has possession. If each can point to current activities on the land as evidence of his or her possession, a court will generally award possession to the one who can show a better title.⁵¹ If neither has a title (e.g., by grant, conveyance, testamentary disposition, or descent), and they both rely on their alleged possession, one of them will need to show possession to the exclusion of the other. If neither of them can do so, then possession cannot be accorded to either because it must be exclusive.⁵² There can thus be no shared exclusivity by persons who dispute the possession with one another. Shared exclusivity

⁴⁷ *Delgamuukw*, *supra* note 2 at para 196.

⁴⁸ *Marshall/Bernard*, *supra* note 16 at para 57. At para 54, McLachlin CJ also stated: "the common law recognizes that exclusivity does not preclude consensual arrangements that recognize shared title to the same parcel of land: *Delgamuukw*, at para. 158." See also *Nunavik Inuit v. Canada (Minister of Canadian Heritage)*, [1998] 4 CNLR 68 at 101 (para 120) (FCTD), where the possibility of joint title was mentioned.

⁴⁹ See *supra* note 3 and text.

⁵⁰ See *Kynock v Rowlands*, [1912] 1 Ch 527 at 533-34 (CA) [*Kynock*]; *Bligh v Martin*, [1968] 1 All ER 1157 at 1160 (Ch).

⁵¹ See *Jones v Chapman* (1849), 2 Exch Rep 803 at 821 (Ex Ch); *Kynock*, *supra* note 50 at 533-34. In this situation, the maxim "possession follows title" applies: see Frederick Pollock and Robert Samuel Wright, *An Essay on Possession in the Common Law* (Oxford: Clarendon Press, 1888), 24-25; John M Lightwood, *A Treatise on Possession of Land* (London: Stevens & Sons, 1894), 36-39.

⁵² See Pollock and Wright, *supra* note 51 at 20-21; Lightwood, *supra* note 51 at 14-15.

can exist only in situations where the single possession is held by co-possessors whose claims are not in conflict with one another.

The common law concept of shared exclusivity therefore applies where two or more persons concurrently have possession of the same parcel of land.⁵³ It usually arises in situations where there is either a joint tenancy or tenancy in common that is vested in possession.⁵⁴ In most cases, these forms of co-ownership of interests in land are created either by an *inter vivos* grant or conveyance, or by a testamentary devise or intestacy, to two or more persons of an interest in land. In the case of a joint tenancy the tenants have “a unified interest in the whole” that they hold equally in every respect, whereas tenants in common have undivided fractional shares that can be either equal or unequal.⁵⁵ In addition, joint tenants enjoy a right of survivorship, meaning that when one of them dies the entire interest continues to be vested in the surviving joint tenant or tenants.⁵⁶ As tenants in common do not have a right of survivorship, their interests will be distributed by will or intestacy when they die. Most importantly for our purposes, however, joint tenancy and tenancy in common both entail “unity of possession”, so that in each case all the tenants have “undivided rights to possession of the whole of the relevant property” as against everyone else.⁵⁷ With regard to possession, therefore, there is no distinction between the shared exclusivity enjoyed by joint tenants and tenants in common: in both common law forms of co-ownership, “each co-owner is as much entitled to possession of any part of the land as the others.”⁵⁸

⁵³ See *Powell*, *supra* note 21 at 470; Mary Jane Mossman and Philip Girard, *Property Law Cases and Commentary*, 3rd ed (Toronto: Emond Montgomery, 2014), 522-23.

⁵⁴ The common law distinguishes between estates in land that are vested in possession, and estates that are vested in interest (e.g., a life estate vested in possession, and a remainder in fee simple vested in interest). The former entail a right of immediate possession, whereas the latter entail a right to future possession when the preceding estate in possession comes to an end: see Mossman and Girard, *supra* note 53 at 316-18. Shared exclusivity could also exist at common law in family contexts where co-parcenary or tenancy by the entirety arose (see *ibid* at 533-34), but these old forms of co-ownership are not relevant to our discussion.

⁵⁵ *Ibid* at 531. For example, a fee simple estate can be held by two tenants in common in equal 50/50 shares, or in unequal 75/25, 60/40, etc, shares, whereas a fee simple held by joint tenants is a unified whole that is not held in shares.

⁵⁶ If there is more than one survivor, they continue to hold as joint tenants. If there is only one survivor, he or she becomes the sole proprietor and the joint tenancy is at an end. See *ibid.* at 526-27.

⁵⁷ *Ibid* at 531.

⁵⁸ Robert Megarry and William Wade, *The Law of Real Property*, 7th ed by Charles Harpum, Stuart Bridge, and Martin Dixon (London: Sweet & Maxwell, 2008), 490 (I am grateful to Mary Jane Mossman for bringing this quotation to my attention). See also Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Carswell, 2010), 336-37.

While joint tenancies and tenancies in common are usually created by a grant, conveyance, will or intestacy, they can also arise from occupancy (taking possession of unowned land), which is particularly relevant to our discussion because the common law test for sufficiency of occupation to acquire a title by occupancy is the test the Supreme Court found relevant for proof of Aboriginal title in *Tsilhqot'in Nation*.⁵⁹ Because the common law doctrine of tenure deemed all land in England to have been originally possessed and therefore owned by the King, acquisition of title by taking possession of unowned land was generally impossible except in the anomalous situation where a *pur autre vie* estate (an estate for the life of another) became vacant as a result of the death of the life tenant before the death of the *cestui que vie* (the person whose life measured the estate's duration).⁶⁰ Prior to statutory reform, the first person who took possession of the land after the death of the life tenant acquired the *pur autre vie* estate by occupancy for the rest of the *cestui que vie*'s life. Where two or more persons acting together entered as occupants, they would have acquired the vacant life estate as co-owners (probably as joint tenants⁶¹) and shared the possession equally.

Similarly, adverse possessors who act in concert generally acquire an estate as joint tenants⁶² (though the test for acquisition of adverse possession is more onerous than the test for occupancy because the possession is initially wrongful⁶³). However, in either situation if the occupants or adverse possessors agreed among themselves that they should hold the estate as tenants in common, a court might decide that they hold the land

⁵⁹ *Tsilhqot'in Nation*, *supra* note 1 at para 39.

⁶⁰ See McNeil, *Common Law Aboriginal Title*, *supra* note 22 at 11-13; Derek Mendes da Costa, Richard J Balfour and Eileen E Gillese, *Property Law Cases, Text and Materials*, 2nd ed (Toronto: Emond Montgomery, 1990), 14:4.

⁶¹ While I am not aware of any authority directly on this point, it is supported by the common law's preference for joint tenancies (see Mossman and Girard, *supra* note 53 at 527) and judicial decisions holding that adverse possessors take as joint tenants: see cases cited in note 62 *infra*.

⁶² See *Ward v Ward* (1871), LR 6 Ch App 789 (CA); *Bolling v Hobday* (1882), 31 WR 9 (Ch); *In Re Livingston Estate* (1901), 2 OLR 381 (Div Ct); *Smith v Savage*, [1906] 1 Ir R 469 (Ch); *Coady and Coady Estate v Coady and Coady Estate* (1983), 48 Nfld & PEIR 355 (Nfld SC, TD). Compare *Afton Band of Indians v Attorney General of Nova Scotia* (1978), 29 NSR (2d) 226 (NSSC, TD), where the members of an Indian Band adversely possessed land for the limitation period. At 241, Jones J held that the members generally had used the lands "in common" for various purposes, which would have led him to decide that the Band had title, were it capable of holding property. However, as he found the Band itself lacked the legal personality necessary to hold property, "title had to vest and did vest in members of the Band as tenants in common": *ibid*. However, it is not clear from the judgment why the members took as tenants in common rather than as joint tenants.

⁶³ *Tsilhqot'in Nation*, *supra* note 1 at para 40.

in that way.⁶⁴ However, as mentioned above this would not affect the shared exclusivity of their right of possession, as unity of possession applies equally to joint tenancies and tenancies in common. The important point is that two or more persons who acquire an interest in land by taking possession have shared exclusivity, the meaning of which Chief Justice Lamer said in *Delgamuukw* is “well-known to the common law” and which can be adapted to apply to joint Aboriginal title.⁶⁵

We will consider the relevance of this body of common law to joint Aboriginal title in Part V of this article, but before doing so we need to discuss the law on joint title of Indian nations in the United States, as that is the second source of authority for joint title that Chief Justice Lamer referred to in *Delgamuukw*.

IV. JOINT ABORIGINAL TITLE IN THE UNITED STATES

We will start with a brief outline of American law on Aboriginal or Indian title generally,⁶⁶ and then turn to joint title.⁶⁷ However, it is important to point out at the outset that, unlike the Canadian cases of *Delgamuukw* and *Tsilhqot’in Nation*, the cases dealing with joint Aboriginal title in the United States have generally involved claims for compensation for lands taken by the United States without fair payment, not applications for declarations of title. This is because most of these American cases originated in claims brought before the Indian Claims Commission (ICC),⁶⁸ a statutory body created in

⁶⁴ Again, I know of no direct authority for this. However, joint tenants can sever their joint tenancy in equity by mutually agreeing to hold as tenants in common: see Mossman and Girard, *supra* note 53 at 534-37; Ziff, *supra* note 58 at 345-47. See also *Williams v Williams* (1867), LR 2 Ch App 294 (Ch); *Martin v Kearney* (1902), 36 ILTR 117 (CB). It should therefore be possible for co-occupants or adverse possessors to agree to take as tenants in common rather than as joint tenants, at least in equity. Presumably, this would also allow them to decide to take in unequal equitable shares.

⁶⁵ *Delgamuukw*, *supra* note 2 at para 158. See text at note 46 *supra* for complete quotation.

⁶⁶ For further discussion and comparison of American law on Aboriginal title with Canadian, Australian, and New Zealand law, see Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Leichhardt, NSW: Federation Press, 2008); Kent McNeil, “Judicial Perspectives on Indigenous Land Rights in the Common Law World”, in Benjamin J Richardson, Shin Imai, and Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing, 2009), 257-83; Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Oxford: Hart Publishing, 2014).

⁶⁷ My discussion covers mainly US Supreme Court and Court of Claims decisions. A more complete discussion would include decisions of the Indian Claims Commission as well.

⁶⁸ Created by the *Indian Claims Commission Act* of 1946, 60 Stat 1049.

1946 to provide compensation for past wrongs and unfair dealing by the United States.⁶⁹ As the only remedy the ICC could grant was a monetary award, neither declarations of title nor restoration of lands could be ordered. Nonetheless, the cases examined here, involving mainly appeals to the Court of Claims from ICC decisions, do provide insight into American law on exclusive occupation and joint title that could assist Canadian courts in resolving over-lapping claims.

As in Canada, Aboriginal title in the United States is based on exclusive occupation of land.⁷⁰ However, while this occupation must have been “for a long time”,⁷¹ it need not have pre-dated European or even American assertion of sovereignty.⁷² Also, Aboriginal title in the United States can be held either communally or individually.⁷³ It includes the natural resources on and under the land,⁷⁴ as does Aboriginal title in Canada.⁷⁵ However, unlike in Canada, for constitutional purposes it is non-proprietary

⁶⁹ See Sandra C Danforth, “Repaying Historical Debts: The Indian Claims Commission” (1973) 49 *North Dakota L Rev* 359-403; Imre Sutton, ed, *Irredeemable America: The Indians’ Estate and Land Claims* (Albuquerque: University of New Mexico Press, 1985); Harvey D Rosenthal, *Their Day in Court: A History of the Indian Claims Commission* (New York: Garland Publishing, 1990).

⁷⁰ See cases cited *infra* in notes 71-73; Michael J Kaplan, “Proof and Extinguishment of Aboriginal Title to Indian Lands” (1979, updated 2003) LEXSEE 41 ALR Fed 42; *Cohen’s Handbook of Federal Indian Law*, Nell Jessup Newton ed (New Providence, RI: LexisNexis, 2012), §15.04[2] at 999-1004, §15.05 at 1015-17 [*Cohen’s Handbook*].

⁷¹ *Sac and Fox Tribe of Indians of Oklahoma v United States*, 161 Ct Cl 189 at 202, 205-7 (1963) [*Sac and Fox Tribe* 1963], *cert denied* 375 US 921 (1963); *Confederated Tribes of the Warm Springs Reservation of Oregon v United States*, 177 Ct Cl 184 at 194 (1966) [*Confederated Tribes*]; *United States v Pueblo of San Ildefonso*, 513 F 2d 1383 at 1394 (1975, Ct Cl) [*Pueblo of San Ildefonso*]; *Seneca Nation of Indians v New York*, 206 F Supp 2d 448 at 503 (2002), WDNY. In *Confederated Tribes* at 194, Durfee J said: “The time requirement, as a general rule, cannot be fixed at a specific number of years. It must be long enough to have allowed the Indians to transform the area into domestic territory so as not to make the Claims Commission Act ‘an engine for creating aboriginal title in a tribe which itself played the role of conqueror but a few years before’” (quoting from *Sac and Fox Tribe* 1963 at 206).

⁷² Aboriginal title could therefore be acquired after American acquisition of sovereignty: see *Cramer v United States*, 261 US 219 (1923) [*Cramer*]; *United States v Seminole Indians*, 180 Ct Cl 375 at 387 (1967) [*Seminole Indians*]; *Sac and Fox Tribe v United States*, 383 F 2d 991 at 996-69 (1967, Ct Cl) [*Sac and Fox Tribe* 1967], *cert denied* 389 US 900 (1967); *Turtle Mountain Band of Chippewa Indians v United States*, 490 F 2d 935 at 941-42 (1974, Ct Cl) [*Turtle Mountain Band*]. Compare *Yankton Sioux Tribe of Indians v South Dakota*, 796 F 2d 241 (1986, 8th Cir CA), *cert denied* 107 S Ct 3228 (1987).

⁷³ See *Cramer v United States*, *supra* note 72 at 227-29; *Santa Fe Pacific Railroad*, *supra* note 46 at 345-46; *United States v Dann*, 105 S Ct 1058 at 1065 (1985); *United States v Kent*, 912 F 2d 277 (1990, 9th Cir CA).

⁷⁴ See *Ogden v Lee*, 6 Hill 546 (1844, NYSC), affirmed *sub nom Fellows v Lee*, 5 Denio 628 (1846, NY Ct of Errors); *United States v Paine Lumber Co*, 206 US 467 (1907); *United States v Shoshone Tribe*, 304 US 111 at 116-17 (1938); *United States v Klamath & Moadac Tribes*, 304 US 119 at 122-23 (1938); *Miami Tribe v United States*, 175 F Supp 926 at 942 (1959, Ct Cl); *United States v Northern Paiute Nation*, 393 F 2d 786 at 796 (1968, Ct Cl); *United States ex rel Chunie v Ringrose*, 788 F 2d 638 at 642 (1986, 9th Cir CA).

⁷⁵ *Delgamuukw*, *supra* note 2 at paras 116-24.

until recognized by treaty or statute, and so is not protected by the Fifth Amendment to the US Constitution that, among other things, requires that just compensation be paid when private property is taken for public purposes.⁷⁶

The occupation upon which Aboriginal title in the United States is based must have been exclusive in the sense that the Aboriginal group claiming title must have been the only ones who occupied the land. Accordingly, if the land in question was used by two or more tribes who were rivals or had no connection with one another, none of them would have Aboriginal title. In *United States v Santa Fe Pacific Railroad* (the only American case referred to by Lamer CJ in *Delgamuukw* in the context of proof of Aboriginal title), Douglas J stated:

Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had “Indian title”.⁷⁷

In assessing whether Indian use of the land amounted to occupation, American courts have taken their manner of life into account. In an early decision, Baldwin J expressed the opinion of the Supreme Court that Indian occupation was to be “considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites”.⁷⁸ Thus, as long as only one Indian tribe or nation was using the land, the manner in which they used it does not seem to matter.⁷⁹ So tribes that American courts described as “nomadic” have been held to have Aboriginal title to lands they used on a regular basis in accordance with their ways

⁷⁶ *Tee-Hit-Ton Indians v United States*, 348 US 272 (1955) [*Tee-Hit-Ton Indians*]. For a powerful critique of the Supreme Court’s exclusion of Aboriginal title from this constitutional protection, see Nell Jessup Newton, “At the Whim of the Sovereign: Aboriginal Title Reconsidered” (1980) 31 *Hastings LJ* 1215. See also Steven John Bloxham, “Aboriginal Title, Alaskan Native Property Rights, and the Case of the Tee-Hit-Ton Indians” (1980) 8 *Am Indian L Rev* 299; McNeil, *Common Law Aboriginal Title*, *supra* note 22 at 259-67.

⁷⁷ *Santa Fe Pacific Railroad*, *supra* note 46 at 345. See *Oneida Indian Nation v County of Oneida*, 414 US 661 at 667-74 (1974), and *County of Oneida v Oneida Indian Nation*, 470 US 226 at 235-36 (1985), for useful overviews of US case law, including *Santa Fe Pacific Railroad*, on Indian or Aboriginal title.

⁷⁸ *Mitchel v United States*, 9 Pet (34 US) 711 at 746 (1835).

⁷⁹ In *Worcester v Georgia*, 6 Pet (31 US) 515 at 559 (1832), Marshall CJ said the “Indian nations had always been considered ... as the undisputed possessors of the soil from time immemorial”. This was confirmed by the Supreme Court in *Holden v Joy*, 17 Wall (84 US) 211 at 243 (1872). See also *Seminole Indians*, *supra* note 72 at 383-86.

of life.⁸⁰ Moreover, this would include “seasonal or hunting areas over which the Indians had control even though those areas were only used intermittently.”⁸¹

Disputes over the existence of Aboriginal title in the United States have related mainly to lands that are located between the uncontested lands of two or more Indian tribes or other groups. American courts have indicated that, depending on the facts, there are three ways of resolving these disputes. First, the lands can be divided between the groups, so that each receives the land where its use predominated.⁸² Secondly, if the lands in question were visited, used, or fought over by two or more groups without one of them prevailing and establishing its exclusive occupation, then none of them would have Aboriginal title.⁸³ Finally, if two or more groups with some kind of connection used the same lands in an amicable rather than an adversarial fashion to the exclusion of other groups, they could have joint Aboriginal title.⁸⁴ While there is thus no doubt that joint Aboriginal title can exist in the United States, examination of the American case law reveals that the nature of the connection Aboriginal groups must have to enjoy joint title is not entirely clear.

In *Confederated Tribes of the Warm Springs Reservation of Oregon v United States*, Durfee J, delivering the opinion of the Court of Claims, stated that “[j]oint and amicable possession of the property by two or more tribes or groups will not defeat

⁸⁰ *United States v Kagama*, 118 US 375 at 381 (1886); *Cramer*, *supra* note 72 at 227; *Northwestern Bands of Shoshone Indians v United States*, 324 US 335 at 338-40 (1945); *Tee-Hit-Ton Indians v United States*, 120 F Supp 202 at 204 (1954, Ct Cl), affirmed *supra* note 76 at 285-88.

⁸¹ *Confederated Tribes*, *supra* note 71 at 194. See also *Delaware Tribe of Indians v United States*, 130 Ct Cl 782 at 789 (1955); *Spokane Tribe v United States*, 163 Ct Cl 58 at 66 (1963). The *Spokane Tribe* decision, at 68-69, also reveals that the presence of other Indians by permission does not undercut the exclusivity required for Aboriginal title; see also *Strong v United States*, 518 F 2d 556 at 572 (1975, Ct Cl) [*Strong*], *cert denied* 423 US 1015 (1975). In *Seminole Indians*, *supra* note 72 at 385-86, Collins J said: “the Government leans far too heavily in the direction of equating ‘occupancy’ (or capacity to occupy) with actual possession, whereas the key to Indian title lies in evaluating the manner of land-use over a period of time. Physical control or dominion over the land is the dispositive criterion.” [emphasis in original]

⁸² See *Turtle Mountain Band*, *supra* note 71 at 939, 948-50; *Seminole Indians of Florida v United States*, 455 F 2d 539 at 542 (1972, Ct Cl).

⁸³ See *Sac and Fox Tribe* 1967, note 71 at 206-7; *Six Nations v United States*, 173 Ct Cl 899 at 910-11 (1965); *Iowa Tribe of the Iowa Reservation v United States*, 195 Ct Cl 365 at 367-68 (1971) [*Iowa Tribe*]; *Strong*, *supra* note 81 at 561-62. See also the quotation from *Santa Fe Pacific Railroad* at note 77 *supra*.

⁸⁴ See *Sac and Fox Tribe*, *supra* note 71 at 202 n11; *Confederated Tribes*, *supra* note 71 at 194 n6; *Iowa Tribe*, *supra* note 83 at 394-96; *Turtle Mountain Band*, *supra* note 72 at 944; *Pueblo of San Ildefonso*, *supra* note 72 at 1394-95; *Strong*, *supra* note 81 at 561-62; *Uintah Ute Indians v United States*, 28 Fed Cl 768 at 785, 787 n21 (1993) [*Uintah Ute Indians*]. For discussion, see Kaplan, *supra* note 70, § 3b, “‘Exclusive’ use or occupancy; joint aboriginal title”.

‘Indian title’.”⁸⁵ Later in his judgment, he clarified that he was not deciding a joint title case, as there was insufficient evidence that usage by a neighbouring group was on a “guest-host” basis.⁸⁶ He nonetheless criticized the ICC for apparently denying title to some land “because of its usage as a common subsistence area by more than one band of Indians” who belonged to the same cultural group.⁸⁷ For Durfee J, the issue therefore seems to have been the definition of the claimant group, rather than joint title. He stated:

To prevent recovery for all the lands claimed to be used collectively by the Wayampam [the claimant group], there must be substantial evidence that the various Wayampam bands not only did not constitute a single political unit, but also that they were not an identifiable group or tribe in the ethnic or cultural sense.⁸⁸

In other words, Aboriginal title can vest in one ethnic or cultural group that collectively used lands, without imposing an additional requirement that they “constitute a single political unit”. That Durfee J was concerned here with the identity of the titleholding group rather than with joint title is demonstrated as well by his reliance upon the following quotation from *Hualapai Tribe v United States*:

Assuming for the moment that the Hualapai were not a tribe in a political sense, we have a people who, all ethnologists agree, spoke the same language, had a common culture, intermarried, made common use of the lands away from their settlements, shared their own territories, engaged in common economic activities and considered themselves one people. Such factors make the Hualapai an identifiable group and a land-owning entity.⁸⁹

Nonetheless, in *Iowa Tribe of the Iowa Reservation v United States*, the Court of Claims, in a *per curiam* judgment, said this in reference to the finding of the ICC in the case:

⁸⁵ *Confederated Tribes*, *supra* note 71 at 194 n6.

⁸⁶ *Ibid* at 198. I find Durfee J’s use of the term “guest-host” to be confusing in this context, as it suggests a situation where one group had given permission to another to use the lands, which would support a finding of Aboriginal title in the group giving permission rather than a finding of joint title: see *supra* note 81.

⁸⁷ *Ibid* at 206. See also 210, where he said the case had to be remanded to the ICC to reconsider “their finding with regard to common usage”.

⁸⁸ *Ibid* at 206.

⁸⁹ 11 Ind Cl Comm 458 at 474 (1967), quoted *ibid* at 206 n22. At 206 n21 Durfee J also quoted a passage from *Lummi Tribe v United States*, 5 Ind Cl Comm 525 at 546 (1957): “If a group of village entities speak the same dialect, move about more or less together in search of subsistence and retain a hold on the same general area of land for their homes, then ... they should be considered an entity capable of prosecuting a claim and establishing their right thereto as a group.”

The Commission was not wrong in refusing to find such joint acquisition here. The Iowas and the Sac and Fox did not consider themselves, and were not treated, as a single or closely integrated entity, but rather as separate political groups which were friends or allies (for the most part). Their use of the same lands may have been in common – like much of Indian use of the midwestern and western regions – but the Commission could properly decide that it was not proved to be truly joint, and therefore that each separate tribe’s claim to Indian title would have to be tested on its own distinct basis.⁹⁰

One can read this passage simply as a refusal by the Court to interfere with a factual finding of the Commission that was supported by substantial evidence.⁹¹ However, it seems to me that the Court lacked a clear sense of the distinction drawn in *Confederated Tribes* between a situation of joint title, which apparently could be held by neighbouring groups that did not form a cultural unit, and a situation involving identification of a group that displayed sufficient cultural cohesion (if not political unity) to be a single landholding entity.

In *Turtle Mountain Band of Chippewa Indians v United States*, the Court of Claims affirmed that two groups in “joint and amicable” occupation would have joint title if there was “extensive cooperation between them.”⁹² Significantly, the Court said that joint title could arise between an Indian band and a “mixed blood” (Métis) band.⁹³ On the facts, the Court found that the full and mixed blood Chippewas were both organized as bands, lived independently of “white social and political institutions”, and often hunted together.⁹⁴ It nonetheless refused to interfere with the decision of the ICC that, “based on political, social and economic factors, these full and mixed bloods should be considered members of a larger Indian group”.⁹⁵ In other words, as in *Confederated Tribes*, this was a case where title was vested in a larger entity that included these groups, rather than in the groups as joint titleholders.⁹⁶

⁹⁰ *Iowa Tribe*, *supra* note 83 at 370.

⁹¹ In the absence of an error of law, the Court of Claims was “required to sustain the Commission if its resolution of the controversy [was] supported by substantial evidence in the record as a whole”: *Sac and Fox Tribe* 1963, *supra* note 71 at 207. See also *Pueblo of San Ildefonso*, *supra* note 71 at 1394 and cases cited there.

⁹² *Turtle Mountain Band*, *supra* note 71 at 944.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ For another case that apparently involved a claim by a larger group comprised of subgroups, see *Sioux Tribe v United States*, 500 F 2d 458 (1974, Ct Cl) [*Sioux Tribe*] (that the Court of Claims did not regard this

In *United States v Pueblo of San Ildefonso*⁹⁷ the Court of Claims held that joint Aboriginal title had actually been acquired, in that case by two Indian Pueblos, Santo Domingo and San Filipe, in New Mexico. The lands in question are adjacent to lands granted to the two Pueblos for their common use by the Spanish Crown in 1770.⁹⁸ Durfee J, delivering the unanimous opinion, stated that “this court has acknowledged, on several occasions, that two or more tribes or groups might inhabit a region in joint and amicable possession without destroying the ‘exclusive’ nature of their use and occupancy, and without defeating Indian title.”⁹⁹ He then dealt with the argument of the government of the United States that joint title could only be held by groups “so closely allied or integrated in their land use and occupancy that they [had] in fact become virtually one land using entity.”¹⁰⁰ Durfee J rejected this argument, observing that “[t]here are no holdings of this court which say that two Indian tribes or groups, each a separate ‘entity’ and each with its own separate lands, can never assert joint ownership to other lands which are commonly used and occupied.”¹⁰¹ He then clarified the Court’s remarks on the matter of joint title in *Iowa Tribe*:¹⁰²

On the record before us in *Iowa Tribes, supra*, we held that the Iowas and the Sac and Fox may have used lands in common, but that the Commission could properly decide, on the basis of the evidence before it, that their occupancy was not proved to be truly joint, and therefore that each separate tribe’s claims to Indian title

as a joint title case is also revealed by the fact that it was not mentioned in the Court’s decisions just nine and eleven months later in *Pueblo of San Ildefonso, supra* note 71 at 1394-95, and *Strong, supra* note 81, per Cowan CJ at 561, where the Court’s other decisions referring to joint title were cited). In response to the US Government’s argument that the Teton and Yanktonais Sioux had not shown which lands east of the Missouri River had been used exclusively by each of them, Cowen CJ, for the majority at 472, distinguished cases like *Iowa Tribe, supra* note 83, which involved “competing groups which claimed the same territory”, and stated: “However, the Teton and Yanktonais are not antagonists competing for the same territory. The award here is to the Docket 74 Sioux who are the legitimate representatives of the Teton and Yanktonais on whose behalf this action is asserted. All the Docket 74 Sioux, except the Sioux of the Santee Reservation, are comprised at least in part of Yanktonais and Teton descendants or both. The Government has no right to complain because the descendants chose to assert the joint interest of their ancestors rather than compete for separate interests.” [emphasis in original]

⁹⁷ *Supra* note 71.

⁹⁸ *Ibid* at 1392-93, 1395-96. The Spanish official who delivered the grant to the two Pueblos “gave them to understand that the pastures and watering places were to be in common to each one of the Pueblos and without preference to either of the Pueblos”: *ibid* at 1392. The Pueblos thought that the grant included the lands in dispute in the case, but an earlier claim on that basis had been narrowly rejected by the Court of Private Land Claims in 1898: *ibid* at 1395-96.

⁹⁹ *Ibid* at 1394.

¹⁰⁰ *Ibid* at 1395.

¹⁰¹ *Ibid*.

¹⁰² *Supra* note 83. See text at note 90 *supra*.

would have to be tested on its own distinct basis. The *Iowa Tribes* decision did not purport to set down any rule that two or more tribes must first conclusively prove that they are a single or closely integrated entity before they can claim joint ownership of land. In our view, the Commission correctly held that the complete merger of two or more tribes into one is not a prerequisite for claiming joint aboriginal title.¹⁰³

In *Pueblo of San Ildefonso*, the factual evidence of joint use was fortified by the belief of the two Pueblos that the lands in question had been granted to them by the Spanish Crown as their joint property in 1770. Durfee J accordingly concluded:

The factual picture which has emerged here adds up to significantly more than mere use and occupancy of a particular area by two or more tribes at the same time. These two pueblos had a joint Spanish grant which they believed to encompass a large area, and although the Court of Private Land Claims did not validate the entire claim, it did validate an area contiguous to the 8,600-acre tract in issue – hence there was a substantial objective basis for the Indians’ belief that they jointly owned the disputed land.¹⁰⁴

The last Court of Claims’ decision on joint Aboriginal title that I have found was handed down in 1975 in *Strong v United States*.¹⁰⁵ Cowen CJ, for the Court, stated:

Although normally no tribe will be deemed to have proven aboriginal title when others used and occupied the land in question, there is a “built-in exception” to the “exclusivity” requirement. Actually, this “exception” merely creates a method of analysis of “exclusivity” in certain rare situations. In the past, the court has held on several occasions that two or more tribes or groups might inhabit an area in “joint and amicable” possession without erasing the “exclusive” nature of their use and occupancy.... To qualify for treatment under “joint and amicable” occupancy, the relationship of the Indian groups must be extremely close. We described just such a relationship in *Sac & Fox Tribe v. United States*, 179 Ct. Cl. at 16, 383 F. 2d at 995, as follows:

Originally the Sac and Fox Nation consisted of two separate and identifiable tribes of Indians belonging to the Algonquin stock. Around 1735, due to their mutual hostility and conflict with the French, they formed a close and intimate alliance, politically and socially, *so that from thence forward they have been dealt with and referred to as a single nation both in their relationship with other Indian tribes and in treaty negotiations and other matters with the United States*. [Cowan CJ’s emphasis]¹⁰⁶

¹⁰³ *Pueblo of San Ildefonso*, *supra* note 71 at 1395.

¹⁰⁴ *Ibid* at 1396.

¹⁰⁵ *Supra* note 81.

¹⁰⁶ *Ibid* at 561-62.

I have difficulty reconciling Cowan CJ's opinion that, for "joint and amicable" occupation to exist, the relationship between the groups must have been "extremely close" (like that of the Sac and Fox, which seems to have involved a merger into a "single nation"), with the Court's decision in *Pueblo of San Ildefonso*.¹⁰⁷ In the latter case, decided just two months before *Strong*, Durfee J held that joint title could arise even though the groups were not "a single or closely integrated entity".¹⁰⁸ In that case, the Santo Domingo and San Filipe Pueblos were held to have joint title to lands located between their Pueblos, even though they remained separate and did not merge into a single nation. As Cowan CJ referred to *Pueblo of San Ildefonso* in *Strong* and did not express disagreement with it, I think his comments on joint title in the passage quoted above need to be treated with caution. If taken literally, they would actually eliminate the possibility of joint title, as the Sac and Fox Nation held their Aboriginal title lands as a single entity, not as joint titleholders.¹⁰⁹ Moreover, we have seen that, in *Confederated Tribes*¹¹⁰ and *Turtle Mountain Band*,¹¹¹ the Court of Claims held that groups with cultural ties who used the same lands in common but lacked political unity would nonetheless have a single Aboriginal title vested in a larger entity encompassing those groups.¹¹² As the Sac and Fox had "formed a close and intimate alliance, politically and socially,"¹¹³ they were more closely connected than the groups in those two cases. To suggest, as Cowan CJ did in *Strong*, that for joint title to arise there must be the kind of relationship that existed between the Sac and Fox is therefore inconsistent with the approach the Court formerly took to identification of the titleholding entity and to joint title. Cowan CJ nonetheless went on to hold that most of the claims to joint title in *Strong* failed because the groups did not have a sufficiently close relationship to be in joint and amicable occupation.¹¹⁴ Where so-called joint title did exist, apparently the holders of that title were so closely connected as to have been a single landholding entity.¹¹⁵

¹⁰⁷ *Supra* note 71.

¹⁰⁸ *Ibid* at 1395. See also text accompanying note 101 *supra*.

¹⁰⁹ See *Sac and Fox Tribe* 1963, *supra* note 71; *Iowa Tribe*, *supra* note 83.

¹¹⁰ *Supra* note 71.

¹¹¹ *Supra* note 72.

¹¹² See text accompanying notes 85-96 *supra*. See also discussion of *Sioux Tribe*, also decided by Cowan CJ, in note 96 *supra*.

¹¹³ *Sac and Fox Tribe* 1967, *supra* note 72 at 995.

¹¹⁴ *Strong*, *supra* note 81 at 562, 568-70.

¹¹⁵ *Ibid* at 570, 572-73

To conclude this discussion of the degree of connection necessary for two or more groups to hold joint title, I think one first has to identify the group or groups that may have title. If two or more groups were so closely connected, either culturally and socially or politically, that they formed a single entity that used and controlled lands in common, joint title would *not* exist (despite what Cowan CJ said in *Strong*) because a single landholding unit would have title.¹¹⁶ In my opinion, true joint title arises only in a case like *Pueblo of San Ildefonso* where two or more distinct groups amicably used the same lands to the exclusion of all other groups. There would be no need for them to have been culturally or politically linked, as they would be separate landholding entities. The focus of the inquiry would therefore be on their relationship in the context of land use and control. If they had an explicit agreement or implicit understanding that they both could occupy and use the lands, and did jointly and amicably occupy and use them to the exclusion of others, they would have been in control of those lands in a way that would be sufficient for a single Aboriginal title to vest in each of them concurrently. Put another way, there would have to be both a common intention to occupy jointly and exclusively, and fulfilment of that intention by actual joint and exclusive use and control of the land. It was that kind of factual situation that led the Court to conclude that joint title had been established in *Pueblo of San Ildefonso*.¹¹⁷ In my view, this approach resolves the confusion created by Cowan CJ's judgment in *Strong* in a way that is consistent with the Court of Claims' earlier judgments on joint title.¹¹⁸

¹¹⁶ As we have seen, that was the situation in *Confederated Tribes*, *supra* note 71, and *Turtle Mountain Band*, *supra* note 72: see text accompanying notes 85-88 *supra*. Note, however, that an issue might still arise over how the subgroups shared in the interest held by the overarching group in which title vested: see *Strong*, *supra* note 81 at 572-73; *Sioux Tribe*, *supra* note 96 at 478-79.

¹¹⁷ The intention element is revealed by the Court's reliance on the belief by the Santo Domingo and San Felipe Pueblos that they held the lands jointly: see text accompanying note 104 *supra*.

¹¹⁸ It is unfortunate that the issue of joint title has not been dealt with by the Supreme Court and does not appear to have been revisited by the Court of Claims after *Strong*. The Supreme Court declined the opportunity to resolve the contradictions between the earlier cases and *Strong* when it denied *certiorari* in that case: *supra* note 81. The possibility of joint title was acknowledged in *Sekaquaptewa v MacDonald*, 619 F 2d 801 at 809 (1980, 9th Cir CA), but the case was remanded to the District Court of Arizona with no decision on the matter (however, the 9th Cir did decide that no joint title had been created by statute). The most recent reference to joint title that I have found in the American case law was in 1993 in *Uintah Ute Indians*, *supra* note 84 at 787 n21, where Nettesheim J wrote: "Plaintiff presented evidence to the court of substantial mixed-tribal use of the subject area, namely by Shoshone and Weber Utes. This would impact plaintiff's allegation of exclusive use. While the court does not have the benefit of a complete record in this regard, the evidence suggests that plaintiff would face a serious obstacle in proving joint and amicable use of the Salt Lake Valley area by the two groups. Even if the bands lived in joint and amicable possession,

This interpretation is also consistent with the common law we examined earlier on shared occupation and joint title. Where two or more persons acting together exclusively occupy land, a possessory title vests in each of them as separate legal persons.¹¹⁹ In other words, their shared occupation results in one title that is held by all of them as joint titleholding entities. The decision of the Court of Claims in *Pueblo of San Ildefonso* is like this, the main difference being that the titleholding entities that share the single Aboriginal title are Indian groups rather than individuals. Also, for a joint possessory title to arise at common law from shared exclusive occupation, the joint occupiers do not, of course, have to act as one entity – that is not possible where natural persons are concerned. In this respect as well, *Pueblo of San Ildefonso* is more consistent with the common law than the *Strong* decision and should guide Canadian courts in deciding joint title claims.

There is, however, a further issue to consider, namely the nature of the rights held by the joint Aboriginal titleholders *inter se*. More specifically, can those rights be analogized with the common law rights of either joint tenants or tenants in common, or are they unique? Unfortunately, as we shall see when we examine this issue in Part V.C below, the American case law is not very helpful in this regard.

V. JOINT ABORIGINAL TITLE IN CANADA

Our discussion so far has revealed that Chief Justice Lamer's observations in *Delgamuukw* that the "meaning of shared exclusivity is well-known to the common law" and that the "possibility of joint title has been recognized by American courts" are amply supported by case law in England and the United States.¹²⁰ In England, common law occupants and adverse possessors acting in concert could acquire joint title arising from their exclusive shared occupation of the land in question. Likewise in the United States, two or more Indian groups who were not closely connected enough to comprise a single titleholding entity could have joint title to land that they amicably occupied and shared to

the court would also inquire into the composition of the Weber Utes, since they are variously described as Ute, mixed-blood, and Shoshone." Although she did not deal with the matter, Nettesheim J thus recognized the relevance of identification of the landholding group or groups to the issue of joint title.

¹¹⁹ See text at notes 61-65 *supra*.

¹²⁰ *Delgamuukw*, *supra* note 2 at para 158.

the exclusion of other Indian groups. It is the latter situation that Lamer CJ and La Forest J envisaged in *Delgamuukw*, and that McLachlin CJ accepted as a possibility in *Marshall/Bernard*.¹²¹ Given, then, that shared exclusivity resulting in joint Aboriginal title is possible in Canada, I think at least four questions emerge: (1) How does one identify and define the Aboriginal groups that are claiming joint title? (2) What kind of relationship would those groups need to have had at the time of Crown assertion of sovereignty? (3) How can exclusive shared occupation at that time be proven? (4) What kinds of interests would each group have in the land as a result of their shared occupation? As mentioned earlier, I am going to leave question (1) aside in this article, as it deserves more attention than I can devote to it at this time. My focus will therefore be on the other three questions.

A. The Relationship Between the Holders of Joint Aboriginal Title

Where the appropriate titleholder is an Aboriginal group comprised of subgroups that are closely connected politically, culturally, and/or socially, and the larger group was in exclusive occupation through use and control of the land by the subgroups, Aboriginal title would vest in the group as a whole.¹²² Unless a different group with its own legal personality shared the occupation, joint title would not arise because only one legal entity would have title. For there to be joint title, two or more Aboriginal groups with distinct legal personalities must have shared exclusive occupation at the time of Crown sovereignty.¹²³

¹²¹ See text at notes 46-48 *supra*.

¹²² See discussion of *Confederated Tribes* and *Turtle Mountain Band* in text at notes 85-89, 92-96, *supra*. This was the situation in *Tsilhqot'in Nation*, *supra* note 1: see note 10 *supra*. The subgroups might have internal land interests by virtue of their own laws, but Aboriginal title vis-à-vis the outside world would be vested in the larger group. See Kent McNeil, "Aboriginal Title and the Supreme Court: What's Happening?" (2006) 69 *Sask L Rev* 281-308 at 291-93; Brian Slatery, "The Metamorphosis of Aboriginal Title" (2007) 85 *Can Bar Rev* 255-86 at 270, 279.

¹²³ Although the Supreme Court has not explicitly said that Aboriginal groups that hold title have legal personality, this must be the case because Aboriginal title is proprietary and in the common law only entities with legal personality can have property rights: see McNeil, "Post-*Delgamuukw*", *supra* note 13 at 122-25.

American law on joint title requires that the distinct Aboriginal groups sharing occupation must have had an amicable relationship.¹²⁴ Where they were contesting one another's occupation, for Aboriginal title to exist a court would either have to find that one group was in exclusive occupation and members of the other group were trespassers, or divide the land between the two groups by drawing a boundary between their respective territories. If neither of these options for unshared Aboriginal title was available on the facts, neither group would have title.¹²⁵

The approach to joint title in the United States is consistent with the common law in England where two or more persons acting together acquire joint title by taking possession of land as occupants or adverse possessors. Where individuals act in opposition to one another, however, a court has to decide between them, draw a boundary, or deny possession and title to either or any of them.¹²⁶

Given Chief Justice Lamer's reliance on American law and shared exclusivity in the common law in envisaging joint Aboriginal title, I expect that the insights we have been able to draw from those sources would assist in resolving joint title claims in Canada. However, we have seen that in the United States the timeframe for proving the occupation on which Aboriginal title depends is "a long time" before the lands were taken by the United States government, whereas in Canada there is a precise date, namely assertion of Crown sovereignty.¹²⁷ In the United States, the relationship between the Aboriginal groups has thus usually been assessed over a lengthy period of time.¹²⁸ Given that a relationship necessarily involves an ongoing connection, the strength of which can vary over time, I think Canadian courts should likewise assess the nature of the relationship, in particular the element of amicability, over a period of time leading up to

¹²⁴ This was the situation in *Pueblo of San Ildefonso*, *supra* note 71, discussed *supra* in text at 97-104.

¹²⁵ See also *Santa Fe Pacific Railroad*, *supra* note 46 at 345, where Douglas J distinguished "lands wandered over by many tribes" from lands in exclusive occupation. Importantly, however, there is another possibility in Canada: where the exclusive occupation necessary for title cannot be established, Aboriginal groups may nonetheless have other Aboriginal rights, such as hunting and fishing rights, that do not need to be exclusive. See *R v Adams*, [1996] 3 SCR 101 at paras 25-30; *R v Côté*, [1996] 3 SCR 139 at paras 35-39; *Delgamuukw*, *supra* note 2 at paras 137-39; *Marshall/Bernard*, *supra* note 16 at paras 52-59.

¹²⁶ See text at notes 50-53, *supra*.

¹²⁷ See notes 2, 71-72, and accompanying text *supra*.

¹²⁸ In *Pueblo of San Ildefonso*, *supra* note 71, which in my opinion is the most relevant decision for our purposes, the period was from 1770 to 1902.

Crown assertion of sovereignty. Trying to determine amicability at a precise date is unrealistic and might lead to a false assessment of an ongoing relationship.

But why is amicability even a requirement? Surely the issue to be determined is whether two or more Aboriginal groups together made exclusive use of the land and excluded others who did not have their permission to enter. They could be in exclusive occupation even if their relationship was not free of conflict. A precedent for this kind of situation actually existed internationally at the very time and in a geographical area that included at least part of the territory in question in *Delgamuukw*. After contesting one another's claims to the Pacific Northwest for years after the United States purchased the territory of Louisiana from France in 1803, the United States and Great Britain agreed in the Convention of Commerce of 1818 to jointly occupy the area west of the Rocky Mountains on the north west coast of America that might be claimed by either of them.¹²⁹ They thereby claimed joint territorial title (without prejudice to their individual claims or the claims of other powers or states), even though their occupation was anything but amicable – in fact, they almost went to war over the territory in the 1840s before agreeing in the 1846 Washington (Oregon Boundary) Treaty to divide it along the 49th parallel.¹³⁰ If Britain and the United States could acquire territorial title to the Pacific Northwest while jointly occupying it from 1818 to 1846 in a way that was anything but amicable, why could Aboriginal groups having a similar relationship not acquire joint title to lands in the same area during the same period?¹³¹

But where the relationship between the Aboriginal groups in question was generally amicable, as a preliminary matter it would be necessary to decide on the facts whether one group had exclusive occupation and members of the other group entered with permission, in which case the former group would have title and the members of the latter group would be guests (or licencees, in common law terms).¹³² Otherwise, if their

¹²⁹ Article III, Convention of Commerce between Great Britain and the United States, signed at London, 20 October 1818, in Clive Parry, ed, *The Consolidated Treaty Series* (Dobbs Ferry, NY: Oceana Publications), vol 69 (1969), 293.

¹³⁰ See Donald A. Rakestraw, *For Honour or Destiny: The Anglo-American Crisis Over the Oregon Territory* (New York: Peter Lang, 1995); Hutchison, *supra* note 6 at 288-98; Nicholson, *supra* note 6 at 41-47.

¹³¹ As we have seen, the date of the Washington (Oregon Boundary) Treaty was the date accepted in *Delgamuukw*, *supra* note 2, and *Tsilhqot'in Nation*, *supra* note 1, as the time of the Crown's assertion of sovereignty over British Columbia: see note 2 *supra*.

¹³² See text at notes 35-40, *supra*.

occupation was exclusive and truly shared, though not necessarily truly amicable, they would have joint Aboriginal title. This does not mean that they would have had to occupy and use the land in the same way. One can envisage situations where they used the land in different ways, which takes us to the issue of proof.

B. Proving Exclusive Shared Occupation

In Part II, we discussed the test for exclusive occupation established in *Delgamuukw* and applied in *Tsilhqot'in Nation*. In the latter case, Chief Justice McLachlin summarized the test in this way:

In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.¹³³

Regarding the exclusivity requirement, she said “[e]xclusivity should be understood in the sense of intention and capacity to control the land.”¹³⁴ As the facts revealed that the Tsilhqot'in people “repelled other people from their land and demanded permission from outsiders who wished to pass over it”, McLachlin CJ agreed with the trial judge “that the Tsilhqot'in treated the land as exclusively theirs” and therefore had title.¹³⁵

Where two Aboriginal groups claim joint title over an area of land, I think it is a matter of applying the test for exclusive occupation the Supreme Court has already laid down to the historical facts as presented. One would take into account the land uses of both groups over the area claimed, and determine whether they were in control together to the exclusion of other groups. The necessary control could be shown by presence on and use of lands, by repelling others or requiring them to obtain permission to enter, and/or by application of their own laws, for example land tenure laws or laws relating to

¹³³ *Tsilhqot'in Nation*, *supra* note 1 at para 50.

¹³⁴ *Ibid* at para 48. See also *Marshall/Bernard*, *supra* note 16 at para 64, where she also emphasized control: “The right to control the land and, if necessary, to exclude others from using it is basic to the notion of title at common law.”

¹³⁵ *Tsilhqot'in Nation*, *supra* note 1 at para 58.

trespass.¹³⁶ Whether the two groups had joint title would depend on the sum total of all the evidence relating to their shared use and control of the land.

C. The Interests of Joint Aboriginal Titleholders

The interests the joint titleholders have vis-à-vis the rest of the world would be no different than the interest of a single Aboriginal group that has unshared Aboriginal title.¹³⁷ This interest was described in detail in *Delgamuukw* in terms reiterated in *Tsilhqot'in Nation*, and so a brief summary here will suffice before addressing the more difficult question of the interests the joint titleholders have in relation to one another.¹³⁸

In *Delgamuukw*, Chief Justice Lamer referred to Aboriginal title as a “right to the land itself” that is proprietary in nature.¹³⁹ The titleholders have the right to exclusive occupation and use of their lands for a variety of purposes that are not limited to traditional uses that would be the basis for Aboriginal rights apart from title.¹⁴⁰ For example, they have a right to oil and gas, even if they made no use of those resources prior to Crown acquisition of sovereignty.¹⁴¹ However, Lamer CJ said the permissible uses are subject to an inherent limit, namely that “they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group’s aboriginal title.”¹⁴² This limitation, which he said is meant to preserve the titleholders’ special relationship with the land, is one aspect of Aboriginal title that makes it a *sui*

¹³⁶ See *Delgamuukw*, *supra* note 2 at para 157, where Lamer CJ stated that “the Aboriginal group asserting the claim to Aboriginal title may have trespass laws which are proof of exclusive occupation”. This passage was quoted with apparent approval by McLachlin CJ in *Tsilhqot'in Nation*, *supra* note 1 at para 49. See also *Delgamuukw* at para 148, where Lamer CJ said that laws relating to land, such as “a land tenure system or laws governing land use”, “would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title.”

¹³⁷ Brian Slaterry, “A Taxonomy of Aboriginal Rights”, in Hamar Foster, Heather Raven, and Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007), 111-28 at 118, describes Aboriginal title as a generic right that “does not vary from group to group”.

¹³⁸ See also Brian Slaterry, “Making Sense of Aboriginal and Treaty Rights” (2000) 79 *Can Bar Rev* 196-224; McNeil, “Post-*Delgamuukw*”, *supra* note 13.

¹³⁹ *Delgamuukw*, *supra* note 2 at para 138. See also para 113.

¹⁴⁰ *Ibid* at paras 111, 117-24.

¹⁴¹ *Ibid* at para 122. See also *Tsilhqot'in Nation*, *supra* note 1 at paras 107-16, where McLachlin CJ held that timber on Aboriginal title land belongs to the Aboriginal titleholders and so is not “Crown timber” within the meaning of that term in the *Forest Act*, RSBC 1996, c157.

¹⁴² *Delgamuukw*, *supra* note 2 at para 111. See also paras 125-32.

generis interest unlike any common law interest in land.¹⁴³ Other *sui generis* aspects distinguishing it from common law interests such as fee simple estates are its source in pre-Crown sovereignty occupation of land, the fact it is inalienable other than by surrender to the Crown, and its communal nature.¹⁴⁴ Also, the titleholding group has decision-making authority over their land,¹⁴⁵ authority that Justice Williamson in *Campbell v British Columbia* held to be governmental in nature and so indicative of an inherent right of self-government.¹⁴⁶

In *Tsilhqot'in Nation*, Chief Justice McLachlin affirmed Lamer CJ's characterization of Aboriginal title as *sui generis* and agreed with La Forest J's statement in *Delgamuukw* that "Aboriginal title 'is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts'."¹⁴⁷ Regarding its incidents, she said "Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land."¹⁴⁸ While also affirming the inherent limit, she appears to have altered the conception of it by avoiding Lamer CJ's characterization of the limit's purpose as preservation of the land for the traditional uses that gave rise to the title, describing it more in terms of forward-looking sustainability. Aboriginal title, she said,

comes with an important restriction – it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations

¹⁴³ *Ibid* at para 112. See also per La Forest J at para 190.

¹⁴⁴ *Delgamuukw*, *supra* note 2 at paras 113-15. For discussion, see McNeil, "Post-*Delgamuukw*", *supra* note 13.

¹⁴⁵ *Delgamuukw*, *supra* note 2 at para 115.

¹⁴⁶ [2000] 4 CNLR 1 (BCSC) at paras 114, 137-38 [*Campbell*]. See also *House of Sga'nisim v Canada (Attorney General)*, [2012] 2 CNLR 82 (BCSC), affirmed without deciding the inherent right issue, [2013] 2 CNLR 226 (BCCA). For discussion, see Kent McNeil, "Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence", in Foster, Raven, and Webber, *supra* note 132, 129-52, especially 139-43 [McNeil, "Judicial Approaches"].

¹⁴⁷ *Tsilhqot'in Nation*, *supra* note 1 at para 72, quoting La Forest J in *Delgamuukw*, *supra* note 2 at para 190.

¹⁴⁸ *Tsilhqot'in Nation*, *supra* note 1 at para 73. See also para 75, where she said that current Aboriginal titleholders enjoy all the incidents of title enjoyed by their ancestors, "most notably the right to control how the land is used."

of the benefit of the land. Some changes – even permanent changes – to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.¹⁴⁹

Her emphasis was thus on preserving the land for the benefit of future generations so they could continue to use it in ways of their own choosing, which might or might not be traditional uses. “Aboriginal title holders of modern times,” she said, “can use their land in modern ways, *if that is their choice*.”¹⁵⁰ But she then went a step further, declaring that the inherent limit also applies to governments that seek to justify infringements of Aboriginal title.¹⁵¹ This extension of the inherent limit to non-Aboriginal governments is a significant innovation that could place severe restrictions on the power of those governments to infringe.

The descriptions of Aboriginal title from *Delgamuukw* and *Tsilhqot’in Nation* do not assist much in determining the rights of joint Aboriginal titleholders *inter se*. We therefore need to turn to the common law on co-ownership of land and American law on joint Aboriginal title to see if they provide any guidance.

We have seen that in the common law there are two primary forms of co-ownership: joint tenancy and tenancy in common.¹⁵² When vested in possession, they both entail a right of exclusive occupation and use as against the rest of the world for the duration of the interest held by the co-owners, as is the case for joint Aboriginal titleholders.¹⁵³ This right of occupation and use has a two-fold application. First, it applies externally to protect the possession of the joint tenants, tenants in common, or joint Aboriginal titleholders against the outside world.¹⁵⁴ It also applies internally to determine their rights of occupation and use *inter se*. In this second respect, I think there may be substantial differences between joint Aboriginal title on the one hand, and joint tenancy and tenancy in common on the other. For example, in a joint tenancy or tenancy

¹⁴⁹ *Ibid* at para 74. See also paras 15, 121.

¹⁵⁰ *Ibid* at para 75 [emphasis added].

¹⁵¹ “[I]ncursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land”: *ibid* at para 86.

¹⁵² See text at notes 54-58 *supra*.

¹⁵³ See text at note 65 *supra*; *Delgamuukw*, *supra* note 2 at para 117.

¹⁵⁴ *Ibid* at para 155. See also *Tsilhqot’in Nation*, *supra* note 1 at para 76: “The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders.”

in common, all the tenants have a right to use all the land in whatever legal ways they choose, as long as they do not interfere with the occupation and use of their co-tenants.¹⁵⁵ This is not necessarily so where joint Aboriginal title is concerned.

While joint Aboriginal title may have some characteristics in common with both joint tenancies and tenancies in common, it must be kept in mind that it is a *sui generis* interest that cannot be equated with any common law interests.¹⁵⁶ In a key passage in *Delgamuukw*, Lamer CJ stated:

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 must be understood by reference to both common law and aboriginal perspectives.¹⁵⁷

He also said he was “cognizant that the *sui generis* nature of aboriginal title precludes the application of ‘traditional real property rules’ to elucidate the content of that title”,¹⁵⁸ while suggesting that useful analogies can nonetheless be drawn between aspects of Aboriginal title and common law property attributes.¹⁵⁹ McLachlin CJ reiterated these observations in *Tsilhqot’in Nation*:

The characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal title *sui generis* or unique. Aboriginal title is what it is – the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership – for example, fee simple – may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not.”¹⁶⁰

In these passages, Chief Justices Lamer and McLachlin were referring to Aboriginal title of a single Aboriginal group, not joint Aboriginal title. As already suggested, these descriptions should nonetheless apply to joint title vis-à-vis the outside

¹⁵⁵ See Mendes da Costa, Balfour, and Gillese, *supra* note 60 at 18:11-13; Mossman and Girard, *supra* note 53 at 546-47.

¹⁵⁶ See *Delgamuukw*, *supra* note 2, especially paras 111-15, 125-26, 130 (Lamer CJ), 189-90 (La Forest J).

¹⁵⁷ *Ibid* at para 112. See also per La Forest J at para 190.

¹⁵⁸ *Ibid* at para 130, relying on *St Mary's Indian Band v Cranbrook (City)*, [1997] 2 SCR 657 at para 14.

¹⁵⁹ *Delgamuukw*, *supra* note 2 at para 130, where he drew an analogy between the inherent limit on Aboriginal title and equitable waste.

¹⁶⁰ *Tsilhqot'in Nation*, *supra* note 1 at para 72.

world. But the Chief Justices' characterization of Aboriginal title as *sui generis* also implies that, whether unshared or joint, the title needs to be considered internally as well as a unique property interest that has to be defined on its own terms. We therefore should not expect joint Aboriginal title to conform internally to the common law concepts of joint tenancy or tenancy in common.

Lamer and McLachlin CJJ have told us that, as Aboriginal title arises from the historic relationship between the Crown and Aboriginal peoples, both their legal systems have to be taken into account. This is the approach they have taken to defining Aboriginal title externally. But internally, it seems to me that the common law is not relevant because control, management, and use of Aboriginal title land is a matter for the titleholders themselves to determine,¹⁶¹ which must entail self-government and the application of their own laws.¹⁶² Where joint title is concerned, the internal relationship is between the joint Aboriginal titleholders, not with the Crown. Accordingly, the legal systems of the Aboriginal titleholders and the interactions of those legal systems should inform the internal dimensions of joint title. This approach is consistent with the way the rights of the members of an Aboriginal group having unshared Aboriginal title govern distribution and use of lands among themselves in accordance with their own internal laws.¹⁶³

Where two Aboriginal groups occupied land to the exclusion of all others, their legal systems might give them different rights of occupation and use of their jointly-held lands. For example, one group might have rights to hunt and fish, while the other group might have rights and obligations stemming from a special spiritual connection with the land that the first group would have to respect. In other instances, their respective rights of occupation and use might be governed by a treaty or agreement between them,¹⁶⁴ as envisaged by Chief Justice McLachlin in *Marshall/Bernard* when she stated that “the common law recognizes that exclusivity does not preclude consensual arrangements that

¹⁶¹ See *Tsilhqot'in Nation*, *supra* note 1 at paras 73 and 75, quoted at note 145 *supra*.

¹⁶² See text at notes 140-41 *supra*.

¹⁶³ See articles cited in note 122 *supra*.

¹⁶⁴ In *Delgamuukw*, *supra* note 2 at para 157, Lamer CJ acknowledged (in the context of one Aboriginal nation giving permission to another to use its Aboriginal title lands) that treaties between Aboriginal nations governing access to and use of land would “form part of the aboriginal perspective.”

recognize shared title to the same parcel of land”.¹⁶⁵ As a result, one probably cannot define the rights of joint Aboriginal titleholders among themselves in a general way. Definition of their rights depends on the circumstances, including their laws, any agreements they may have reached, and their patterns of land use.

Other factors also militate against drawing too close an analogy between Aboriginal title and either joint tenancy or tenancy in common. Two of the *sui generis* aspects of Aboriginal title identified by Lamer CJ in *Delgamuukw* are its inalienability other than by surrender to the Crown,¹⁶⁶ and the inherent limit described above. So unlike joint tenants or tenants in common, Aboriginal joint titleholders cannot transfer their title to non-Aboriginal persons.¹⁶⁷ But what if one group were to surrender its share of joint Aboriginal title to the Crown, while the other did not? If this were a joint tenancy or tenancy in common, the result might be that the Crown would become a tenant in common with the remaining titleholder.¹⁶⁸ While this matter cannot be pursued further here, an equivalent outcome making the Crown and remaining Aboriginal group joint titleholders probably would not be appropriate, given (among other things) that the Crown owes fiduciary obligations to Aboriginal titleholders.¹⁶⁹

The inherent limit, as conceived by Lamer CJ in *Delgamuukw*, would also have complicated the situation because, in cases where cooperating Aboriginal groups relied on different uses to establish their exclusive joint occupation at the time of Crown sovereignty, the inherent limit might have impacted on their current uses in different ways. However, McLachlin CJ’s reformulation of the inherent limit in *Tsilhqot’in Nation* as forward rather than backward looking, with the goal of maintaining the sustainability of the land for the benefit of future generations, probably removed, or at least diminished,

¹⁶⁵ *Marshall/Bernard*, *supra* note 16 at para 54.

¹⁶⁶ *Ibid* at para 113. See Kent McNeil, “Self-Government and the Inalienability of Aboriginal Title” (2002) 47 *McGill LJ* 473 [McNeil, “Inalienability”].

¹⁶⁷ Arguably, however, they may be able to transfer it to other Aboriginal groups: see *Delgamuukw*, *supra* note 1 per La Forest J at paras 197-98, and discussion in McNeil, *ibid*.

¹⁶⁸ See Mendes da Costa, Balfour, and Gillese, *supra* note 60 at 18:35-36; Mossman and Girard, *supra* note 53 at 534-40. At common law, however, this might present difficulties as, historically at least, the Crown could be a tenant: see Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (London: Joseph Butterworth and Son, 1820), 378.

¹⁶⁹ *Guerin v The Queen*, [1984] 2 SCR 335; *Delgamuukw*, *supra* note 2 at paras 162-63, 166-69 (Lamer CJ), 190 (La Forest J).

this complication. But in any case, the presence of the inherent limit undoubtedly makes analogies with joint tenancies and tenancies in common even less viable.

In *Delgamuukw*, Chief Justice Lamer also said that the communal nature of Aboriginal title provides the titleholding community with decision-making authority over their lands, which “is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.”¹⁷⁰ We have seen that Justice Williamson, in the *Campbell* decision, held that this authority is part of the inherent right of self-government.¹⁷¹ As a result, Aboriginal landholding has public law elements that cannot be equated with private property interests,¹⁷² making it all the more difficult to try to fit Aboriginal title into a common law mold.¹⁷³ This is especially evident in the United States, where the Supreme Court has acknowledged since the 1820s that the Indian nations’ land rights are territorial in the sense of encompassing governmental authority as well as property rights.¹⁷⁴

In *Johnson v M’Intosh*, Chief Justice Marshall acknowledged that the Indian nations were completely independent and owned the lands within their territories prior to European colonization.¹⁷⁵ After colonization and later inclusion within the United States, they retained governmental authority as well as land rights within the territories they continued to possess as “domestic dependent nations”.¹⁷⁶ Their Aboriginal title therefore has always had a governmental dimension, as the “Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights as the undisputed possessors of the soil from time immemorial”.¹⁷⁷ This is still the case today, subject to diminution of their residual sovereignty and land rights by treaties with the United States, Acts of Congress, and judicial decisions that have limited their

¹⁷⁰ *Delgamuukw*, *supra* note 2 at para 115.

¹⁷¹ *Campbell*, *supra* note 141 at paras 136-41.

¹⁷² See McNeil “Post-*Delgamuukw*”, *supra* note 13 at 122-27; Kent McNeil, “Indigenous Land Rights and Self-Government: Inseparable Entitlements”, in Lisa Ford and Tim Rowse, eds, *Between Indigenous and Settler Governance* (Abingdon, UK: Routledge, 2013), 135-47 [McNeil, “Inseparable Entitlements”].

¹⁷³ In McNeil, “Inalienability”, *supra* note 161, I argued that this is one reason why Aboriginal title cannot be acquired by legal persons that are not entities with governmental authority.

¹⁷⁴ See Kent McNeil, “Indigenous Territorial Rights in the Common Law” (forthcoming).

¹⁷⁵ *Johnson v M’Intosh*, 21 US (8 Wheat) 543 at 574 (1823). See also *Worcester v Georgia*, *supra* note 79 at 542-44.

¹⁷⁶ *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 at 17 (1831); *Worcester v Georgia*, *supra* note 79.

¹⁷⁷ *Worcester v Georgia*, *supra* note 79 at 559.

authority over non-members.¹⁷⁸ As a result, subject to some exceptions, property rights within Indian territories (now generally referred to as “Indian country”) continue to be delineated and governed by the internal laws of the Indian nations themselves.¹⁷⁹ However, while the Indian nations can make laws for the creation of property rights within their territories, they can only alienate their collectively-held lands so as to remove them from their territory and jurisdiction by surrendering them to the United States.¹⁸⁰

Indian nations in the United States therefore have always exercised governmental authority over their retained Aboriginal title lands. Where two nations had joint Aboriginal title, this authority would have been shared between them, probably with each nation commonly exercising authority over its own members and their activities on the land, though treaties between the two nations could have provided different arrangements for sharing jurisdiction. Unfortunately, the American cases on joint title that I have looked at do not discuss this issue of shared authority, no doubt because the matter before the ICC and the courts reviewing its decisions was whether compensation should be paid for wrongful or unfair taking of Indian lands in the past, not how governmental authority had been shared by joint titleholders. It is thus hardly surprising that this issue never seems to have been addressed.

Nor do the American decisions relating to joint title provide much guidance on the interests of the titleholding group *inter se*, again because the issue to be decided was monetary compensation for wrongful or unfair taking, not determination of the rights of the joint titleholders vis-à-vis one another. In *Pueblo of San Ildefonso*,¹⁸¹ we have seen that the Court of Claims upheld the decision of the ICC that the Pueblos of Santo

¹⁷⁸ For case references and detailed discussion, see *Cohen's Handbook*, *supra* note 70, §4.01-4.02 at 206-42. See also Jacob T Levy, “Three Perversities of Indian Law”, in Ford and Rowse, *supra* note 167 at 148-61.

¹⁷⁹ *Cohen's Handbook*, *supra* note 70, §3.04[1]-[2][a] at 183-85. This was acknowledged in *Johnson v M'Intosh*, *supra* note 170 at 593, where Marshall CJ stated that a “person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws.”

¹⁸⁰ See *Johnson v M'Intosh*, *supra* note 170; *Cohen's Handbook*, *supra* note 70, §15.06 at 1027-39. However, the *General Allotment Act*, 24 US Stat 388, permitted creation of individual landholdings and distribution of “surplus” Indian lands, resulting in loss of about two-thirds of tribal lands while it was in force from 1887 to 1934: see Delos Sacket Otis, *The Dawes Act and the Allotment of Indian Lands*, edited by Francis Paul Prucha (Norman: University of Oklahoma Press, 1973); Francis Paul Prucha, *American Indian Policy in Crisis: Christian Reformers and the Indian, 1865-1900* (Norman: University of Oklahoma Press, 1976), 227-64.

¹⁸¹ *Supra* note 71.

Domingo and San Filipe had joint Aboriginal title to an 8600-acre tract of land in New Mexico when the United States extinguished the one-half interest of the Santo Domingo Pueblo in 1902 by including the tract in a reservation for the exclusive use of the San Filipe Pueblo. The joint title lands were contiguous to lands that had been granted by the Spanish Crown to the two Pueblos in 1770 as pasture and woodlands, on terms that “they shall be common to both of the aforesaid Pueblos, equally and without any preference”.¹⁸² As the Pueblos honestly (though mistakenly) believed the joint title lands had been included in the grant and they had amicably shared use of those lands on the same basis as the granted lands since 1770, the Court of Claims agreed with the ICC’s conclusion that “the Pueblo of Santo Domingo is entitled to recover compensation from the United States in an amount equal to one-half of the fair market value of the 8,600 acres as of June 13, 1902.”¹⁸³ While finding an equal interest in the joint title lands, this decision was obviously based on the unique circumstances that equated that interest with the interest to the contiguous lands granted in 1770, and so it cannot serve as a precedent to determine the interests of other joint titleholders *inter se*.¹⁸⁴ The correct approach therefore must be to determine those interests on the basis of the particular facts and internal legal arrangements of the titleholders themselves, including their laws and any agreements they may have governing their relationship.

To conclude, I think the rights of joint Aboriginal titleholders among themselves will vary, depending on relevant Aboriginal laws, Aboriginal treaties or agreements, and patterns of land use. Apart from the exclusive and undivided right of possession as against the whole world that joint tenants, tenants in common, and joint Aboriginal titleholders all have, I do not think that the rules governing joint tenancies and tenancies

¹⁸² *Ibid* at 1392.

¹⁸³ *Ibid*.

¹⁸⁴ In situations where a single titleholding entity was made up of subgroups, for the purpose of distributing compensation awarded by the ICC it appears that the subgroups could enjoy unequal shares in the title of the larger entity: see *Sioux Tribe*, *supra* note 96 at 478; *Strong*, *supra* note 81 at 572. In *Sioux Tribe*, the Court of Claims indicated that the proper approach would be to distribute the compensation proportionally to the number of individuals from each subgroup that were actually occupying and using the land prior to the taking: *ibid* at 467-68. However, as this case does not appear to involve joint title as such (see note 96 *supra*), one should be cautious about applying it to joint title claims. Also, the matter of dividing up the interest of a larger titleholding entity usually seems to have arisen when the larger entity subsequently split into separate groups: see *Strong* at 572. See also *Turtle Mountain Band*, *supra* note 72 at 954, where Davis J explained that “the ancestral group ‘owns’ the claim, and present-day Indian groups are before the Commission only on behalf of the ancestral entity.”

in common are of much relevance to joint Aboriginal title. Instead, the rules governing joint Aboriginal title will have to be formulated by taking into account the various *sui generis* aspects of Aboriginal title, including inalienability, the inherent limit, and the title's communal nature and governmental dimensions. Any general rules that are developed in the context of those *sui generis* aspects will then have to be adapted to the particular circumstances of the Aboriginal groups who hold joint title.

VI. CONCLUSION

Where Aboriginal title claims overlap, we have identified three possible ways of resolving the matter. First, on the basis of historical patterns of land use, exercise of control, and the Aboriginal laws of the groups claiming title, a court could divide up the land by drawing a boundary. Secondly, where a boundary could not be drawn and the groups were in conflict over the lands historically to the extent that they did not have shared exclusive occupation, a court would probably have to conclude that neither or none of them has Aboriginal title (though they could have Aboriginal rights apart from title in the disputed area¹⁸⁵). Thirdly, if no group was in occupation to the exclusion of the other group or groups, but they shared exclusive occupation and use among themselves, they could have joint Aboriginal title. Proof of joint title would entail the same kind of evidence required to prove unshared Aboriginal title, demonstrating that together the groups exclusively occupied the land by exercising control over it and excluding others. However, they would not have to show that their relationship was such that they formed one group, as that would result in unshared title that would be vested in that group as a single titleholding entity,¹⁸⁶ in which case there would be no overlap and no joint title. Genuine joint title involves different Aboriginal groups with distinct legal personalities that share title to the same land.

Aboriginal title, whether unshared or joint, has external and internal dimensions. The external dimensions determine the relationship of the titleholders with the outside world, whereas the internal dimensions determine the relationship of the titleholders

¹⁸⁵ See note 125 *supra*.

¹⁸⁶ The benefits of that title could, nonetheless, be distributed among subgroups, which is how I understand the *Sioux Tribe* case, *supra* note 96.

among themselves. Looking outward, the relationship of unshared and joint Aboriginal titleholders with the rest of the world should be the same: in each case, they are entitled to occupation, use, benefit, and control of the land vis-à-vis everyone else.¹⁸⁷ Looking inward, the rights of the members of a group that has unshared Aboriginal title are determined by the practices and laws of that group. Similarly, the internal rights of joint titleholders are determined as between the joint titleholding groups by their own patterns of land use, their own laws, and any agreements they may have reached governing their relationship. Within each group, however, the rights of the members of that group *inter se* would be determined by the group's own practices and laws. So in a joint title situation, there are two levels of legal orders governing internal rights to the land: the legal order as between the titleholding groups, and the legal orders of each of those groups that determine the rights and obligations of their members.

The application of Aboriginal laws internally is one feature of Aboriginal title that makes it truly unique and unlike any common law interest in land. Where joint Aboriginal title is concerned, this unique feature necessarily excludes the internal application of common law principles and rules governing co-ownership. Joint tenants and tenants in common do not have their own legal orders governing their relationship,¹⁸⁸ whereas Aboriginal titleholders do. This feature of Aboriginal title also means that the internal aspects of joint title will vary from one instance to another, depending on the laws and agreements of the Aboriginal groups who share the title. So while the external aspects of joint Aboriginal title should not vary, the internal aspects will have to be determined by examination of the titleholders' legal orders, which like all legal orders cannot be static – they must be subject to change by the titleholding groups through the exercise of their governmental authority.¹⁸⁹

¹⁸⁷ As is the case for other landholders, these rights are subject to legislative infringement, but because Aboriginal rights are constitutionally protected by s 35 of the *Constitution Act, 1982*, *supra* note 11, infringements of Aboriginal title have to be justified by a stringent test: see *Delgamuukw*, *supra* note 2 at paras 160-69; *Tsilhqot'in Nation*, *supra* note 1 at paras 77-88.

¹⁸⁸ They might have contractual arrangements with one another, but these arrangements are governed by the common law and any applicable statutes, not by the tenants' own legal orders.

¹⁸⁹ See McNeil, "Judicial Approaches", *supra* note 141; McNeil, "Inseparable Entitlements", *supra* note 167.