Continuity of Aboriginal Rights

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CONTINUITY OF ABORIGINAL RIGHTS

Kent McNeil

Note: Professor McNeil submitted this paper for inclusion in this book well before the Nova Scotia Court of Appeal released its decision in R. v. Marshall, [2004] 2 C.N.L.R. 211. Cromwell J.A.’s decision for the court in that case includes extensive discussion of the continuity issue (at paras. 157–181); his conclusions on some points are substantially the same as those that Professor McNeil had already reached independently. The congruence between the two presentations is, therefore, coincidental. The version of Professor McNeil’s paper published below takes account of, and incorporates reference to, the Marshall decision.

On 29 April 2004, the Supreme Court of Canada granted leave to appeal the Marshall decision. At this writing, the appeal is awaiting oral argument before the Court.—Ed.

In 1982, the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada were recognized and affirmed, without definition, by s. 35(1) of the Constitution Act, 1982. Attempts during four constitutional conferences in the 1980s to define those rights were largely unsuccessful. As a result, the onerous task of definition has been left to the courts. Since 1990, the Supreme Court of Canada has responded to this challenge in a series of decisions that have attempted to give some content to Aboriginal rights. In two decisions in particular, R. v. Van der Peet and Delgamuukw v. British Columbia, the Court provided crucial guidelines for the identification and proof of Aboriginal rights, including Aboriginal title to land.

The Van der Peet and Delgamuukw decisions have already generated extensive discussion and commentary. In this paper, I do not intend to provide any broad analysis of these cases, nor to revisit issues that have already been discussed in detail elsewhere. My goal is much more modest. I will focus on a specific aspect of these decisions that has not, as far as I know, received much attention: their discussion of the continuity of an Aboriginal right from the time it would have been acknowledged by the common law to the time a court is called upon to recognize its current existence as a constitutionally protected right. The fundamental issue to be addressed is this: is proof of continuity a requirement for establishing existing Aboriginal rights in all cases, or is it only required when Aboriginal claimants rely on practices, customs, and traditions subsequent to European contact, or on occupation of land subsequent to European sovereignty, to establish their rights? I will start by examining how this matter was dealt with in Van der Peet.
and subsequent Supreme Court decisions involving Aboriginal rights other than title to land, and then consider the relevance of continuity to proof of Aboriginal title by examining the Delgamuukw decision.

CONTINUITY AND ABORIGINAL RIGHTS

The Van der Peet case involved a charge laid under the federal Fisheries Act against Dorothy Van der Peet, a member of the Sto:lo Nation in British Columbia, for illegal sale of ten salmon. She claimed that she had an Aboriginal right, protected by s. 35(1) of the Constitution Act, 1982, to sell the salmon. Chief Justice Lamer, for a majority of the Supreme Court, held that she had failed to establish an Aboriginal right to exchange fish for money or other goods. In so holding, Lamer C.J. created what is known as the “integral to the distinctive culture” test for Aboriginal rights. According to this test, for an Aboriginal right to be established, it is necessary to prove that it was “an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group” prior to contact with Europeans. Dorothy Van der Peet was convicted because she could not meet this test in respect of the Aboriginal right she had claimed.

Although the “integral to the distinctive culture” test has several elements, my present concern is exclusively with its continuity aspect. Chief Justice Lamer began his discussion of continuity by acknowledging how difficult it might be for Aboriginal peoples to prove what their practices, customs, and traditions had been prior to European contact.

It would be entirely contrary to the spirit and intent of s. 35(1) to define Aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right. The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute Aboriginal rights.

From this passage, Lamer C.J. appears to have regarded continuity as the means for linking post-contact practices, customs, and traditions with pre-contact Aboriginal societies, so that very real difficulties of proof would be lessened. In other words, the requirement of continuity would appear to apply only where post-contact practices, customs, and traditions were relied upon, not where an Aboriginal person was able to provide sufficient independent proof of pre-contact practices, customs, and traditions.

In the next paragraph of his judgment, Lamer C.J. elaborated on the relevance of continuity to proof of Aboriginal title. This key paragraph needs to be quoted in full:

I would note in relation to this point the position adopted by Brennan J. in Mabo, supra, where he holds, at p. 60, that in order for an aboriginal group to succeed in its claim for Aboriginal title it must demonstrate that the connection with the land in its customs and laws has continued to the present day:

... when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.

The relevance of this observation for identifying the rights in s. 35(1) lies not in its assertion of the effect of the disappearance of a practice, custom or tradition on an aboriginal claim (I take no position on that matter), but rather in its suggestion of the importance of considering the continuity in the practices, customs and traditions of Aboriginal communities in assessing claims to Aboriginal rights. It is precisely those present practices, customs and traditions which can be identified as having continuity with the practices, customs and traditions that existed prior to contact that will be the basis for the identification and definition of Aboriginal rights under s. 35(1). Where an Aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an Aboriginal right for the purposes of s. 35(1).11

Although the last two sentences in this passage, if taken out of context, might be regarded as imposing a general requirement of continuity, Lamer C.J.'s comments on continuity as a whole reveal that this cannot have been what he meant.

In the first place, his refusal to take a position on the assertion by Brennan J. (as he then was) in Mabo that Native title can be lost by discontinuance of the traditional connection with the land shows that Lamer C.J. did not intend to make continuity of practices, customs, and traditions from the time of contact with Europeans a requirement for Aboriginal rights to exist today. Moreover, we have seen that Lamer C.J.’s express reason for mentioning continuity in the first place was to avoid imposing impractical burdens of proof on Aboriginal claimants. As his obvious intention was to lessen the burden of proof for Aboriginal peoples, he cannot have meant to increase that burden at the same time by imposing an additional requirement of continuity that would have to be met even if pre-contact practices, customs, and traditions establishing an Aboriginal right could be proven independently. In cases where an Aboriginal right is established by proof of a pre-contact practice, custom, or tradition, it will, of course, still have to be shown that the present-day activity alleged to be an exercise of that right does in fact fall within the right’s scope. In other words, there has to be a sufficient connection between the present-day activity and the right in the sense that the activity is encompassed
by the definition of the right, but there is no need to show continuity between
the two over time from contact to the present. Moreover, failure to demonstrate
that the present-day activity is sufficiently connected with the right would not
invalidate the right itself; it would simply mean that that particular activity does
not qualify as an exercise of the right.

This understanding of continuity is confirmed by the Supreme Court's de­
cision in R. v. Gladstone,20 delivered the same day as Van der Peet. In Gladstone,
the defendants were able to prove that, as members of the Heiltsuk Nation in
British Columbia, they had an Aboriginal right to harvest and sell herring spawn
on kelp in commercial quantities. The evidence that led a majority of the Court
to accept that the Heiltsuk had traded herring spawn on a commercial scale prior
to contact with Europeans consisted of an entry in Alexander Mackenzie's journal
in 1793, an entry by Dr. William Tolmie (a fur trader) in his journal in 1834,
and testimony by Dr. Barbara Lane (an expert witness). In his majority judgment,
Lamer C.J. said that "[t]he evidence presented in this case . . . is precisely the type
of evidence which satisfies this [continuity] requirement," as described in Van der Peet.17 He elaborated as follows:

The evidence of Dr. Lane, and the diary of Dr. Tolmie, point to trade of herring
spawn on kelp in "tons." While this evidence relates to trade post-contact, the diary
of Alexander Mackenzie provides the link with pre-contact times; in essence, the
sum of the evidence supports the claim of the appellants that commercial trade in
herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk
prior to contact.18

Lamer C.J.'s decision in Gladstone therefore affirms that the purpose of the con­
tinuity doctrine in this context is to permit evidence of post-contact practices,
customs, and traditions to be used to prove pre-contact practices, customs, and
traditions.

However, in R. v. Adams,19 Lamer C.J. appears to have placed a different
interpretation on this aspect of his judgments in Van der Peet and Gladstone. After
concluding that the evidence showed that the Mohawks had fished for food in
Lake St. Francis in what is now Quebec at the time of contact with the French
in 1603 and that this was a significant part of their life from that time, he con­
cluded that this was "sufficient to satisfy the Van der Peet test."20 He nonetheless
went on to say this:

As part of the second stage of the Van der Peet analysis, there must be "continuity"
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they are to adopt with regards to the evidence presented to establish the prior-to-
contact practices, customs and traditions of the aboriginal group making claim to an
aboriginal right. 28

Although these remarks were made in the context of proof of continuity where
post-contact practices, customs, and traditions are relied upon, they nonetheless
reveal that suspension of practices, customs, and traditions will not necessarily
cause loss of the Aboriginal rights derived from them. This was confirmed by
McLachlin J. (dissenting on other grounds) in Van der Peet, when she said:

The continuity requirement does not require the aboriginal people to provide a
year-by-year chronicle of how the event has been exercised since time immemorial.
Indeed, it is not unusual for the exercise of a right to lapse for a period of time. Failure
to exercise it does not demonstrate abandonment of the underlying right. 29

But this might still leave open the possibility of an Aboriginal right being lost
if there was an actual disappearance of the practice, custom, or tradition, rather
than just suspension of the exercise of it.

Before discussing further whether the disappearance of practices, customs,
and traditions can cause loss of Aboriginal rights, I should point out two things.
First, I am troubled by the very concept of disappearance in this context. Customs
and traditions seldom disappear; instead, they undergo modification as societies
and cultures change to take account of new circumstances. 30 As for practices, they
may cease, but what is to prevent them from being resumed at some time in the
future? If that happens, it would seem to be more appropriate to regard them as
having been suspended in the interim. So the distinction between disappearance
and suspension may in fact be a false one.

Second, I think it is essential, at the risk of repetition, to clarify the onus of
proof in this context. If Aboriginal people rely on a post-contact practice, custom,
or tradition, it appears from Lamer C.J.'s judgment in Van der Peet that the onus
will be on them to prove continuity to the satisfaction of the court. 31 However, if
they are able to establish the existence of the right by direct proof of a pre-contact
practice, custom, or tradition, then if that right could be lost by the disappearance
of the practice, custom, or tradition (which I doubt, for reasons given below), the
onus should be on the Crown to prove loss of the right in this way. Otherwise,
Aboriginal people would end up having to prove that no loss of the right had
occurred, which would involve proving continuity up to the present in addition
to proving the pre-contact practice, custom, or tradition. As discussed above, this
does not appear to be what Chief Justice Lamer had in mind when he discussed
the matter of continuity. 32

However, I think there are good reasons why Aboriginal rights, once estab-
lished by proof of pre-contact practices, customs, and traditions, should not be
lost, even if the practices, customs, and traditions upon which they were originally
based have not been followed for a long time. First of all, Aboriginal rights that
are based on pre-contact practices, customs, and traditions would have become
enforceable at common law when that law was received into the part of Canada
where the right arose. 33 Lamer C.J. affirmed this in Van der Peet when he said
that s. 35 of the Constitution Act, 1982 conferred constitutional protection on
"aboriginal rights [that] existed and were recognized under the common law." 34
In the case of an Aboriginal practice that was not rooted in Aboriginal law or
custom, 35 this means that juridical force would have been given to the practice by
the common law, so that a legally enforceable right would have been created when
the common law was received. 36 From then on, the practice could be engaged
in as of right. As a general rule, legal rights, whether derived from custom or the
common law, are not lost as a result of non-user. In Re Yateley Common, Foster J.
said in regard to a customary right to a common:

A right of common is a legal right, and it is exceedingly difficult to prove that a
person having such a legal right has abandoned it. Non-user, if the owner of the
right has no reason to exercise it, requires something more than an immense length
of time of non-user. It is essential that it is proved to the court's satisfaction that
the owner of the legal right has abandoned the right—in the sense that he not only
has not used it but intends never to use it again. The onus lies fairly and squarely
on those who assert that the right has been abandoned. 37

So non-user of an Aboriginal right, for no matter how long, should not by itself
cause the right to disappear, any more than non-user causes other legal rights to
disappear. 38

Conferral of common law recognition on Aboriginal rights therefore should
be sufficient to prevent those rights from being lost without some positive act
of extinguishment, even if the practices, customs, and traditions on which those
rights were originally based have not recently been followed or observed. Once
the Van der Peet test has been met by proof that those practices, customs, and
traditions were integral to the Aboriginal people's distinctive culture at the time
of European contact, the resultant rights would be enforceable as common law
rights 39 and so would no longer need to be supported by continuance of those
practices, customs, and traditions. 40 However, even if Aboriginal rights were based
solely on Aboriginal custom or law (rather than on common law recognition of
Aboriginal practices, customs, and traditions), those rights should not be lost as
a result of not being exercised, even for long periods of time. In this respect, they
deserve to be treated in the same way as customary rights in England, 41 which, as
we have seen, are not lost by non-user, even if not exercised for long periods of
time. 42 This is further illustrated by Lord Denman C.J.'s observation in Scales v.
Key in 1840 that the jury's finding in that case "that the custom had existed till
1689, was the same in effect as if they had found that it had existed till last week,
unless something appeared to shew that it had been legally abolished." In the more recent case of Wyld v. Silver, Lord Denning M.R. affirmed this approach by rejecting the notion that a right to hold a fair could be lost by non-user:

I know of no way in which the inhabitants of a parish can lose a right of this kind once they have acquired it except by Act of Parliament. Mere disuse will not do. And I do not see how they can waive it or abandon it. No one or more of the inhabitants can waive or abandon it on behalf of the others. Nor can all the present inhabitants waive or abandon it on behalf of future generations.

So extinguishment of a customary right in England will occur only if the custom is expressly abolished by or is clearly inconsistent with a statute, in much the same way as Aboriginal rights could only be legislatively extinguished in Canada (prior to receiving constitutional protection in 1982) by or pursuant to a clear and plain enactment.

The proposition that Aboriginal rights recognized by the common law cannot be lost by non-user is supported by Supreme Court jurisprudence. In Sion, the Court considered whether rights that had been affirmed by a treaty between the Hurons of Lorette and the British Crown in 1760 were protected in 1982 against provincial legislation by s. 88 of the Indian Act. Among other things, the Crown contended that “non-user of the treaty over a long period of time may extinguish its effect.” Delivering the unanimous judgment of the Court, Lamer J. pointed out that the Crown had cited no authority for this contention. He then said that he did “not think that this argument carries much weight: a solemn agreement cannot lose its validity merely because it has not been invoked.” Although this rejection of extinguishment by non-user relates only to treaty rights, there seems to be no reason in principle why Aboriginal rights should be treated differently, especially given that treaties often affirmed pre-existing Aboriginal rights.

In summary, the concept of continuity, as formulated by Chief Justice Lamer in Van der Peet and applied by him in Gladstone, serves the purpose of lessening the burden of proof of Aboriginal rights by allowing Aboriginal claimants to use post-contact practices, customs, and traditions to prove the pre-contact practices, customs, and traditions necessary to establish Aboriginal rights. Proof of this kind of continuity back in time is therefore required only when post-contact practices, customs, and traditions are relied upon. When, on the other hand, the Van der Peet “integral to the distinctive culture” test can be met by direct proof of pre-contact practices, customs, and traditions, the Aboriginal right will be established without any need to show continuity in the sense Lamer C.J. envisaged. In the latter situation, however, it will still be necessary to determine whether the present-day activity that is alleged to be an exercise of that right actually occurs within its scope. If it does, the next issue is whether the right had been extinguished at any time prior to receiving constitutional recognition in 1982. Voluntary surrender of the right by treaty aside, it seems that the only way extinguishment could have occurred would have been by or pursuant to clear and plain legislation, enacted by a constitutionally competent legislative body.

As we have seen, these principles are supported both by the Sion decision in relation to treaty rights, and by common law doctrine in relation to the continuation of legal rights generally, including legal rights arising in England from custom. Once proven, customary rights continue, even if not exercised for long periods of time, in the absence of unambiguous legislative extinguishment. As with Aboriginal rights in Canada, the concept of continuity is used to facilitate proof of a custom back to the time when it must have been in existence to qualify for legal recognition; it is not necessary to prove that the exercise of a custom, once shown to have existed at that time, has continued. Moreover, the onus of proving that a custom or an Aboriginal right has been extinguished is on the party so alleging, and is not easily met.

CONTINUITY AND ABORIGINAL TITLE TO LAND

The Delgamuukw case arose from claims by the Wet'suwet'en and Gitxsan (spelled “Gitksan” in the judgments) nations to Aboriginal title and self-government over their traditional territories in British Columbia. The Supreme Court did not decide the merits of the claims, in part because the trial judge had not accorded adequate respect and weight to the Wet'suwet'en and Gitxsan oral histories. However, in the principal judgment in the case, Chief Justice Lamer did define Aboriginal title in reasonably clear terms and provide significant direction on how it can be proven.

In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

The second requirement, relating directly to the matter of continuity, need be met only “if present occupation is relied on.” In other words, in situations where Aboriginal claimants are able to meet the other two requirements by direct proof of exclusive occupation at the time the Crown asserted sovereignty, there should be no need to prove continuity.

This interpretation is confirmed by Lamer C.J.’s elaboration on the second requirement. Referring to his judgment in Van der Peet, he said that he had acknowledged in that case that...

...it would be “next to impossible” (at para. 62) for an aboriginal group to pro-
vide conclusive evidence of its pre-contact practices, customs and traditions. What would suffice instead was evidence of post-contact practices, which was "directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact" (at para. 62). The same concern, and the same solution, arises with respect to the proof of occupation in claims for aboriginal title, although there is a difference in the time for determination of title. Conclusive evidence of pre-sovereignty occupation may be difficult to come by. Instead, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title. What is required, in addition, is a continuity between present and pre-sovereignty occupation, because the relevant time for the determination of aboriginal title is at the time before sovereignty.61

This passage is entirely consistent with our earlier analysis of the Van der Peet decision and with the reason why Lamer C.J. introduced the concept of continuity in Aboriginal rights cases.62 His evident intention was to make proof of Aboriginal rights, including title, easier by permitting evidence of post-contact practices, customs, and traditions or post-sovereignty occupation to be introduced and relied upon. He did not intend to make proof of Aboriginal rights and title more difficult by imposing a requirement of continuity in all cases, even when sufficient direct evidence of the pre-contact practices, customs, and traditions or pre-sovereignty occupation is available.

Lamer C.J. went on to say that "there is no need to establish 'an unbroken chain of continuity' (Van der Peet, at para. 65) between present and prior occupation," especially because

[i]o impose the requirement of continuity too strictly would risk "undermining the very purpose of s. 35(1) [of the Constitution Act, 1982] by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect" aboriginal rights to land (Côté, supra, at para. 53). 63

He also made it clear that "the fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained."64 Taken out of context, statements such as these might be interpreted to mean that there is a general requirement of continuity for proof of Aboriginal rights and title. However, given that these passages all appear in his judgment under the heading "[i]f present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation,"65 it is apparent that he was limiting the application of the concept of continuity to that situation.

If Aboriginal title is proven by sufficient evidence of exclusive occupation of the claimed lands at the time of Crown assertion of sovereignty,66 Aboriginal title will have vested at common law in the Aboriginal occupants as a community at that historical moment.67 Once vested, Aboriginal title continues until surrendered to the Crown or extinguished by clear and plain legislative enactment.68 Moreover, the burden of proving extinguishment of Aboriginal rights, including title, is on the Crown or other party so alleging.69 Given these well-established principles, it is understandable that Lamer C.J. limited the requirement of proving continuity to situations where present (or at least post-sovereignty) occupation is relied upon to prove occupation at the time of Crown assertion of sovereignty.70 If Aboriginal people had to prove post-sovereignty continuity even in cases where occupation at the time of sovereignty had been established, they would be required in effect to prove that their title had not been extinguished or otherwise lost. In addition to conflicting with Supreme Court decisions involving Aboriginal rights, such a requirement would be inconsistent with common law principles regarding property rights.

Once property and other legal rights, including rights arising from custom, are vested, they are presumed by the common law to continue until proven to have been extinguished, transferred, or otherwise relinquished.71 The application of this fundamental principle to personal property is revealed by the rule that a chattel, even if lost, is presumed not to have been abandoned in the absence of evidence that the owner intended to give up his or her rights to it.72 Regarding land, although title can be statutorily extinguished by adverse possession for the limitation period in some jurisdictions, the onus of proving adverse possession for the requisite time is clearly on the person attempting to establish title in this way.73 Discontinuance of possession by the paper-titleholder, for no matter how long, will not start the time period running unless someone else has actually acquired adverse possession of the land.74

So even if Aboriginal title could be lost by failure to maintain a substantial connection with the land, common law principles would require that the Crown bear the onus of proving that that had happened. But is it even possible for Aboriginal title to be lost in this way? In Delgamuukw, Chief Justice Lamer said that Aboriginal title "is a right to the land itself."75 Relying on Canadian Pacific Ltd. v. Paul,76 he rejected the notion that "aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests."77 Clearly, Aboriginal title is a real property interest, though it is unlike any other interest known to the common law because it is sui generis in several respects.78 Statutory limitation periods aside, since at least Magna Carta of 1215 the common law has not permitted interests in land to be lost by the wrongful taking of land, whether by private individuals or by the Crown.79 This common law protection for property rights is so fundamental that it must extend to Aboriginal title.80 Dispossession of Aboriginal peoples should not, therefore, amount to the kind of discontinuance of connection with the land that might result in loss of title.81 But could Aboriginal title be lost by discontinuance of the connection with
Aboriginal title is contact, for if that could be shown then the occupation requisite for title at the authorized surrender of Aboriginal title to the Crown, this had to be done at a time of sovereignty, or the practices, customs, and traditions were involved. No informal surrender of Aboriginal title by abandonment was necessary to show continuity all the way back to the time of sovereignty or contact, not forward to post-sovereignty occupation or post-contact practices, customs, and traditions. As Bramwell L.J. said in *Mayor of Penryn v. Best*, “every supposition, not wholly irrational, should be made in favour of long-continued enjoyment.”

**CONCLUSIONS**

Our examination of Chief Justice Lamer’s decisions in *Van der Peet, Gladstone,* and *Delgamuukw* has revealed a consistent approach to the matter of continuity in regard to both Aboriginal title to land and other Aboriginal rights. In these contexts, continuity involves a substantial maintenance of an Aboriginal people’s pre-Crown sovereignty occupation of the land in the case of title, or of their pre-European contact practices, customs, and traditions in the case of other Aboriginal rights. However, continuity of this sort has to be shown only when Aboriginal peoples rely on post-sovereignty occupation or post-contact practices, customs, and traditions as evidence of their pre-sovereignty occupation or pre-contact practices, customs, and traditions. If they are able to produce adequate direct evidence of their pre-sovereignty occupation or pre-contact practices, customs, and traditions, then proof of continuity from that time is unnecessary. In other words, continuity applies backward in time to sovereignty or contact, not forward in time from those moments in history.

Aboriginal rights at the time of contact, could be proven directly in most cases without any need to rely on post-sovereignty occupation or post-contact practices, customs, and traditions. As Lamer C.J.’s express intention in allowing post-sovereignty occupation and post-contact practices, customs, and traditions to be relied upon was to make proof of Aboriginal title and other Aboriginal rights easier, proof as far back as sovereignty or contact should not be necessary. All that should be required is sufficient evidence of post-sovereignty occupation or post-contact practices, customs, and traditions to raise a presumption that the land was occupied at the time of Crown assertion of sovereignty, or that the practices, customs, and traditions were in existence at the time of European contact.

So if proof of continuity back to Crown sovereignty or European contact is unnecessary, how far back does the evidence have to reach? The case law on Aboriginal rights and title so far has not answered this question. There are, however, well-established rules regarding proof of custom in England, and in this respect English custom is closely analogous to the practices, customs, and traditions necessary to establish Aboriginal title. Like Aboriginal practices, customs, and traditions, English custom must be proven from a particular historical moment: namely, 1189, when Richard I became king. As that is almost always impossible, judges have sensibly decided that evidence that the custom was in existence as far back as living witnesses can remember will raise a presumption that the custom existed in 1189. The burden of rebutting the presumption then shifts to the party opposing the custom; it can be met by showing, for example, that the custom did not exist or could not have existed in 1189. This practical approach to proof of custom is supported by a legal maxim, by which courts are expected “to give effect to everything which appears to have been established for a considerable course of time, and to presume that what has been done was done of right, and not in wrong.” As Bramwell L.J. said in *Mayor of Penryn v. Best*, “every supposition, not wholly irrational, should be made in favour of long-continued enjoyment.”

The main rationale for holding that proof of a custom as far back as the memory of living witnesses goes is prima facie sufficient to avoid placing an impossible burden of proof on those who seek to establish customs. As we have seen, Lamer C.J. used the same rationale in *Van der Peet* when he said that Aboriginal peoples can rely on post-European contact practices, customs, and traditions to establish their Aboriginal rights. There is thus good reason to apply the same standard of proof in both these situations, so that proof that the relevant practice, custom, or tradition has been in place for as long as any witnesses can remember will raise a presumption that it was in existence at the time of contact. As with custom in England, it would then be open to the Crown or other party contesting the Aboriginal right to prove that the practice, custom, or tradition has a more recent origin.
The presumption utilized by the courts in relation to proof of custom does not apply to proof of title to land. Real property interests have always been of such vital importance in the common law that the courts have developed a different set of rules where title to land is concerned. As I have already discussed the application of these rules to Aboriginal title in detail elsewhere, I will provide only a brief summary here. First of all, anyone who is in occupation of land is presumed to have a valid title. If occupation can be proven, there is no need to show that it has been continuous for as long as living witnesses can remember, or indeed for any period of time at all. The burden of rebutting the presumption of title arising from occupation is therefore on anyone who challenges the validity of the occupier’s title. But the law goes even further in protecting the occupier, for those challenging the occupier’s right to the land will succeed only if they can show that they either have a better title than the occupier or are claiming the land on behalf of someone who has a better title. It is not sufficient for challengers to prove that a third party has a better title, as that will not give them any right to acquire the lands themselves. These rules have been affirmed and applied in so many cases that their validity is beyond dispute. There is no doubt that they are fundamental to the common law of real property.

As discussed elsewhere, there is no reason in principle why these rules in relation to proof of title to land generally should not apply to Aboriginal title. Proof that an Aboriginal community has exclusive occupation of land at any time after Crown assertion of sovereignty should give rise to a presumption of Aboriginal title. In other words, despite what Lamer C.J. said in *Delgamuukw* about proof of continuity being required if present occupation is relied upon, there should be no need to show continuity of occupation for a presumption of Aboriginal title to arise, any more than there is a need to show continuity of occupation for any other occupier to have a presumptive title. If the Aboriginal community proves the requisite occupation, the burden should then be on the Crown, if it disputes their title, to rebut the presumption of title by showing either that the land was unoccupied and therefore became Crown land unburdened by Aboriginal title at the time of assertion of sovereignty, or that the Aboriginal title was validly surrendered to the Crown or extinguished by legislation at some time after sovereignty had been asserted. Failing that, the presumptive Aboriginal title should prevail.

Canadian courts often treat Aboriginal claims as if the issues raised are ones of first impression. In one sense, this is appropriate, because these claims are unique to the circumstances of the Aboriginal peoples and their historical relationships with the Crown, and do involve complex cross-cultural issues, including the interplay of various different legal systems. However, in contexts where there are relevant principles and rules in the common law that could be adapted and applied to Aboriginal claims without discounting Aboriginal difference and distorting their rights, judges should at least take those principles and rules into consideration. In particular, if the common law would provide advantages to Aboriginal peoples in proving or defending their rights, judges should have very good reasons for not extending the benefit of the common law to them. Regarding proof of Aboriginal rights, including Aboriginal title to land, the common law does contain principles and rules that would help alleviate the heavy burden that Aboriginal peoples face in establishing their rights. As judges develop the concept of continuity that the Supreme Court has sketched out in this context, they should be informed by these principles and rules and apply them in ways that do not cause Aboriginal peoples to be disadvantaged.

**NOTES**

1 I owe a debt of gratitude to Lisa Bowman for her excellent research assistance for this paper, and to Brent Abraham for his help and suggestions. James Gault, Douglas Harris, Brian Slattery, and Kerry Wilkins also provided very helpful comments, for which I am most grateful. The financial support of the Social Sciences and Humanities Research Council of Canada is also gratefully acknowledged.


5 [1997] 3 S.C.R. 1010 [*Delgamuukw*].

The concept of continuity is also used to determine whether the present Aboriginal claimants are sufficiently connected with the Aboriginal people who had the right at the time it was recognized by the common law; see e.g. R. v. Powley, [2003] 2 S.C.R. 207. 2003 SCC 43 at paras. 12, 23, and 27 [Powley] (invoking Métis hunting rights). I am grateful to Kerry Wilkins for reminding me of this. While obviously an important issue, it will not be addressed in this paper.


Van der Peet, supra note 4 at paras. 46, 60.

Ibid. at para. 62.


See text accompanying note 10, supra, and Marshall, ibid. at paras. 160, 170, 173, 177. It is also consistent with the way Lamer C.J. actually applied the continuity concept in Van der Peet, supra note 4 at para. 89, where he held that the evidence of trade of salmon with the Hudson's Bay Company did not prove the existence of a pre-contact practice, custom, or tradition of trading salmon because "[t]he trade of salmon between the Sto:lo and the Hudson's Bay Company does not have the necessary continuity with Sto:lo culture pre-contact to support a claim to an Aboriginal right to trade salmon."

However, as Kerry Wilkins has pointed out to me, it needs to be acknowledged that, in many cases, direct evidence of pre-contact practices, customs, and traditions will be inadequate. So, as a practical matter, Aboriginal claimants will often have to rely on post-contact evidence.

See Powley, supra note 7 at para. 45, where the Supreme Court found that the requisite continuity existed because the hunting right claimed by Steve Powley and Roddy Powley fell "squarely within the bounds of the historical practice governing the right." See also Marshall, supra note 12 at paras. 176–77.


Gladstone, ibid. at para. 28.

Ibid.


Ibid. at paras. 45–46.

Ibid. at paras. 47. See also R. v. Côté, [1996] 3 S.C.R. 139 [Côté], handed down the same day as Adams, ibid., where Lamer C.J. relied (at para. 69) on the same paragraphs from the Van der Peet, supra note 4, and Gladstone, supra note 16, decisions to conclude that, once it has been shown that the Aboriginal right in question is supported by practices, customs, or traditions that existed prior to contact, "there must also be 'continuity' between those practices, customs and traditions and a particular practice, custom or tradition that is integral to Aboriginal communities today." As in Adams, the defendants in Côté were able to show this kind of continuity.

See paras. 62 and 63 of his judgment in Van der Peet, ibid., quoted in text accompanying notes 10 and 11. In para. 28 of Gladstone, ibid., he simply explained how the continuity doctrine, as described in Van der Peet, applied to the facts in Gladstone: see text accompanying notes 16–18. Although Lamer C.J. relied on para. 63 from Van der Peet and para. 28 from Gladstone as authority for his statement in Adams that there must be continuity between pre-contact and present-day practices, customs, and traditions, I do not think those paragraphs support his making continuity a general requirement. On the contrary, we have seen that he used the concept of continuity in those earlier cases to make proof of Aboriginal rights easier, not harder. Moreover, in his post-Adams judgment in Delgamuukw, supra note 5 at para. 83, Lamer C.J. referred to his discussion of continuity in Van der Peet and repeated the reason why Aboriginal peoples can rely on post-contact practices, customs, and traditions is that, "given that many aboriginal societies did not keep written records at the time of contact or sovereignty, it would be exceedingly difficult for them to produce (Van der Peet at para. 62) "conclusive evidence from pre-contact times about the practices, customs and traditions of their community." See also Marshall, supra note 12 at paras. 174–77.

See also the dissenting judgment of McLachlin J. (as she then was) in Van der Peet, ibid. at para. 249, where she said in reference to the "continuity requirement" that "[a]ll that is required is that the people establish a link between the modern practice and the historic aboriginal right." This must be what she had in mind, as well, in her recent judgment in Mitchell v. M.N.R., [2001] S.C.R. 911 at para. 12 [Mitchell], when she said that "an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact" (see also para. 26). In Mitchell, she also affirmed that the "flexible application of the rules of evidence (mandated by the Van der Peet decision) permits, for example, the admissibility of evidence of post-contact activities to prove continuity with pre-contact practices, customs and traditions" (para. 29). As it would make no sense to say that the common law "permits" the admissibility of evidence of post-contact activities to prove continuity, or to describe that as a "flexible application of the rules of evidence" if proof of such continuity were required, McLachlin C.J. must have used the term "continuity" in two senses: first, to mean that when a post-contact practice, custom, or tradition is relied upon, it must be traced to a pre-contact practice, custom or tradition; and second, to mean that there has to be a link between a current activity and an Aboriginal right established by proof of a pre-contact practice, custom, or tradition, in the sense that the activity comes within the scope of the right. McLachlin C.J. was nonetheless able to avoid actually applying these concepts in Mitchell because she found (at para. 51) that the respondent had failed to prove that the Mohawks of Akwesasne had "an ancient practice of transporting goods across the St. Lawrence River for the purposes of trade" (the basis for the claimed Aboriginal right, as she characterized it) at the time of contact with Europeans. She had already determined at para. 41 that "[o]nly if this ancestral practice is established does it become necessary to determine whether it is an integral feature of Mohawk culture with continuity [in the second sense described above, I think] to the present day."


See Yorta Yorta, supra note 12. See also Marshall, supra note 12 at paras. 157–81.

In Gladstone, supra note 16, all the evidence of pre-contact trade in herring spawn relied upon by the Court related to Heiltsuk lands or customs. However, this is not to suggest that the Heiltsuk lacked laws or customs in this regard; it just means that proof of their existence is not a requirement for Aboriginal rights in Canada. For an illuminating discussion of the Heiltsuk herring spawn fishery and the Gladstone decision, see Douglas C. Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-Kelp Fishery" (2000) 34 U.B.C. L. Rev. 195.

See also Adams, supra note 19; Côté, supra note 21; Delgamuukw, supra note 5; Mitchell, supra note 23.

Van der Peet, supra note 4 at para. 65.

Ibid. at para. 249.


See the last sentence in his passage from his judgment accompanying note 11, supra.

See text accompanying notes 18–19. See also Marshall, supra note 12 at paras. 157–81. Moreover, the Supreme Court has affirmed on several occasions that the burden of proving extinguishment of an Aboriginal right is on the Crown or other party so alleging; see e.g. R. v. Sparrow, [1990] 1 S.C.R. 1079 at 1099 [Sparrow]; Badger, supra note 3 at para. 41, Cory J.; Gladstone, supra note 16 at paras. 31–38, Lamer C.J., para. 106, La Forest J., dissenting on other grounds; Côté, supra note 21 at para. 72. Lamer C.J., para. 97, La Forest J.

This date will vary, depending in part on whether the area in question was previously part of French
Canada or was acquired directly by the British Crown.  

Aboriginal rights rooted in Aboriginal law or custom would have existed as rights in Aboriginal legal systems before the common law was received.  

This conclusion is based on a positivist view of law. I acknowledge the possibility that there could also be a natural right to engage in the practice, especially if the livelihood of the Aboriginal people in question depended on it. For an argument in favour of Aboriginal rights that relies on the right of a people to the necessities of life, see Brian Slattery, “Aboriginal Sovereignty and Imperial Claims” (1991) 29 Osgoode Hall L.J. 681.  

47 (1977) 1 All E.R. 505 (Ch.) at 510.  

See the quotation from McLachlin J’s judgment in Van der Peet accompanying note 29. See also Lord v. Wund (1852), 7 Ex. 838, at 839; Guest v. Pridmore (1970), 115 Sol. Jo. 78 (C.A.) [Guest v. Pridmore], in Tezih Industry Mines Ltd. v. Norman, [1971] 2 Q.B. 528 (C.A.) at 553 [Tezih]. Buckley L.J. said: “Abandonment of an easement or of a profit a prendre can only, we think, be treated as having taken place where the person entitled to it has demonstrated a fixed intention never at any time thereafter to assert the right himself or to attempt to transmit it to anyone else.” Nor can rights in relation to natural resources be lost by non-user. For example, mere failure to exercise a riparian right to use water, for however long, does not result in loss of the right at common law: see Sangonoo v. Hoddinott (1857), 1 C.B. (N.S.) 590 (C.P.) at 611, aff’d 3 C.B. (N.S.) 596 (Ex. Ch.).  

48 See Robert v. Canada, (1989) 1 S.C.R. 322 at 340, where Wilson J., in a unanimous judgment, decided that the law of Aboriginal title is “federal common law,” this characterization was applied by the Lamer C.J., in Citéx, supra note 21 at para. 49, to an Aboriginal right to fish.  

It is arguable that if the practices, customs, and traditions ceased between the time of contact with Europeans (the relevant time for them to be integral to the distinctive culture of the Aboriginal people in question, according to the Van der Peet test), and the reception of the common law (the time when the practices, customs, and traditions would be recognized by the common law as giving rise to Aboriginal rights), there would be nothing for the common law to recognize. However, this may also be indicative of the problematic nature of the time frame utilized in Van der Peet: see Borrow, “Frozen Rights,” supra note 6; Barsh & Henderson, supra note 6.  

Custom is defined in Sir Alexander Turner Kingcome & D.R. Christie, eds., Haliburton’s Laws of England, 4th ed., vol. 12(1) (London: Butterworths, 1998) at para. 601, as “a particular rule which has obtained either actually or presumptively from time immemorial in a particular locality and obtained the force of law in that locality, although contrary to, or not consistent with, the general common law of the realm.”  

Ibid. at para. 624.  


(1963) 1 Ch. 243 (C.A.) at 255–56 [Wyd.]  

Haliburton’s Law of England, supra note 41, vol. 12(1) at para. 646. In Re Teckno and Kichakwak (1972), 27 D.L.R. (3d) 225 (N.W.T.T.C.), aff’d Re Kichakwak and Teckno (1972), 28 D.L.R. (3d) 483 (N.W.T.C.A.) [Kichakwak and Teckno]. Morrow J. held that the rule that customs can be abolished only by statute applies to Inuit customs relating to adoption, and that the legislation that would have to be repugnant to those customs, directly or by implication intended to abolish them.  

In Van der Peet, supra note 4 at para. 28, Lamer C.J. said that “[s]ubsequent to s. 35(1) of the Constitution Act, 1982) aboriginal rights cannot be extinguished and can only be regulated or impaired in such a way as to be consistent with the justiciable test laid out by this Court in Spence.” This was affirmed by McLachlin C.J. in Mitchell, supra note 23 at para. 11.  

47 See Spence, supra note 32 at 1099; Gladstone, supra note 16 at paras. 31–38; Delgamuukw, supra note 5 at para. 180. Note, however, that voluntary surrender of Aboriginal rights by treaty is possible in Canada. For detailed discussion, see Kent McNeil, “Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion” (2001–2002) 33 Ottawa L. Rev. 301.
Aboriginal title in Canada is an interest in land that is proprietary (see Kent McNeil, *Emerging Justice*, supra note 1). See also McNeil, *Emerging Justice*, supra note 1. 67 In Delgamuukw, supra note 5 at para. 145, Lamont J. said that "aboriginal title crystallized at the time sovereignty was asserted." 68 In Delgamuukw, Lamont J. affirmed that Aboriginal title, like other Aboriginal rights, could be extinguished prior to the enactment of the *Constitution Act, 1982*, only by clear and plain legislation enacted by a constitutionally competent legislative body, ibid. at para. 180. Regarding surrender of Aboriginal title, see supra note 55, and infra notes 86-87 and accompanying text.

38 See supra note 32.

However, an argument will be made in the Conclusions to this paper that the requirement that Aboriginal peoples actually prove continuity of their occupation even in this context offends common law principles in relation to title to land. See authorities cited supra in notes 37-38, 42-45. See also Mofitt v. Katana, [1969] 2 Q.B. 152 at 156, where Wigram J. said that the owners of the money in question in the case "remain the true owners of the money unless they . . . had diverted . . . themselves of the ownership by one of the recognised methods, abandoning, gift or sale."


72 Delgamuukw, supra note 5 at para. 140 [emphasis in original].


74 Delgamuukw, supra note 5 at para. 113.

75 ibid. at paras. 112-15. For discussion, see McNeil, "Post-Delgamuukw," supra note 55.


77 See Kent McNeil, "Aboriginal Title as a Constitutionally Protected Property Right" and "Racial Discrimination and Unilateral Extinguishment of Native Title" in McNeil, *Emerging Justice*, supra note 2, 292 and 357, respectively.

Lamont C.J. suggested this himself in Delgamuukw, supra note 5 at para. 153, where he gave the following reason why "an unbroken chain of continuity" need not be established: "The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize Aboriginal title." See also the quotation accompanying note 63, supra.


79 The common law abhorred an abeion of seisin, in part because that would mean no one was responsible for the feudal services and incidents of tenure. This is probably what led Mainland to remark that "[i]t seems very doubtful whether a man could (or can) get rid of a seisin once acquired, except by delivering seisin to some one else": Frederick Pollock & Frederic William Mainland, *The History of English Law Before the Time of Edward I*, 2nd ed. (Cambridge: Cambridge University Press, 1898, reissued 1968), vol. 2 at 55 n. 2.

80 It should be noted that American law apparently does allow Indian title to be lost by abandonment: see e.g. *United States v. Arrelando*, 6 Pet. 691 (1832) at 747-48; *Williams v. Chicago*, 242 U.S. 434 (1917); *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941) at 354-58; *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935 (1974) at 947-48. However, Indian title in the United States is a non-proprietor right of occupancy: *See-Hi-Ton Indians v. United States*, 348 U.S. 272 (1955). As Aboriginal title in Canada is an interest in land that is proprietary (see text accompanying notes 76-79), this aspect of American law is inapplicable here. See discussion in McNeil, *Common Law Aboriginal Title*, supra note 80 at 58-67. Compare Ontario (A.G.) v. *Bear Island Foundation*, [1985] 1 C.N.L.R. 1 (Ont. S.C.) at 77, where Steele J. found, inter alia, that the Aboriginal title of the Temagami Indians had been extinguished because they had abandoned their traditional use and occupation" of their lands. Although his decision was affirmed on appeal, [1989] 2 C.N.L.R. 73 (Ont. C.A.), [1991] 2 S.C.R. 570, the Supreme Court did not mention abandonment, holding only that the Temagami Indians' land rights had been validly surrendered by adhesion to a treaty. Moreover, at 575, the Supreme Court said it did "not necessarily follow" from their acceptance of Steele J.'s factual findings that they agreed "with all the legal findings based on those facts. In particular, we find that on the facts found by the trial judge the Indians exercised sufficient occupation of the lands in question throughout to establish an Aboriginal right." The Court said that Steele J. had been misled in this regard by certain considerations, including his finding that the Temagami Indians had failed to prove "that, as an organized society, they continued to exclusively occupy and make Aboriginal use of the Land Claim Area from 1763 or the time of coming of settlement to the date the action was commenced": ibid. at 574-75, quoting [1985] 1 C.N.L.R. 1 at 21. For further discussion, see Kent McNeil, *The High Cost of Accepting Benefits from the Crown: A Comment on the Temagami Indian Land Case* in McNeil, *Emerging Justice*, at 147.
C.J.’s pre-contact time frame for proof of Aboriginal rights, advocating instead an approach that would recognize rights based on practices, customs, and traditions that have been integral to distinctive Aboriginal cultures “for a substantial continuous period of time”: Van der Peet at para. 175 (emphasis in original). She said that the actual length of this period “will depend on the circumstances and on the nature of the Aboriginal right claimed,” but suggested that it should be in the range of twenty to fifty years: ibid. at para. 177, relying on Brian Slattery. “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727 at 758. See also her concurring judgments in Gladstone, supra note 16 at paras. 203–35, 143–45, and Adams, supra note 19 at para. 66. Her twenty- to fifty-year period is similar to the period that will usually suffice to raise a presumption of a valid custom at common law; see Haliburton’s Laws of England, supra note 41, vol. 12(1) at para. 622. However, unlike in the case of English custom, L’Heureux-Dubé J. does not appear to have envisaged that proof of an Aboriginal right could be rebutted by evidence of non-existence of the practice, custom, or tradition before the twenty- to fifty-year period.


141 See Whale v. Hitchcock (1876), 34 L.T. 136 (Div. C.A.); Emmerson v. Madderick (1906) A.C. 569 (P.C.) at 575; Wheeler v. Baldwin (1934), 52 C.L.R. 609 (H.C.A.), esp. at 621–22; Allen v. Boulegh (1955), 94 C.L.R. 98 (H.C.A.) at 136–41. This presumption is usually expressed as a presumption of title from possession, but since possession (a matter of law) is presumed from occupation (a matter of fact), it is not necessary in this context to distinguish between them. On the difference between occupation and possession, see McNeil, Common Law Aboriginal Title, supra note 80 at 6–8.

142 On proof of occupation, see McNeil, ibid. at 197–204.


146 If exclusive occupation at the time of Crown assertion of sovereignty is proven, then of course an actual Aboriginal title will have been established, not just a presumptive title.

147 See text accompanying note 60.

148 Kent McNeil, supra note 103 as well as present occupation should give rise to this presumption of Aboriginal title; see McNeil, “Onus of Proof,” supra note 103 at 794–96 (Emerging Justice) at 152–54.

149 See generally John Borrows, Recovering Canada: The Resurgence of Indigenous Law (Toronto: University of Toronto Press, 2002).

150 For an insightful discussion of ways in which courts have used Aboriginal difference (and sameness) to the disadvantage of Aboriginal peoples, see Patrick Macklem, “First Nations Self-Government and the Borders of the Canadian Legal Imagination” (1991) 36 McGill L.J. 382.

151 See articles cited in note 81, supra. Admittedly, the Supreme Court has said on occasion that common
law property principles do not necessarily apply to Aboriginal rights and title, given the latter's *sui generis* nature: see e.g. Guerin *v. The Queen*, [1984] 2 S.C.R. 335 at 381-82, Dickson J.; *Sparrow*, supra note 32 at 1112; *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657 at paras. 14-16. However, the reasons the Court has generally given for this are to avoid distortion of Aboriginal rights and title by inappropriately trying to fit them into common law categories, to respect the intentions of Aboriginal peoples and the Crown when they negotiate agreements, and to prevent injustice. These goals are not inconsistent with applying common law principles that would assist Aboriginal peoples in the often difficult task of proving or defending their rights.