forum non conveniens may foreshadow the increasing globalisation of the judicial function.[39]

D. Conclusion

Raeburn cannot be faulted for its fidelity to orthodox jurisprudence. The Caribbean now has its own version of *Duke* v. *Andler*: foreign orders affecting local land will be refused recognition, whether the foreign judgment affects the title directly or indirectly, by operation *in rem* or *in personam*. It may be regretted, however, that the chance presented by this litigation was not seized to create a departure from a rule that seems increasingly anachronistic. In this light *Raeburn* could be regarded as a lost opportunity to fashion a Caribbean contribution to private international law jurisprudence.

WINSTON ANDERSON*

ABORIGINAL RIGHTS AND SUSTAINABLE DEVELOPMENT IN CANADA

A. Introduction

This article explores briefly the relation between aboriginal rights and sustainable development in Canada, using as a vehicle for discussion the decision of the Supreme Court of Canada in *Delgamuukw* v. *British Columbia*.[1] This case involved claims by the Houses of Gitksan and Wet'suwet'en, comprising some 6,000 to 7,000 persons, to aboriginal title over separate portions of approximately 58,000 square kilometres of land in the interior of British Columbia. The territory is a rich agricultural area with vast forests and abundant wildlife.

Delgamuukw is the most recent of what can only be described as an explosion of Supreme Court of Canada decisions relating to aboriginal rights over the last 25 years, but particularly since 1982 when Canada amended its constitution to provide (*inter alia*) a measure of protection to aboriginal rights.[2] This protection is

39. Although, in relation to *forum non conveniens*, there may be constitutional constraints: see Winston Anderson, "Forum Non Conveniens and the Constitutional Right of Access: A Commonwealth Caribbean Perspective" (1993) 2 J. Transnational Law and Policy 51.

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1. (1997) 153 D.L.R. (4th) 193 (S.C.C.), rev'g in part (1993) 104 D.L.R. (4th) 470 (B.C.C.A.), which aff'd (1991) 79 D.L.R. (4th) 185 (B.C.S.C., McEachern CJSC) (hereafter "Trial"). For related rulings concerning admissibility of evidence see *Delgamuukw* v. *The Queen in right of B.C.* (1987) 40 D.L.R. (4th) 685 (B.C.S.C.); *Delgamuukw* v. *B.C.* [1989] 6 W.W.R. 308 (B.C.S.C.); and *Delgamuukw* v. *B.C.* [1989] 6 W.W.R. 319 (B.C.S.C.).

2. In the opening para. of his judgment, Lamer CJC identifies the cases as commencing with *R.* v. *Sparrow* [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 (hereafter cited to D.L.R.); proceeding through the *Van der Peet* trilogy (*R.* v. *Van der Peet* [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 (hereafter cited to D.L.R.), *R.* v. *N.T.C. Smokehouse Ltd* [1996] 2 S.C.R. 672, 137 D.L.R. (4th) 528 (hereafter cited to D.L.R.), and *R.* v. *Gladstone* [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 (hereafter cited to D.L.R.)); and ending in *R.* v. *Pamajewon* [1996] 2 S.C.R. 821, 138 D.L.R. (4th) 204 (*sub nom. R.* v. *Gardner*; *R.* v. *Jones*) (hereafter cited to D.L.R.), *R.* v. *Adams* [1996] 3 S.C.R. 101, 138 D.L.R. (4th) 657 (hereafter cited to D.L.R.), and *R.* v. *Coté* [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385.

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found in section 35(1) of the Constitution Act 1982,[3] which states in full: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Canadian courts are now being required to interpret this provision and the extent of its protection.

The constitutional protection of aboriginal rights is viewed as representing a process of recognition and reconciliation. It is a recognition of the fact that "when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries",[4] and a reconciliation of this fact with the present-day sovereignty of the Crown (that is, the State). It is not an attempt to turn back the clock because, as the Chief Justice of Canada recognised at the end of his judgment in *Delgamuukw*, "Let us face it, we are all here to stay."[5] It is, rather, an attempt to balance—or more accurately, to redress the balance of—the often conflicting claims of aboriginals and the "newcomers".[6] In this process of balancing, priority is to be given to aboriginal rights. This priority flows, first, from the general principal that constitutional protection of rights must be given a liberal and generous interpretation and, second, from the fact that the Crown is in a fiduciary relationship with the aboriginal peoples and cannot breach that bond of trust.[7]

We will consider the relation between aboriginal rights and sustainable development in the light of the *Delgamuukw* decision, looking first to the requirements for aboriginal rights (*infra* Section B) and then to the limits to these rights (*infra* Section C).

B. Requirements for Aboriginal Rights

What sorts of aboriginal rights are protected under section 35 of the Constitution? The cases suggest two general sets of requirements for recognition, one relating to timing and the other to content.

1. Temporal requirements

The constitutional protection of aboriginal rights is limited to those pre-colonial[8] customs and practices that have continued in a more or less uninterrup-

3. Being Sched. B to the Canada Act 1982 (UK), 1982, c.11.

4. Lamer CJC in *Van der Peet*, *supra* n.2, at p.303 (emphasis in original). He went on to stress that it is "this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status".

5. *Delgamuukw*, *supra* n.1, at p.273.

6. The expression is that of Delgam Uukw, Hereditary Chief of the Gitksan. See Gisday Wa and Delgam Uukw, *The Spirit of the Land: Opening Statement of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia May 11, 1987* (Gabriola, B.C., 1989), p.7.

7. See generally *Sparrow*, *supra* n.2, at pp.407–409. See also *Guerin* v. *Canada* (1984) 131 D.L.R. (4th) 321 (S.C.C.).

8. In *Delgamuukw*, *supra* n.1, at pp.254–255, Lamer CJC distinguishes between claims to aboriginal rights falling short of title and aboriginal title itself (see *infra* n.16 and accompanying text), and makes it clear that the appropriate pre-colonial period is different in the two cases. It is the period prior to first contact between the Europeans and aboriginals in the case of rights falling short of title, and the period prior to the assertion of sovereignty in the case of aboriginal title.

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ted fashion up to the present day. These temporal requirements of pre-existence, continuance and present existence reflect the fact that the purpose of the constitutional provision is to acknowledge and protect those traditional or ancestral practices and customs that remain important today.[9]

Protection is thus not available for customs and practices that developed after the coming of Europeans; nor is it available for pre-colonial activities that were later abandoned or the practice of which was significantly changed since the European arrival. Moreover, it is also not available for aboriginal rights that were validly extinguished prior to 1982. The courts have now made it clear that pre-1982 jurisdiction to effect extinguishment rested either with the British colonial authorities in the pre-Confederation period or with the federal government subsequently,[10] and that the intention to extinguish had to be "clear and plain"[11] (although not necessarily express).

While the burden of proving extinguishment rests with the Crown, that of proving the historical quality of the right (i.e. its continued existence since pre-colonial times) rests with the claimants of the benefit of the right.[12] One of the contributions of *Delgamuukw* is to temper the usual strict rules concerning the admissibility of evidence to admit proof by way of oral history, including legends, songs, dances and symbols (masks, totems, blankets, etc.). An example is an "*adaawk*" (a sacred story of the Gitksan people) about the destruction of a native village by a supernatural grizzly bear, which was told at trial in support of the claim to a historical connection to the land:[13]

> the people watched where the noise comes from, and they've seen some great big trees were throwing about the top of the rest of the tall trees, and they just stood there wondering what happened, until it comes ... And finally they see this great huge bear ... And the chiefs sent messengers through the village ... to have the warriors ready ... And ... they all come out bravely to meet this great grizzly bear ... [A]nd whenever they shot him with an arrow, the arrow flies way up high instead and fall back down again and it hit the warriors ... And this grizzly bear tramped them until they were crushed to the ground, and goes through the village and kills a lot of people. And after that, he turned ... and ... disappeared into the lake.

Scientific evidence adduced at trial indicated that a major pre-historic landslide had occurred in the area which, in the words of one geomorphologist, would have caused "a tremendous noise, overwhelming loud noise, a great cloud of material, swaths of forest being cleared",[14] not unlike the noise and actions attributed to the giant grizzly bear.

9. See e.g. *Gladstone*, *supra* n.2, at p.662 (*per* Lamer CJC): "In *Van der Peet* this was described as the requirement of 'continuity'—the requirement that a practice, tradition or custom which is integral to the aboriginal community *now* be shown to have continuity with the practices, traditions or customs which existed *prior to contact*" (emphasis added).

10. *Delgamuukw*, *supra* n.1, at pp.267–272.

11. *Sparrow*, *supra* n.2, at p.401; *Gladstone*, *supra* n.2, at p.663.

12. Most often a member or members of the aboriginal group itself, although in *N.T.C. Smokehouse*, *supra* n.2, the existence of an aboriginal right was claimed by a non-aboriginal corporation charged with dealing in illegally caught fish.

13. Trial, *supra* n.1, at p.264.

14. *Idem*, p.267.

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2. Substantive requirements

To receive constitutional protection, an aboriginal activity must be "defining": it must be "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right".[15] This test is obviously critical and the Court has applied it specifically, rather than generally, so that whether or not a particular claim or activity is "integral to the distinctive culture" depends on both the nature of the activity and the characteristics of the aboriginal group practising it.

Generalisation about the content of aboriginal rights is therefore difficult, but the Chief Justice described them in *Delgamuukw* as falling along a spectrum with respect to their degree of connection with the land.[16] At one end of the spectrum are aboriginal rights that are not connected to the land in any site-specific way, as with the rights of nomadic peoples.[17] In the middle are activities that are connected to the land in a site-specific way but are not sufficiently extensive to support a claim of title to the land, as with a right to hunt on a specific tract of land. At the other end of the spectrum is aboriginal title itself, and *Delgamuukw* is significant for the light it casts on the content of aboriginal title.

Rights along this spectrum thus fall into two main groups, those falling short of title (the exercise of which might or might not be site-specific) and aboriginal title. Two general observations can be made about these two groups.

The first is that in both cases, the constitutional protection is limited, as we have seen, to those activities that are "integral to the distinctive culture" claiming the right. However, whereas this centrality must be proved by the claimants of an aboriginal right falling short of title, it is presumed in a claim for aboriginal title from the historical continuity of occupation, which continuity the claimants must prove: "under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirements of occupancy".[18] The Chief Justice explained this difference as follows:[19]

> Although this [being of central significance to their distinctive culture] remains a crucial part of the test for aboriginal rights, given the occupancy requirement in the test for aboriginal title, I cannot imagine a situation where this requirement would actually serve to limit or preclude a title claim. The requirement existed for rights short of title because it is necessary to distinguish between those practices which were central to the culture of claimants and those which were more incidental. However, in the case of title, it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants. As a result, I do not think it necessary to include explicitly this element as part of the test for aboriginal title.

The second observation is that in both cases the rights are *sui generis*, in that they are communal rather than individual and inalienable except to the Crown.

15. *Van der Peet*, *supra* n.2 at p.310 (*per* Lamer CJC). It must be "a central, significant or defining feature of the distinctive culture" of the aboriginal society in question: *Adams*, *supra* n.2, at p.671 (*per* Lamer CJC); see also *Gladstone*, *supra* n.2, at p.660.
16. *Delgamuukw*, *supra* n.1, at pp.251–252.
17. See e.g. *Adams*, *supra* n.2, at p.667.
18. *Delgamuukw*, *supra* n.1, at p.253 (*per* Lamer CJC).
19. *Idem*, pp.256–257.

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However, title rights are more flexible than non-title rights, and recognition of this flexibility is another contribution of *Delgamuukw*. Non-title rights can perhaps be described as "frozen", in the sense that their present-day exercise is limited to the purpose[20] for which they were exercised in pre-colonial times—so that, for example, whether or not an aboriginal people had historically bartered or sold the fish caught or had simply fished for sustenance is critical to the recognition of a present-day aboriginal right to fish commercially.[21] Title rights, on the other hand, are not so limited, as *Delgamuukw* makes clear: "aboriginal title encompasses the right to exclusive use and occupation of the land for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures".[22] Aboriginal title rights are thus not frozen, and change of use and the commercialisation of the products of the land are permitted. However, *Delgamuukw* also makes clear that aboriginal title is not equivalent to full ownership, and is subject to limits.

C. *Limits to Aboriginal Rights*

What are the limits to aboriginal rights? *Delgamuukw* suggests the existence of two different sorts of limits, those that are internal (or implied) and those that are external (or express).

1. *Internal limits*

Although Chief Justice Lamer recognised in *Delgamuukw* that aboriginal land can be put to non-traditional uses, he emphasised that this is subject to an inherent, or overarching, limit. "Lands held pursuant to aboriginal title cannot be used in a manner that is irreconcilable with the nature of the attachment to the land which forms the basis of the group's claim to aboriginal title";[23] it cannot be used in a manner that goes against the "special bond between the group and the land" that is at the heart of the aboriginal claim:[24]

> one of the critical elements in the determination of whether a particular aboriginal group has aboriginal title to certain lands is the matter of the occupancy of those lands. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands

20. However, the manner in which the right is exercised is not similarly frozen. See *Sparrow* and *Van der Peet*, both *supra* n.2.

21. See particularly *Gladstone*, *supra* n.2 (right to fish commercially); and *N.T.C. Smokehouse* and *Van der Peet*, both *supra* n.2 (right to fish for sustenance and for social and ceremonial purposes).

22. *Delgamuukw*, *supra* n.1, at p.243 (*per* Lamer CJC).

23. *Idem*, p.246.

24. *Idem*, p.247 (emphasis added). He continued with the following concrete examples: "For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip-mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot)."

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> are so occupied, there will exist *a special bond between the group and the land in question* such that the land will be part of the definition of the group's distinctive culture. It seems to me that these elements of aboriginal title create an inherent limitation on the uses to which the land, over which such title exists, may be put.

Lamer CJC justified this limitation in terms reminiscent of the Brundtland Commission[25] or the concept of sustainable development in the Rio Convention:[26]

> The relevance of the continuity of the relationship of an aboriginal community with its land here is that it applies not only to the past, but to the future as well. The relationship should not be prevented from continuing into the future. As a result, uses of the land that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title.[27]

Non-title rights can similarly have an internal, or built-in, limit. This would be the case, for example, of a right to fish for personal or communal uses,[28] in which case the "Tragedy of the Commons"[29] is not likely to occur and the need for externally imposed limits, for regulation, is thus not particularly pressing. Where the aboriginal fishing right includes the right to sell fish commercially,[30] however, the only limit is one of supply and demand[31] and external regulation becomes much more necessary.

2. *External limits*

(a) State-imposed limits. Delgamuukw and other Supreme Court of Canada cases recognise that aboriginal rights, including aboriginal title, can be limited or regulated by the State. More precisely, they recognise that aboriginal rights can be validly "infringed" (to use the somewhat particular terminology of the cases), as long as the infringement is justified:[32]

> The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1). . . .
>
> . . .

25. World Commission on Environment and Development, *Our Common Future* (1987).

26. Rio Declaration on Environment and Development, Doc. A/Conf.151/5/Rev.1, UN Conference on Environment and Development, 3–14 June 1992. See particularly Principle 3: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."

27. *Delgamuukw*, *supra* n.1, at p.247.

28. That is, for food, ceremonial and social purposes. See e.g. *Sparrow*, *Van der Peet* and *N.T.C. Smokehouse*, all *supra* n.2.

29. Hardin, "The Tragedy of the Commons" (1968) 162 Science 1243. The "Tragedy of the Commons" can occur when a group of people has unrestrained access to a resource, in which case it is in the short-term interest of each member of the group to appropriate individually as much of the resource as possible, although this will inevitably lead to the exhaustion of the resource and thus be contrary to the long-term interest of the group as a whole.

30. E.g. *Gladstone*, *supra* n.2.

31. As Lamer CJC points out in *Gladstone*, *idem*, p.674, Lambert JA's qualification (in dissent in the B.C. Court of Appeal in both *Van der Peet* and *N.T.C. Smokehouse*, both *supra* n.2) of the right to fish commercially as being for the purpose of obtaining a "moderate livelihood" would constitute an internal limit.

32. *Sparrow*, *supra* n.2, at pp.411, 412 (*per* Dickson CJC and La Forest J, speaking for the Court).

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> If a *prima facie* interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right.

The onus of proving a *prima facie* infringement lies on the individual or group challenging the State action; the onus of proving justification lies on the State. Like the aboriginal rights themselves, the justification of infringement varies with the nature of the activity and the characteristics of the aboriginal group practising it.[33] The requirements for justification are twofold.

The first is that the infringement of the aboriginal right must be in furtherance of a legislative objective that is "compelling and substantial".[34] This is assessed in the light of the dual purpose—recognition and reconciliation[35]—of the constitutional protection provided in section 35(1):[36]

> In the context of the objectives which can be said to be compelling and substantial under the first branch of the *Sparrow* justification test, the import of these purposes is that the objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by aboriginal peoples or—and at the level of justification it is this purpose which may well be most relevant—at the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown.
>
> ... Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, *equally* a necessary part of that reconciliation.

In the case of fishing rights, conservation of resources is obviously a compelling and substantial objective; other possible examples are pursuit of economic and regional fairness, recognition of the historical participation of non-aboriginals in the fishery,[37] and even promotion of sports fishing in parts of the country where this is economically important.[38] As for aboriginal title, Lamer CJC in *Delgamuukw* sets out an expansive list of legislative objectives that could justify an infringement:[39]

> In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objec-

33. See *supra* n.15 and accompanying text. See also *Sparrow*, *supra* n.2, at p.410: "Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case."

34. *Sparrow*, *idem*, p.412; *Delgamuukw*, *supra* n.1, at p.260.

35. See *supra* n.4 and accompanying text.

36. *Gladstone*, *supra* n.2, at pp.681–682 (*per* Lamer CJC) (emphasis in original).

37. *Idem*, p.682; Lamer CJC continues (at 682–683): "*In the right circumstances*, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment" (double emphasis in original).

38. *Adams*, *supra* n.2, at p.679. On the other hand, justification of measures as being "in the public interest" is "so vague as to provide no meaningful guidance and so broad as to be unworkable" as a test for justification (*Sparrow*, *supra* n.2, at p.412).

39. *Delgamuukw*, *supra* n.1, at pp.263–264.

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> tives that are consistent with this purpose [reconciliation of aboriginal rights with Crown sovereignty] and, in principle, can justify the infringement of aboriginal title.

This suggests that, in the case of aboriginal title, objectives related to development play a more central role that those related to conservation, and one might wonder what remains of the concept of aboriginal title. This question is partly answered by the second wing of the justification test.

The second requirement for justification is that the infringement of the aboriginal right must be consistent with the special fiduciary relationship that exists between the Crown and the aboriginal peoples. Aboriginal rights must thus be given priority,[40] but how this can be accomplished varies from right to right. In allocating fishing rights after conservation measures have been implemented, for example, aboriginal fishing for food, ceremonial and social purposes must be given absolute priority over commercial and sports fishing, with the latter thus bearing the brunt of the conservation measures:[41]

> If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.

However, where the aboriginal right is one that has no internal limit (such as commercial fishing), such an approach would be too limiting of non-aboriginal rights[42] and the doctrine of priority must be applied more flexibly. The appropriate level of government must demonstrate that in allocating the resource it "has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority"; it must show that both "the process by which it allocated the resource and the actual allocation of the resource which results from that process" reflect the prior interest of aboriginal rights holders.[43]

In the case of aboriginal title, *Delgamuukw* suggests a different approach to fiduciary duty from that of priority, and emphasises instead a need for participation and compensation. This difference flows, first, from the fact that aboriginal

40. See *supra* n.7 and accompanying text.

41. *Sparrow*, *supra* n.2, at p.414.

42. See *Gladstone*, *supra* n.2, at p.675: "Because the right to sell ... [fish] to the commercial market can never be said to be satisfied while the resource is still available and the market is not sated, to give priority to that right in the manner suggested ... would be to give the rightholder exclusivity over any person not having an aboriginal right to participate in the ... fishery" (*per* Lamer CJC).

43. *Idem*, p.676. This could involve "[q]uestions ... relating to consultation and compensation, as well as questions such as whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example), whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal right[s] holders, the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how the government has accommodated different aboriginal rights in a particular fishery (food *versus* commercial rights, for example), how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users" (*idem*, pp.677–678).

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title includes the right to choose the use to which the land may be put. The fiduciary duty thus requires that the aboriginal people must be involved in the decision-making process concerning the use of land through procedures ranging from mere consultation to full consent:[44]

> There is always a duty of consultation ... The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, where the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

It flows, second, from the fact that aboriginal title, unlike the right to fish for food, has "an inescapably economic aspect"[45] (particularly in view of the modern uses to which the land may be put). The fiduciary duty therefore requires that aboriginal peoples should be compensated for any interference with their title:[46]

> In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.

(b) Aboriginal-imposed limits. A second source of regulation of aboriginal rights could be the aboriginal group itself. This raises the question of the existence of an aboriginal right to self-government. The Supreme Court of Canada has so far shied away from dealing with this issue, which is obviously very sensitive. In *Delgamuukw* the Chief Justice said simply that "this is not the right case for the Court to lay down the legal principles to guide future litigation" on the question, and referred to an earlier decision in which he held that "rights to self-government, *if they existed*, cannot be framed in excessively general terms".[47] In the earlier case, *Pamajewon*, he stressed that a right to self-government (should one exist) must be approached in the same way as any other aboriginal right—that is, specifically rather than generally—so that its nature and scope will vary from one aboriginal group to another. "Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claimed."[48]

The Canadian government, on the other hand, has been less circumspect than the Court about aboriginal self-government, and has clearly stated: "The Government of Canada recognizes the inherent right of self-government as an existing

44. *Delgamuukw*, *supra* n.1, at p.265.
45. *Ibid.*
46. *Idem*, pp.265–266.
47. *Idem*, p.266 (emphasis added).
48. *Pamajewon*, *supra* n.2, at p.213. He underlined (*idem*, p.212) that he was "[a]ssuming without deciding" that s.35(1) includes self-government claims.

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right within section 35 of the *Constitution Act, 1982*."[49] Like the Court, however, it would define the content of the right not in abstract terms but, rather, in a way that is tailor-made for each aboriginal group, through a process of negotiation. The government envisages a system of exclusive and shared jurisdiction. Aboriginal groups would have exclusive jurisdiction over matters that are "internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution".[50] In regard to sustainable development, this could include the following: property rights (including succession and estates); land management (including zoning, service fees, and tenure and access, and expropriation of aboriginal land by aboriginal governments for their own public purposes); natural resources management; agriculture; and hunting, fishing and trapping on aboriginal lands. Aboriginal groups could also be given a measure of shared jurisdiction over matters that concern a wider community than the group itself. Examples related to sustainable development could include: environmental protection, assessment and pollution prevention; fisheries co-management; and migratory birds co-management. In areas of shared jurisdiction, the federal or provincial government (as the case may be) would have primary jurisdiction, and their laws would prevail over aboriginal laws in the event of conflict.[51]

The aboriginal "history of conservation-consciousness and interdependence with natural resources"[52] suggests that rules and regulations adopted in exercise of the right of self-government will be protective of the environment, although one might perhaps question the extent to which the traditional environmental ethic will be able to resist the forces of a market-driven economy.[53]

D. Conclusion

Delgamuukw is the most recent, and wide-ranging, discussion of aboriginal rights by the Supreme Court of Canada. The actual decision in the case was rather narrow: the Court overturned the decision of the lower courts denying the Gitksan and Wet'suwet'en claim to aboriginal title but was unable to decide the case on its merits because of procedural errors in the plaintiff's pleadings; it therefore

49. *Aboriginal Self-Government: Federal policy guide: The Government of Canada's approach to implementation of the inherent right and the negotiation of aboriginal self-government* (Ottawa: Minister of Indian Affairs and Northern Development, 1995) (http://www.inac.gc.ca/pubs/selfgov/policy/html), p.1.

50. *Idem*, p.3.

51. *Idem*, pp.3–4. The federal government suggests (*idem*, pp.6–7) that the exercise of self-government may affect its fiduciary relationship with the aboriginal peoples. "As Aboriginal governments and institutions exercise jurisdiction or authority and assume control over decision-making that affects their communities, they will also assume greater responsibility for the exercise of those powers. As a result, Crown responsibilities will lessen. In this sense, the historic relationship between Aboriginal peoples and the Crown will not disappear, but rather, will evolve as a natural consequence both of Aboriginal peoples' changing role in shaping their own lives and communities, and of the Crown's diminished control and authority in relation to them."

52. *Sparrow*, *supra* n.2, at p.417.

53. See e.g. the practice of chipping maple trees to bare their wood to determine whether they are the more valuable "bird's eye" maple: see *R.* v. *Paul* (1996) 145 D.L.R. (4th) 472 (N.B. Prov. Ct.), aff'd (1997) 153 D.L.R. (4th) 131 (N.B.Q.B.), rev'd (1998) 158 D.L.R. (4th) 231 (N.B.C.A.).

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ordered a new trial. However, the Court also expressed a strong preference for negotiation, rather than further litigation:[54]

> Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts ... Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet* ... to be a basic purpose of s. 35(1)—"the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.

We appear in Canada to be entering an era of negotiated settlements. On 4 August 1998 the first aboriginal treaty in British Columbia since the 1850s was signed between the Province of British Columbia, the Government of Canada and an aboriginal people called the Nisga'a. When it is ratified, this treaty will recognise Nisga'a title to some 2,000 square kilometres of land and control over its natural resources, as well as a measure of self-government for the Nisga'a First Nation.[55]

The Nisga'a Final Agreement was a long time in the making,[56] and it is clear that the Supreme Court of Canada's call for a negotiated settlement in *Delgamuukw* played a role in its ultimate adoption.[57] It will probably serve as a model for treaties with other aboriginal groups, including the Houses of Gitksan and Wet'suwet'en who persevered in bringing the landmark case of *Delgamuukw* v. *British Columbia* before the Supreme Court of Canada.

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54. *Delgamuukw*, *supra* n.1, at p.273.

55. See http://www.aaf.gov.bc.ca/aaf/treaty/nisgaa/nisga_agreement.html.

56. The Nisga'a people first sent a delegation to the provincial capital requesting a settlement of their land claims in 1887; they petitioned the Imperial Privy Council in 1913; and were successful in the first of the modern aboriginal rights cases (*Calder* v. *Attorney-General of British Columbia* [1973] S.C.R. 313, 34 D.L.R. (3d) 145) before the Supreme Court of Canada.

57. The Preamble to the Agreement reads in part as follows: "Whereas Canadian Courts have stated that the reconciliation between the prior presence of aboriginal peoples and the assertion of sovereignty by the Crown is best achieved through negotiation and agreement, rather than through litigation or conflict."

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