The Common Law Basis of Aboriginal Entitlements to Land in Canada:

The Law's Crooked Path

By

Brian Donovan

A Thesis Submitted to the Faculty of Graduate Studies
In Partial Fulfillment of the Requirements
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Contents

Abstract

Prior to contact with European societies, Aboriginal peoples inhabiting the geographical territory which now comprises Canada had numerous and varied relationships with the land. In many cases, pre-contact Aboriginal rules and customs relative to land were sufficiently developed to amount to systems of "land tenure" in the parallel European sense. Such Aboriginal systems had nothing to do with "tenure" in the Anglo-Norman feudal sense, but did amount to systems of tenure in the etymological and conceptual sense, in relation to the term's Latin root *tenere*, literally, to have, to hold, or to possess. They were systems of land-*holding*.

Equally, all Aboriginal peoples were territorial in some degree. Pre-contact patterns of Aboriginal territoriality and land occupation can in many cases be ascertained even in cases in which, due to the passage of time and the decimation and dislocation of populations, original Aboriginal systems of tenure can now no longer be reconstructed. Pre-contact Aboriginal systems of tenure and patterns of territoriality have present legal implications relative to Aboriginal legal entitlements to land. These have not been fully explored. This thesis explores some of these implications.

Chapter One examines briefly some of the existing evidence of pre-contact Aboriginal systems of tenure. This survey is not intended to be exhaustive, but, in contrast, is meant to demonstrate the sorts of evidence which would have to be adduced in land claims litigation on the legal principles set out in subsequent Chapters.

Chapter Two examines various common law doctrines relative to the property rights of indigenous peoples as well as the general English common law of real property. Imperial constitutional common law rules are shown to preserve pre-existing Aboriginal systems of tenure in their own terms where these can be ascertained. Further, the common law doctrines of real property, if conscientiously applied, will grant Aboriginal peoples presumptive seisin in fee simple, as well as prescriptive rights, in the lands they historically possessed.

Chapter Three traces the evolution of the concept of "Aboriginal title" in Canadian common law. The courts have developed "Aboriginal title" in spite of, rather than in accordance with, the common law principles they were obliged to apply. Judicial unwillingness to characterise Aboriginal property interests in accordance with regular common law principles has resulted in the articulation of such unhelpful legal concepts as the "personal and usufructuary" or "*sui generis*" property interest said to be enjoyed by Aboriginal peoples, in contrast to the "normal" property interests said to be available to non-Aboriginal citizens.

Chapter Four concludes with the suggestion that the development by the courts of "Aboriginal title" as an interest in land distinct from property interests available to non-Aboriginal citizens has systematically and without legal justification debased the Aboriginal interest in land below what Aboriginal peoples would be entitled to receive by the operation of regular principles of real property law. An attempt is made to demonstrate how land claims litigation could be framed in terms of these well understood principles and to suggest what outcomes might arise.

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Chapter One

Original Aboriginal Tenure

"In the early times the Indians owned this land ... ."
Chief Alec Paul, Temagami Band, *circa* 1915.[1]

To speak historically of Aboriginal land tenure in Canada may be something of a misnomer, if "tenure" is defined in its Anglo-Norman common law feudal context.[2] Archaic as it may seem in the twenty-first century, "tenure" in that sense remains at the conceptual core of the practise and teaching of the law of real property in Canada.

This concept of tenure is a European historical artifact, and it is improbable that any North American Aboriginal peoples ever occupied land on such terms, involving the rendering of fealty and services as between lord and tenant. In a generic sense, "tenure" may still be useful in describing the relationship of Aboriginal peoples with the land they occupied in the pre-contact period, if the term is approached etymologically from its Latin root *tenere*, literally, to hold, to possess, or to occupy. Did Aboriginal peoples possess systems of land tenure in this more generic sense? If so, what are the present legal implications of such tenure?[3]

Prior to European contact most parts of North America were occupied by Aboriginal peoples, from the arctic Inuit to the Six Nations of the St. Lawrence River valley to the peoples of the plains to the Natives of

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[1] Quoted by Frank G. Speck in "The Family Hunting Band as the Basis of Algonkian Social Organization" (1915), 17 *American Anthropologist* 289 at p. 294.

[2] Tenure has been defined as follows: "In feudal landholding, the relationship between one person, the tenant or vassal, and another, the lord or superior, whereby the tenant holds certain lands not in full ownership but from another in return for periodical rendering of services or payments of money. Under a system of tenure both lord and tenant simultaneously have an estate or interest in the land though the latter has the actual occupation and use of the land held. Various kinds of tenures were recognized having different rules, particularly as to the services or payments to be given to the lord." *Oxford Companion to Law* (Oxford: Clarendon Press, 1980): "Tenure"

[3] In this thesis I address the legal principles governing Aboriginal land tenure, in the sense of "Indian" and Inuit tenure. I have not addressed issues surrounding Metis land tenure, which may well be governed by a different set of principles.

the north-west coast. In some cases, their occupation had many, if not all, of the incidents associated with land tenure, including rights of inheritance, rights to repel trespassers and rights of alienation and assignment. Their systems of land tenure differed in many ways from the European, but were nevertheless cognizable as systems of land holding.

It is the argument of this thesis that the past occupation of North America by Aboriginal peoples has present legal implications which remain relatively unexplored. If no North American Aboriginal people had a system of land "tenure" in the European feudal sense of this term, it does not follow, nor does the historical and anthropological evidence support the notion, that Aboriginal peoples had no concepts of tenure relative to the land they inhabited. On the basis of the available evidence, some of these systems of tenure can be reconstructed historically. In other cases, even where the rules and customs which would constitute a system of tenure cannot now be ascertained or reconstructed, distinct patterns of geographical occupation can be determined. Both these circumstances have present legal implications, which this thesis will elucidate in subsequent Chapters.

Let us begin with a non-Canadian example which will illustrate this point.

(1) An Example: The Pima Indians and Land Tenure

The Pima Indians inhabited relatively arid areas of the territory which now comprises the southwestern United States. Anthropological evidence based on information provided by Pima informants suggests that they were a sedentary agrarian people, who depended upon high maintenance irrigation systems to produce crops. They lacked rigid or sophisticated legal conceptions, other than those relating to land tenure. Relative to land, in contrast, Pima law appeared to have been no less precise than that prevailing in many European societies in pre-contact times. It comprised a system of rules for land acquisition, alienation, ownership, and devolution, as well as rules governing compensation for damage to or interference with land.

The American anthropologist W. W. Hill[4] described the Pima system of land acquisition in the following terms:

> Land assignments under native custom were accomplished in two ways. When a large tract was to be taken in, it involved the cooperative efforts of individuals from one to three villages. Qualified men were first sent out to chose the land and to "survey" the canal location. Then the community or communities, with the permission and under the direction of the headmen, constructed the canal from the river to the selected area. When this was completed, the men who had taken part in the work chose or were assigned plots of land under the supervision of the headman assisted by an advisory body. This advisory "land board" usually consisted of six men. The headman customarily chose the most advantageous location for himself. In case of a dispute, the decision of the headman was final.
>
> The second type of assignment concerned a single individual. A man, or one of the man's relatives, applied to the village headman and a plot of land was designated for him. In both cases, once the assignment was made, the land became the inalienable property of the assignee and his heirs. Woman (*sic*) were never assigned land and did not inherit it, though they owned certain usage rights in it ... .[5]

Aside from the land so assigned, there was no "private ownership" of real property, and unassigned land was communally available for hunting and gathering. However, "No one but the owner had a right to cut down a tree, cactus, or bush that grew on his land."[6]

Pima land tenure included water rights for the irrigation of crops and corresponding obligations:

> Water rights were included in the land title. Formerly the Gila river and its springs furnished ample water for agricultural and domestic purposes. In rare cases when a shortage of water did occur farms were watered in turn. The only regulation placed upon water users was that they must contribute labor to the construction and maintenance of the main canals. This was enforced at the will and under the direction of the village headman and a "ditch foreman."[7]

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[4] W. W. Hill, "Notes on Pima Land and Tenure" (1936), 38 *American Anthropologist* 586. Unfortunately, Hill does not identify his informants or explain his methodology; however, his findings were confirmed by Edward F. Casteller and Willis H. Bell in *Pima and Papago Indian Agriculture* (Albuquerque: University of New Mexico Press, 1942). Casteller and Bell based their conclusions on field studies including interviews with Pima informants in the fall of 1938, 1939 and 1940 at the Gila River Indian Reservation centering at Sacaton, Arizona. According to these authors, in those years Pima agriculture had changed little from ancient times, so that their findings probably approximate closely to pre-contact practices.

[5] Hill, supra note 4 at p. 586.

[6] *Ibid.*, at p. 587.

Pima land law provided as well for a form of "sharecropping":

> Two types of land rental were practiced. If a Pima, a non-relative of the owner, wished to farm he might obtain land for a share of the crop (this share varied) and by contributing his services to the maintenance of the irrigation system. Indians of other tribes, who applied for land, might be allowed to use it rent free, subject only to contributing their services toward the maintenance of the main dams and canals. Except in rare cases, these foreigners never gained actual title to the lands.[8]

There also existed a system of testamentary devolution of land, and rules which operated in the event of an intestacy:

> The most important legal aspect of land, aside from ownership, was inheritance. Normally, a man's male children inherited all his land, and the oldest male member of the household assumed the patriarchal responsibilities of directing the agricultural procedure. Unless a verbal will had been made dividing the land, the household head was considered the nominal owner.[9]

There existed as well rules analogous to the common law of trespass and nuisance. Damages or restitution could be collected by one landholder from another who had damaged his crops by allowing his irrigation ditches to overflow, or by setting a fire on his own land which spread to adjacent land.[10] Moreover, Pima law did not recognize land acquisition by adverse possession or use, however long the period of adverse occupation.[11]

Did the Pima people have a system of land tenure? Their system of rules relative to land had virtually all of the characteristics associated with a modern landholding system. It included rules relative to original land acquisition, land transfers, the rental of land, the rights and responsibilities of landholders relative to land held by others, rules of testamentary and intestate succession, rules governing compensation for trespass or nuisance, and public duties related to land. It constituted a system of landholding as well defined and precise as many European systems which were its contemporaries. There is therefore no reason to deny the

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[7] *Ibid.*
[8] *Ibid.*, at p. 588.
[9] *Ibid.*
[10] *Ibid.*, at p. 589.
[11] Casteller and Bell, *supra* note 4 at p. 128.

Pima system the status of a system of land tenure, or to suggest that the Pima people were not landholders in the parallel European sense.

(2) The Purpose of the Pima Example

The purpose in offering the Pima system of land holding as an example is to demonstrate that pre-existing Aboriginal land tenure did exist, at least in some localities, prior to European contact. The legal analysis that follows in Chapter Two will demonstrate that the pre-existence of Aboriginal systems of land tenure has present legal consequences which have yet to be fully recognised.

In the geographical territory which now comprises Canada, there existed prior to European contact numerous Aboriginal peoples who occupied the land. Their relationships with the land, and their rules governing its use, were as varied as the cultures of the Aboriginal peoples who inhabited it, ranging from relatively simple, but identifiable, patterns of regular occupation and use, to ascertainable systems of rules very different from, but as precise and complex as, the Pima system of land-holding ("tenure") described above.

It is not the purpose of this introductory Chapter (nor is it possible) to give detailed accounts of all, or even many, of the Canadian Aboriginal patterns of land occupation and the rules that governed Aboriginal relationships to the land they occupied. This is work for other writers in other disciplines. Nor, for the purposes of the ensuing legal analysis, is it necessary to describe any one particular Aboriginal system of land-holding with complete precision. If my legal conclusions relative to the significance of prior Aboriginal occupation of land and pre-existing Aboriginal laws governing its use are correct, this should constitute the subject matter of historical, ethnographic and anthropological investigations which will inform Aboriginal land claims litigation in cases yet to be commenced.

My purpose here is more limited. I examine a few representative systems of land-holding and land occupation by Canadian Aboriginal peoples during the period prior to European contact. The objective is

not to document any one of these systems of land tenure in intricate detail but, in contrast, simply to demonstrate that they existed. Subsequent Chapters of this thesis will address the hitherto unexplored present legal consequences of their prior existence.

Relationships of Some Aboriginal Peoples to Land

The relationships between Canada's Aboriginal peoples and the lands that supported them were as varied as the land itself and what it would yield in terms of resources. All Aboriginal peoples were territorial to some extent. Their presence on the land reflected a range of Aboriginal cultures with distinctly different views of human relationships with land. These world views spanned a broad spectrum, ranging from usufructuary utilisation of communal or familial hunting grounds, to systems which recognised "private property rights" in a manner no less precisely defined than their contemporary Europeans.

All that is intended here is to give a few examples which illustrate that patterns of territoriality, and sometimes highly developed systems of land tenure, did exist among various Canadian Aboriginal peoples. At the outset, however, a few words of caution are appropriate. We have few records from pre-Columbian Canadian Aboriginal peoples relative to their institutions of property and land tenure. Aboriginal societies in the pre-contact period had oral rather than written traditions. Many but not all of these have now been lost in time. For "primary" evidence, therefore, it is necessary to rely heavily upon accounts by Europeans who recorded their observations of various Aboriginal peoples in the early contact period. The task of drawing inferences as to pre-contact practices from these early accounts is to some degree problematic.

Early European explorers and missionaries were motivated by interests other than the discovery of indigenous systems of land tenure. Merchant explorers of Canada's west coast such as Daniel Harmon, Simon Fraser, Alexander MacKenzie, and Gabriel Franchere were servants of the North-West Company whose interest in the Aboriginal populations they encountered was driven by the profit motive and the desire to establish trading relationships advantageous to the Company. Each produced journals in which

various practices of Aboriginal populations were described in considerable detail.[12] None recorded matters relative to Aboriginal land tenure other than incidentally, and when they did it is doubtful whether they fully understood the significance of what they were observing.

The *Jesuit Relations* relative to the Aboriginal peoples of New France present other difficulties. The Jesuit Fathers were embarked upon a mission of Christian conversion. Their objectivity, and even their capacity for objective observation, depending on the topic at hand, are subject to serious question, as their observations were filtered through a prism of religious zeal. Some appear to have held the Aboriginal population in low esteem.[13]

It is necessary, therefore, to have recourse as well to "secondary" sources produced later by anthropologists, historians and ethnologists, who relied upon actual Aboriginal informants, in order to conduct even a modestly accurate reconstruction of pre-contact Aboriginal systems of land tenure. That, however, is not the purpose of this introductory Chapter. The task of reconstructing in detail the patterns of territoriality and rules of land holding of any particular Aboriginal people is a task for litigation, on the principles set out in Chapter Two of this study.

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[12] Daniel William Harmon, *A Journal of Voyages in the Interior of North America, 1800 – 1819* (New York: A. S. Barnes and Company, 1903); *The Letters and Journals of Simon Fraser, 1806 – 1808*, W. K. Lamb, ed. (Toronto: The Macmillan Company of Canada Limited, 1960); *The Journals and Letters of Sir Alexander Mackenzie, 1786 – 1819*, W. K. Lamb, ed. (Toronto: Macmillan of Canada, 1970); *The Journal of Gabriel Franchere, 1811-14*, W. K. Lamb, ed. (Toronto: The Champlain Society, 1969).

[13] Father Briard, in his Letter of 31 January 1612, described the Aboriginal population of New France as "possessing neither laws nor arts, ... indolent in every occupation, and dull in those pursuits which depend upon talent or memory. On the whole, the race consists of men who are hardly above the beasts" As to their religious beliefs, he complained that "Of the one supreme God they have a certain slender notion, but they are so perverted by false ideas and by custom, that, as I have said, they really worship the Devil" [emphasis added]. *The Indians of North America from the Jesuit Relations and Allied Documents*, Edna Kenton, ed. (New York: Harcourt Brace & Company, 1927), Vol. I, at pp. 24 to 25.

In his *Relation* of 1644 – 45, Father Vimont wrote "We find that the Devil interferes and gives them (the Indians) any help beyond the operation of nature, but they have recourse to him; they believe that he speaks to them in dreams; they invoke his aid; they make presents and sacrifices to him – sometimes to appease him and sometimes to render him favourable to them; they attribute to him their health, their cures, and all the happiness of their lives. In this, they are all the more miserable that they are slaves of the Devil, without gaining anything in his service – not even in this world, of which he is called Prince, and wherein he seems to have some power." *Jesuit Relations*, Vol. 28, p. 55.

It seems unlikely that men of this cast of mind would be likely to discover or record Aboriginal systems of land tenure other than incidentally.

(1) West of the Rocky Mountains

The Coast Salish, Inland Salish and the Carrier peoples, among many others, were observed by the explorers Franchere, Fraser, Harmon, and Mackenzie as inhabiting the territories west of the Rocky Mountains in the late eighteenth and early nineteenth centuries. For many of these peoples, the merchant explorers of the North-West Company were the first Europeans they had ever encountered, allowing for Russian and Spanish sailors who preceded Captains Cook and Vancouver in the 1780s. They inhabited the north-west coast of North America, including the present British Columbia coastline, Vancouver Island, and parts of the British Columbia interior. The explorers' observations as to the land tenure systems of these peoples were scanty. Harmon casually observed that the Carrier people were sedentary and territorial:

> The people of every village have a certain extent of country, which they consider their own, and in which they may hunt and fish; *but they may not transcend these bounds without purchasing the privilege of those who claim the land.* Mountains and rivers serve them as boundaries, and they are not often broken over[14] [emphasis added].

This casual observation by Harmon indicated at least a proprietary attitude towards land. Tribute was payable for the privilege of using land held by others.

Interestingly, while it is now understood that the periodic feasting complex known as the "potlatch" was an important political mechanism for the determination and validation of resource ownership and territorial boundaries among Aboriginal peoples west of the Rocky Mountains, none of the early explorers appeared to be aware of this institution or its significance. Some did, however, observe ceremonial feasts which, from the descriptions recorded, were in all likelihood "potlatchs." Harmon, for instance, in describing the feasting activities of the Carriers, wrote:

> Besides the feasts, made for their dead ... the Carriers give others, merely to entertain their guests, who are frequently all the people of a village, as well as a few who belong to a neighbouring village. The following ceremonies attend such festivals. The person who makes the entertainment, who is always a Chief, boils or roasts several whole beavers; and as soon as his guests are seated around a fire, which is in the centre of his house, he takes up a whole beaver, and with a raised voice, relates how and where he killed it, *that all may know that it came from his own land.* After that necessary explanation is over, he steps forward, and presents the tail end to the most respectable person in the house, and stands holding the animal with both hands until this person has eaten what he chooses.[15] [emphasis added]

Alexander MacKenzie separately observed similar phenomena among Aboriginal peoples of the northwest coast, but with little evident understanding of or interest in their significance for land tenure. He wrote:

> [At public feasts] several chiefs officiate ... and procure the necessary provisions, as well as prepare a proper place of reception for the numerous company. Here the guests discourse upon public topics, repeat the heroic deeds of their forefathers, and excite the rising generation to follow their example.[16]

The significance of feasting and the "potlatch" has only relatively recently been understood by anthropologists as an Aboriginal method of establishing and validating their rights as landholders and confirming territorial boundaries. It is now understood that the coastal peoples, while heavily dependent upon the sea for subsistence, also had inland territories demarcated with remarkable precision by means of natural geographical features, totem poles and family crests. As their tradition was oral rather than written, special oral histories were memorised, repeated and periodically validated relative to their claims to territory and resources. The occasion at which such formal validations of territorial and proprietary claims were made was the community feast or "potlatch."[17] Suttles observed:

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[14] Harmon, *Voyages and Travels in the Interior of North America, 1800 – 1819, supra* note 12, at p. 225.
[15] *Ibid.*, at p. 260.
[16] *Journals and Letters of Sir Alexander MacKenzie, 1786 – 1819, supra* note 12, at p. 139.
[17] Many early anthropologists, including Diamond Jenness, appear completely to have missed the significance of the potlatch system as a means of asserting and validating territorial and proprietary claims. Early in the twentieth century, conventional non-Aboriginal wisdom was that the potlatch was simply a wasteful and dissipating periodic feasting complex, and attempts were made to suppress it under penal sanction. See, Douglas Cole and Ira Chaikin, *An Iron Hand upon the People: The Law Against the Potlatch on the Northwest Coast* (Seattle: University of Washington Press, 1990).

> The potlatch very likely played an important part within [the] system of sharing access to resources. By potlatching, a group established its status vis-à-vis other groups, in effect saying "we are an extended family (or a village of extended families) with title to such-and-such a territory having such-and-such resources." And when a leading member assumed a name that harked back to the beginning of the world when the ancestors of the group first appeared on the spot, this not only demonstrated the validity of the group's title but perhaps also announced in effect "this man is in charge of our resources. ...[18]

The significance of the "potlatch" system as a method for the validation of "proprietary claims" has been better explained by Dara Culhane,[19] herself an Aboriginal anthropologist, in her recent work on the trial in *Delgamuukw v. British Columbia*.[20] According to Culhane, the Gitskan *adaawk* and the Wet'suet'en *kungax* are elaborate oral histories which, *inter alia*, "document ownership of lands and resources, transactions, relations with neighbors, and historical events."[21] The general acceptance of these claims asserted in these oral histories was confimred at the potlatch feasts:

> Gitskan and Wet'suet'en oral tradition includes the feasting complex through which various oral accounts may be validated or contested by the people as a whole. When a Chief and his House hold a feast to mark an important event, such as the transfer of property, the guests assembled serve as witnesses to the event or transaction being marked by the feast and they watch and listen to the performance of the *adaawk* or *kungax* at the feast gathering. If they are persuaded that the laws have been properly followed, the guests/witnesses validate the event or transaction by accepting the host's offers of food and gifts. If they disagree, they make their objections known by making a speech explaining their position and refraining from accepting anything from the host that might be construed as witnessing, validation or affirmation. Sometimes disputes are resolved within the context of a single feast, and sometimes they remain contentious over longer periods of time.[22]

At the time of European contact, coastal Aboriginal communities were relatively sedentary, notwithstanding their non-agrarian economies, due to the relative ease with which surpluses of food could be obtained from the sea, and by hunting and gathering inland. There was little question that, in their

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[18] Wayne Suttles, "Affinal Ties, Subsistence, and Prestige among the Coast Salish," (1960), 62 *American Anthropologist* 296 at p. 299.
[19] Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Burnaby, British Columbia: Talon Books, 1998); see also John W. Adams, *The Gitskan Potlatch: Population Flux, Resource Ownership and Reciprocity* (Toronto: Holt, Rinehart and Winston of Canada, 1973).
[20] (1991), 79 D.L.R. (4th) 185 (B.C.S.C.), discussed in Chapter Three.
[21] Culhane, *supra* note 19 at p. 120.

relationship to the environment, the coastal peoples recognised a species of territorial rights in land which, while differing in many respects from private property rights as understood by European explorers of the day, were hardly less precise. Alexander MacKenzie observed what amounted to the private ownership of productive resources (*i.e.*, a fishing weir) by individuals rather than the community.[23] Subsequent anthropological studies have confirmed that property was "owned" by the coastal Aboriginal communities in a variety of ways.

Coast Salish society differed from many North American Aboriginal societies in that it contained clear class divisions. Jenness described Coast Salish social organisation as comprising a class of "nobles," a class of "commoners," and a class of slaves, owned by the noble families.[24] He described the typical social structure in the following terms:

> [T]he ultimate social unit in this area was the individual family, the ultimate political unit was the village community. In the earliest days, according to Indian theory, all the inhabitants of such a community (except, of course, the slaves) could trace their origin to a single family, but through wars and migrations other people came to settle in the same place, so that in the course of time every village contained representatives of several genealogical families. Each genealogical family, that is to say, each family that claimed descent from a common ancestor, occupied with its retainers, commoners and slaves, one of the large plank houses so typical of the coast; sometimes, also, a second large house and a number of smaller dwellings when the original home became overcrowded. Every village of any size contained several such genealogical families, or "houses"[25] as we may conveniently call them;

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[22] *Ibid.*

[23] *Journals and Letters of Alexander Mackenzie, 1786 – 1819*, *supra* note 12, at pp. 393 to 394.

[24] Diamond Jenness, *The Indians of Canada* (Toronto: University of Toronto Press, 2000), 7th ed., at p. 140. The proportion of slaves has been estimated at approximately one seventh of the total population as at the beginning of the nineteenth century. Local laws governed the treatment of slaves by their owners. For instance, in the southerly coastal communities, a master could not kill a slave at will nor did he have sexual rights over female slaves, whereas in the northern communities he had both these rights under the local law. At or around the time of contact, the monetary value of a slave seemed to vary between two hundred and one thousand dollars: see Wayne Suttles, "Coping with Abundance: Subsistence on the Northwest Coast," in Richard B. Lee and Irven DeVore, eds., *Man The Hunter* (Chicago: Aldine Publishing Co., 1968) at p. 66. The early merchant explorer Gabriel Franchere observed that the treatment of slaves was relatively humane, "but as soon as they become old and decrepit they are neglected and left to die in poverty. And when they die they are thrown under a log or into the edge of the woods." *Journal of Gabriel Franchere, 1811-14*, *supra* note 12. See also Robert H. Ruby and John A. Brown, *Indian Slavery in the Pacific Northwest* (Spokane: The Arthur H. Clark Company, 1993).

[25] In the same sense as the expressions "House of York," "House of Lancaster," in the English Wars of the Roses: see Jenness, *supra*, note 24 at p. 141.

> and, conversely, a single "house" often had representatives in several villages.[26]

The property concepts of the Coast Salish extended beyond the ownership of productive resources (slaves may be included in this category) to include rights to the use of certain ritual objects or the performance of ritual songs and dances.[27] For present purposes, however, it is with land tenure concepts that we are principally concerned.

According to Suttles, property (in the sense of real property) was held in different ways depending upon its nature.

> [A]ccess to some of the most productive sites was restricted by property rights. Not all, but the best cams beds, fern beds, wapato ponds, and clam beds were owned by extended families with control exercised by individuals. Most duck-net sites were so owned; deer-net sites were not, but the investment of material and labour in the nets was such that only a few hunters had them, and the same is probably true of seal nets. Weirs and traps for salmon seem usually to have been built by the whole community, perhaps under the direction of the head of an extended family, but with no restriction as to access.[28] However, the houses standing at the weir sites, which were necessary for smoking the catch, were owned by individuals or extended families. Some other types of fishing were more restricted by property rights. The reef-net locations of the Straits tribes (Lummi, Saanich, Songish) were owned by individuals. ...
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> High status also [came] from food production. Perhaps every kind of joint enterprise had a director in the owner of the gear or the "owner" of the site. The actual degree of control given to an individual probably varied with the complexity of the process and the responsibility required of him. The Straits reef-net was a complex device that had to be carefully made and skillfully operated; the reef-net location was always said to be "owned" by one man or at most two brothers, who evidently had considerable authority over it. On the other hand, the Musqueam sturgeon trap was simply a kind of tidal pond from which fish could easily be drawn at low tide; members of the extended family that had built the trap were its "owners" and were free to come and take fish at any time without consulting the director – it being expected that

[26] Jennes, *supra* note 24.
[27] Wayne Suttles, "Coping with Abundance" in *Man The Hunter*, *supra* note 24.
[28] This is contrary to Alexander MacKenzie's sole recorded observation on the subject, *supra* note 23.

> they would share the fish; while the only responsibility of the director was to see that the trap was repaired once a year and to give permission to nonmembers in the taking of fish. But even the Katzie wapato ponds and berry bogs had an "owner" who gave permission to outsiders to collect there.[29]

The cultures of Aboriginal peoples of the northwest coast, in general terms, could not be regarded as a culture devoid of concepts of property. Their concepts of property were both broader and narrower than European property concepts at the time of first contact. Their concepts were wider in that "property" could consist of songs and rituals, and could extend to other people (slaves). As to real property, it was clear that territorial limits were recognised and respected, and that valuable local resources could be owned individually, jointly, by family groups, or communally, depending on the nature of the resource.

It would be wrong, therefore, to suggest that the property concepts of Aboriginal peoples west of the Rocky Mountains were not governed by "laws." An elaborate system existed for the determination and validation of proprietary claims, which were recorded in the oral histories of the people asserting property rights to territory or resources. Since the system was generally accepted and provided methods of dispute resolution, there was no reason to deny that these laws amounted to a system of tenure.

(2) The Hunters of the Eastern Woodlands

There is good evidence from early European post-contact accounts from which it may be inferred that, in the pre-contact period the Algonkian speaking peoples who inhabited much of what is now southern Ontario, Quebec and Labrador, as well as parts of what is now the northeastern United States, had well defined concepts of land tenure. The Algonkians were not an agricultural people. They lived by hunting. The principal hunting unit was the extended family, and individual families' hunting areas were so well known to them as to be referred to in the native dialect as "my land" or "my home" [*nda'k'im*, literally "my land," among the Temagami of Ontario; *nzi'bum*, or "my river" among the hunting peoples who occupied

[29] Wayne Suttles, *supra* note 18 at p. 299. It is not clear why Suttles uses the term "owner" (*i.e.*, the noun in quotation marks) when he refers to rights to productive resources among the Coast Salish. The type of relationship he describes between these sites and their owners is not dissimilar to ownership of land as understood in the European tradition.

the Penobscot River Valley in Maine]. It even appeared that such family hunting territories were capable of devolution and inheritance upon death.

The earliest recorded evidence that the division of land into defined hunting territories held by family groups was a pre-Columbian Aboriginal practice appeared in almost incidental recordings in the *Jesuit Relations*. The Jesuit Fathers, ostensibly concerned for the souls of the "savages," deplored the tendency of the hunting peoples to disperse to family hunting grounds during the winter months as an impediment to their conversion to Christianity,[30] without any apparent understanding that this periodic dispersal of the people was an incident of the form of land tenure practised by the indigenous population.[31] And yet, when travelling with small family hunting groups, they noted the tendency of these groups to adhere to particular boundaries and not "trespass" upon the hunting grounds of others.

Father Le Jeune, in his *Relation* of 1634, recounted how he had wintered with one family hunting group. The entire group was alarmed when they discovered "the trail of several (other) Savages, who were nearer to us than we thought, *for they were coming to hunt upon our very grounds*, taking away our game and our lives at the same time"[32] [emphasis added]. Later in the same winter Le Jeune was amazed by the generosity of the "barbarians" when they refrained from punishing another family group which had strayed into their family hunting territory:

> But admire, if you please, the love these barbarians have for each other. These new guests were not asked *why they came upon our boundaries*, if they were not well aware that we were in the same straits as they were, and that they were coming to take the morsel out of our mouths. On the contrary, they were received, not with words, but with deeds; without exterior ceremony, for of this the Savages have none, but not without charity. They threw them large pieces of the Moose which had

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[30] In his undated *Relation* entitled "What Occurred in New France in the Year 1642 and 1643," Father Vimont lamented that "It is necessary to follow these Peoples, if we wish to Christianize them; but, as they continually divide themselves up, we cannot devote ourselves to some without wandering from the others.": *The Indians of North America from the Jesuit Relations and Allied Documents*, Edna Kenton, ed. (New York: Harcourt, Brace & Company, 1927), Vol. I, pp. 256 to 257.

[31] The *Jesuit Relations* are full of references to the agrarian way of life as the Fathers understood it, and which they appear to have hoped the Aboriginal population would soon adopt: *Jesuit Relations*, by Father Le Jeune at Vol. 5, p. 33; Vol. 8, p. 29; Vol. 12, p. 77; Vol. 12, p. 255; by Father Chaumonont at Vol. 18, pp. 78, 87, 93, 101, 109; by Father Cramoisy at Vol. 20, pp. 127, 141.

[32] *Ibid.*, Vol. I., p. 203.

> just been killed, without saying another word but, *mitisoukou*, "eat"
> ....[33]

It is doubtful that the Jesuit Fathers understood land tenure other than in the French feudal agrarian context with which they were acquainted; however, inadvertently Le Jeune described attitudes and behaviours consistent with an entirely different form of land tenure, *i.e.*, that of the family hunting territory.[34]

Other contemporary accounts described similar practices among the hunting peoples of Ontario, Quebec and the eastern seaboard of the United States, extending from the Penobscot of Maine to the Montagnais and Saulteaux of Upper and Lower Canada. In 1643, the protestant missionary Roger Williams, who had lived among the Natives and displayed greater sympathy for them and their institutions than the Jesuits, attempted to produce a catalogue of their languages accompanied by his own observations and commentary.[35] In *A Key*, Williams described the land tenure system of the hunting peoples of Rhode Island and Maine in the following "observations":

> The Natives are very exact and punctuall in the bounds of their Lands, belonging to this or that Prince or People (even to River, Brooke, etc.). And I have known them to make bargaine and sale amongst themselves for a small piece, or quantity of Ground: notwithstanding a sinfull opinion amongst many that Christians have a right to heathen lands
> ....[36]

Williams also described rules against trespass on "proprietary" hunting grounds, which required the rendering of a prescribed tribute to the "owner." For instance, in his account of the language, he defines *Pumpom* as "a tribute deer skin" observing that "When a Deere (hunted by the Indians, or wolves) is kild in

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[33] *Ibid*, Vol. I, p. 205; these were the same "barbarians" to whom Father Vimont referred uncharitably as "Slaves of the Devil," *supra* note 13.

[34] Father Druilletes' comments of 1627 again were indicative of a system of recognised boundaries to family hunting territories: "The good people were not *reproved because they ran over other peoples' marches*" [emphasis added]. *Jesuit Relations*, Vol. 32, p. 271.

[35] Roger Williams, *A Key Into the Language of America* (London: Gregory Dexter, 1643).

[36] *Ibid.*, reprinted in 1973 (Detroit: Wayne State University Press, 1973), at p. 167. The "sinfull opinion" he referred to may have been a veiled criticism of the opinion of Sir Edward Coke, C.J. in *Calvin's case* (1608), 7 Co. R. 1 [77 E.R. 377] to the effect that the property of the inhabitants of "pagan kindoms" was forfeit upon a transference to British sovereignty.

the water. This skin is carried to the Sachim or Prince, within whose territory the deer was slaine."[37] These observations, again, were inconsistent with conceptions of the eastern woodland hunting peoples as roving nomads with no conception of land tenure. On the contrary, precise territorial boundaries were described, together with rules relative to tribute payable to the owner for their use and transit.

The system appeared still to have been in use in the early eighteenth century. A report of 1723 read as follows:

> The principle of the Indians is to mark off the hunting ground selected by them by blazing the trees with their crests, so that they may never encroach on each other. When the hunting season comes, each family pitches its tents in the neighbourhood of its chosen district, and having reconnoitred the paths taken by the beavers to their feeding ground, the traps are made ... .[38]

The North-West Company merchant explorer Daniel Harmon, who made his observations in the early nineteenth century,[39] also observed the phenomenon of the family hunting territory in respect of the Aboriginal populations of the woodlands of eastern North America, noting that the system did not operate among the peoples of the plains:

> Every tribe has its particular tract of country; and this is divided again, among the several families, which compose the tribe. Rivers, lakes and mountains, serve them as boundaries; and the limits of the territory which belongs to each family are as well known by the tribe, as the lines which separate farms are, by the farmers, in the civilized world. The Indians who reside in the plains, make no subdivisions of their territory; for the wealth of their country consists of buffaloes and wolves, which exist in plenty, everywhere among them.[40]

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[37] *Ibid.*, at p. 227. In the original 1643 edition, Williams also cited Young's *Chronicle of Plymouth*, pp. 361 to 362, to the effect that "Every Sachim knoweth how far the bounds and limits of his own country extendeth; *and that is his proper inheritance.* ... In this circuit whosoever hunteth, if they kill any venison, bring him his fee; which is the fore parts of the same, if it be killed on the land, but if in the water, then the skin thereof" [emphasis added]. Quoted in Speck, *supra* note 1 at p. 292.

[38] Cited in Appendix A to H. A. Innis, *The Fur Trade in Canada* (New Haven: Yale University Press, 1930).

[39] Harmon, *Journal of Voyages and Travels in the Interior of North America, 1800 – 1819*, *supra* note 12.

[40] *Ibid.*, "Account of the Indians on the East Side of the Rocky Mountains" at pp. 330 to 331.

Early in the twentieth century the American anthropologist Frank Speck concluded that family hunting territory was central to Algonkian land tenure based on his interviews with actual Aboriginal informants:

> The idea has always prevailed, without bringing forth much criticism, that, in harmony with other primitive phenomena, the American Indians had little or no interest in the matter of claims and boundaries to the land which they inhabited. This notion has, in fact, been presupposed for all the native tribes who have followed a hunting life, to accord with the common impression that a hunter has to range far, and wherever he may, to find enough game to support his family.
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> I should at least like to show that the Indian tribes of eastern and northern North America did have quite different claims to their habitat. Moreover ... these claims existed even within the family groups composing the tribal communities. There is, indeed, considerable significance in the fact that these tracts were remotely inherited in the families and that they were well known by definite bounds not only among the owners but among the neighboring groups. In many cases they were also associated with certain social clan groupings within the tribe. It would seem, then, that such features characterize actual ownership of territory.[41]

The evidence given by Speck's Aboriginal informants early in the twentieth century, together with historical accounts from the early post-contact period, provided strong evidence that the family hunting territory was well defined in geographical terms, was harvested in a conservation-conscious manner by its owners (due to the necessity of future provision from the same land), devolved upon the death of the "owner" to his sons partibly, and that more or less severe rules existed against trespassers.

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[41] See, Frank G. Speck, *supra* note 1 at p. 289. It should be noted that other anthropologists challenged Speck's view and argued that historical evidence supported the development of the family hunting territory system in response to European influences, particularly the fur trade: see Julian H. Steward, "The Economic and Social Basis of Primitive Bands," in *Essays in Anthropology Presented to A. L. Kroeber* (University of California Press, 1936), pp. 331 to 350; Daimond Jenness, *The Indians of Canada* (Bulletin 45, National Museum of Canada, 2nd ed., 1932, n.d. Chapter 9), pp. 124 to 125; D. Jenness, *The Ojibwa Indians of Parry Sound, Their Social Relations and Religious Life* (Bulletin 78, Anth. Series no. 17, National Museum of Canada, 1935), pp. 4 to 6. It is noteworthy, however, that the family hunting territory system was also observed among the hunting tribes of Siberia and northeastern Asia (Tungus and Tatars amongst others) which could not have been influenced by the operations of the Hudson's Bay and Northwest Companies: see, F. G. Speck, "Land Ownership Among Primitive Peoples," *International Congress of Americanists*, XXII, 1926, p. 325. This tends to support the hypothesis that the family hunting territory was a pre-Columbian phenomenon in North America.

Quoting the testimony of an Ojibwa Chief of the Temagami Band in 1915, Speck was able to draw inferences about the land tenure of the woodland hunting peoples which had prevailed at least around the mid-point of the nineteenth century:

> In the early times the Indians owned this land, where they lived, bounded by the lakes, rivers, and hills, or determined by a certain number of days' journey in this direction or that. *Those tracts formed the hunting grounds owned and used by the different families* [emphasis added].
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> We Indian families used to hunt in a certain section for beaver. We would only kill the small beaver and leave the old ones to keep breeding. Then when they got too old, they too would be killed, just as a farmer kills his pigs, preserving the stock for his supply of young. The beaver was the Indians' pork; the moose, his beef; the partridge, his chicken; and there was caribou or red deer, that was his sheep. *All these formed the stock of his hunting ground, which would be parcelled out among the sons when the owner died.* He said to his sons, "You take care of this tract; see that it always produces enough." That was what my grandfather told us. His land was divided among two sons, my father and Pishabo, my uncle. *We were to own this land and no other Indians could hunt on it. Other Indians could go there and travel through it, but could not go there to kill the beaver. Each family had its own district where it belonged, and owned the game. ... If another Indian hunted on our territory we, the owners, could shoot him. The division of the land started in the beginning of time, and always remained unchanged.* I remember about twenty years ago some Nipissing Indians came north to hunt on my father's land. He told them not to hunt beaver. "This is our land," he told them; "you can fish but you must not touch the fur, as that is all we have to live on. Sometimes an owner would give permission for strangers to hunt for a certain time on a certain tract. This was often done for friends or when neighbours had had a poor season. Later the favour might be returned[42] [emphasis added].

Among the Temagami Band Speck observed the proprietary family hunting ground system still in full operation early in the twentieth century. He described it as follows:

> There are fourteen families that form the group. As might be expected, the family hunting territory is of primary importance here as it is throughout the whole region occupied by the northern Algonkin hunting tribes. We find the general characteristics of this type represented here by family proprietorship of the districts, retaliation against trespass, conservation of animal resources, and certain regulations governing inheritance and marriage among the families. The districts of these family groups are fairly definite, bounded by

[42] Testimony of Temagami Chief Alec Paul (in translation) quoted in *ibid.*, at pp. 294 to 295.

> lakes, rivers, ridges, and often groves of certain trees, being exceedingly well known and respected by all the hunters, under a very strong sense of proprietorship. The Timagami even went so far as to divide their districts into quarters, each year the family hunting in a different quarter in rotation, leaving a tract in the centre as a sort of bank not to be hunted over unless forced to do so by a shortage in the regular tract. These quarters were criss-crossed by blazed trails leading to temporary camps. The Timagami called one of these territories *nda'k'im*, "my land."[43]

The family hunting territory was held by the family that used it and was capable of devolution through the family from one generation to the next. Boundaries were clearly understood and penalties for trespass existed, and could be severe. All this was consistent with the existence among the woodland hunting peoples of a non-agrarian form of land tenure with clearly understood rules and uses.

Speaking of his further researches relative to the land holding patterns of the hunting peoples of Newfoundland, Maine, the south Labrador coast, and parts of Ontario and Quebec, Speck observed:

> [L]et me define the family hunting group as a kinship group composed of folks united by blood or marriage, having the right to hunt, trap, and fish in a certain inherited district bounded by some rivers, lakes, or other natural landmarks. These territories, as we shall call them, were, moreover, often known by certain local names identified with the family itself. The whole territory claimed by each tribe was subdivided into tracts owned from time immemorial by the same families and handed down from generation to generation. The almost exact bounds of these territories were known and recognized, and trespass, which, indeed, was of rare occurrence, was summarily punishable. These family groups or bands form the social units of most of the tribes, having not only the ties of kinship but a community of land and interests ... .
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> Regarding territorial bounds, *I indeed found them so well established and definite that it has been possible to show on maps the exact tract of country claimed by each family group*[44] [emphasis added].

The picture that emerged differed radically from the image of the purely nomadic hunter. Family hunting territories were defined with remarkable precision. Trespass was punishable. The land devolved from one

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[43] *Ibid.*, at pp. 297 to 298.
[44] *Ibid.*, at p. 290.

generation to the next. The hypothesis that the families considered themselves to possess a proprietary interest was reinforced by the Native terminology used to describe the hunting districts. The Temagami word for a family hunting district was *nda'k'im*, literally, "my land."[45]

Evidence of the existence of the family hunting territory as a form of land tenure was also found in the conservation-consciousness displayed by family groups within the territories in which they harvested game. This involved the taking of only so much game as was required for subsistence and, in some cases, by the rotation of hunting on an annual basis throughout the family territory, permitting game to regenerate by procreation in the areas not harvested. As Speck pointed out in 1915, conservation-consciousness relative to a particular tract of land was consistent with the expectation that the same land, not somebody else's, would have to satisfy future needs:

> Another feature of economic importance in the institution of the family hunting territory is the conservation of resources practised by the natives. In their regime this means the conservation of game. Let us consult, for example, the native regulations governing the treatment of hunting territories among the northern Ojibwa and the Montangnais of the province of Quebec who are often accused of being improvident as regards the killing of game, notwithstanding the fact that they depend upon it for their living. The Montagnais subsist entirely upon the products of the hunt, trading the furs they obtain during the winter for the necessities of life at the Hudson's Bay Company's posts. Accompanied by his family, the Montagnais hunter operates through a certain territory, known as his "hunting ground" (*oti'tawin*), the boundaries determined by a certain river, the drainage of some lake, or the alignment of some ridge. This is his family inheritance, handed down from his ancestors. Here in the same district his father hunted before him and here also his children will gain their living. Despite the continued killing in the tract each year the supply is always replenished by the animals allowed to breed there. There is nothing astonishing about this to the mind of the Indian because killing is definitely regulated so that only the increase is consumed, enough stock being left each season to insure a supply for the succeeding year. In this manner game is "farmed," so to speak, and the continued killing through centuries does not affect the stock fundamentally. It can readily be seen that the thoughtless slaughter of game in one season would spoil things for the next and soon bring the proprietor to famine.[46]

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[45] *Ibid.*, at p. 298; among the Penobscot of Maine, who inhabited the Penobscot River Valley, the word for a family hunting territory was *nzi'bum*, "my river," which appeared to indicate proprietary claims to the particular sections of the river valley in which different family groups harvested game for food.
[46] *Ibid.*, at p. 293.

It was reasonable to conclude that a system of land tenure, in addition to definable patterns of land occupation, existed among the Aboriginal hunting peoples of eastern Canada. The rules of the institution did not appear to have been as elaborate as the land tenure systems of the Pima or Coast Salish peoples, but this may be accounted for by the comparative simplicity of the resource base provided by the land. Social organisation for irrigation of crops or large scale fishing was not a part of their subsistence hunting culture. Nevertheless, relative to the resource yielding land they occupied, it is appropriate to compare these Aboriginal hunters to Aboriginal farmers, in that their game killing had the characteristics of a regular and regulated harvest. Their system of tenure recognised definite boundaries, allowed for the devolution of land upon the death of the "proprietor," had rules against trespass, and rules to maintain the productivity of the resource base. Even their language reflected a proprietary attitude towards land.

(3) The Agricultural Huron and Iroquois Confederacies

Prior to their decimation by European diseases and war with the Iroquois Confederacy in the mid-seventeenth century, the people of the Huron Confederacy occupied the area of land which now comprises the northern limits of the fertile farming belt of southern Ontario. Unlike the Algonkian and Micmaw, the Hurons were primarily an agricultural people. Trigger estimated that horticultural yields accounted for approximately three quarters of all food consumed.[47] Corn, beans, pumpkins and tobacco were their staple crops.[48]

It would seem unlikely to encounter an agrarian people with no concepts of land tenure and, indeed, this was not the case with the Hurons. Huron society was ordered on the basis of kinship groups, many related families occupying single large longhouses. There was strict division of labour between the sexes. Women tended the agricultural crops grown in cleared fields, while men devoted their productive efforts to defense, clearing land for agriculture, and to hunting and fishing as supplementary food sources.[49]

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[47] Bruce G. Trigger, *The Huron Farmers of the North* (Stanford: Holt, Rinehart and Wilson, 1969) at p. 26.
[48] *Jesuit Relations*, Vol. I, p. 21.
[49] *Ibid.*, Vol. 38, p. 255.

It appeared that agricultural land usually belonged to individual families, while the crops harvested may have belonged to the extended family group occupying the longhouse. Agricultural land could also be held by individual persons.[50] There was no question that cleared agricultural land was considered as property. As Trigger pointed out, upon moving a village the local authorities would attempt to re-locate near to another village where they could "borrow" cleared arable land until sufficient new land had been cleared for the movers to cultivate their own fields again.[51]

It appeared that land could be acquired by clearing it for agricultural purposes, but there was no conception of an enduring "title" to land which, having once been cleared for agriculture, was no longer planted.[52]

> Any man could clear as much land as he wished, and this land remained in the possession of his family members so long as they wished to cultivate it. Once abandoned, however, a field could be planted by anyone who wished to do so. It is unclear to what degree each woman regarded the corn, beans, and squash she produced as her own property or whether the women living in a single longhouse considered all the food they produced to be their common possession. It is significant, however, that the large vats or casks that were used to store corn were located in the porch or in some corner of the longhouse, not in the divisions belonging to individual families. The reciprocity and sharing among the kinsmen that inhabited a single longhouse must have encouraged the *de facto* pooling of their resources.[53]

Land, consequently, was not a completely communal resource. The Huron system of land tenure appeared to have provided for initial acquisition of land by clearing it for agricultural production and retention, so long as such production continued. Land was held by the family whose men had cleared it, whereas its agricultural yield belonged, probably in common, to the occupants of the longhouse whose women had

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[50] *Ibid*, Vol. 23, p. 117: "When the earth is altogether free of snow each one visits his field and begins to till it." (Father Lalemont); Vol. 38, p. 57: "Some Hiroquois (*sic*) ... slew a poor Huron and his wife who were at work *in their own field*" (Father Druillettes, emphasis added).

[51] Trigger, *supra* note 47 at p. 28; see also the accounts of land borrowing recorded by the Jesuit missionaries, *Jesuit Relations*, Vol. 35, p. 209; Vol. 62, p. 181.

[52] Interestingly, this aspect of Huron tenure was completely different from the Pima tenure discussed above, in which land became the inalienable property of its owner even if it was left unused for lengthy periods of time or used by someone else: see Edward F. Casteller and Willis H. Bell, *Pima and Papago Indian Agriculture*, *supra* note 4, at p. 128.

[53] Trigger, *supra* note 47.

done the cultivation. There was no indication that cleared agricultural land was considered communal or village property, or that communal usufructuary rights to cleared land extended beyond the occupants of the longhouse with which the land was associated.[54]

The six nations of the Iroquois Confederacy, like the Hurons whom they ultimately defeated in war, were also an agricultural people. Their principal staples were corn, buckwheat and beans.[55] As to land tenure, land could be cultivated communally by a House, by individuals alone, or reserved for the "nation." Early in the twentieth century, A. C. Parker (*Gawasowaneh*), an anthropologist of Seneca descent, noted that "Certain fields were reserved for the use of the nation, that is, to supply food for the councils and national festivals. These fields were called *Kendiu'gwa'ge hodi' yen'tho*."[56]

Commentary by early observers confirmed that communal cultivation of land was not universal. Writing in 1587, Thomas Hariot stated:

> All the aforesaid commodities for victuals are set or sowed sometimes in grounds apart and severally by themselves, but for the most part together in one ground mixedly.[57]

As to "private land" Parker wrote:

> Cornfields were not always owned by the tribe or clan. Individuals might freely cultivate their own fields[58] if they were willing to do their share in tribal fields. If they did not do this they could not claim their share of the communal harvest. Individual fields were designated by a post on which was painted the clan totem and individual name sign. Any distressed clansman, however, might claim a right in the individual field and take enough to relieve his wants, provided he notified the owner.[59]

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[54] This is in contrast to the account given of the Natchez Indians in the vicinity of New Orleans, who produced their entire crop communally and submitted to the Chief's distribution of the fruits of the harvest: *Jesuit Relations*, Vol. 68, pp. 137 to 139.
[55] *Ibid.*, Vol. I, p. 85.
[56] *Parker on the Iroquois*, reprinted with introduction by William N. Fenton (Syracuse, New York: Syracuse University Press, 1968), "Iroquois Uses of Maize" at p. 24. Arthur C. Parker (*Gawasowaneh*), 1881 – 1955 was a distinguished American ethnologist and a Seneca Iroquois.
[57] Thomas Hariot, "*Brief and True Report*" cited in *ibid.* at p. 25.
[58] *Jesuit Relations*, Vol. 52, p. 165.
[59] Parker, "Iroquois Uses of Maize," *supra* note 56 at p. 29.

To suggest that the peoples of the Huron and Iroquois Confederacies had no institutions or rules of land tenure would clearly be incorrect. These institutions and rules, like those of other Canadian Aboriginal societies described above, have present legal significance, which will be examined in Chapter Two.

(3) Micmaw Land Tenure in Nova Scotia

According to Henderson,[60] an Aboriginal scholar and commentator, the Micmaw[61] Confederacy was highly territorial. The Confederacy recognised the bounds of its territories and divided them internally into seven distinct districts. At one point, a treaty with the Mohawk people involved the cession of land to the Mohawk, thereby ending a period of hostilities.[62] The very possibility of ending hostilities by a treaty of cession indicated a sense of rights in the land being ceded, at least by the ceding people. It also undermines prevalent assumptions that the Micmaw regarded land as inalienable.

Within the Micmaw Confederacy, however, Henderson described a relationship to land which appeared to have been more managerial then proprietary. Family groups were assigned responsibility for valuable resource producing areas, including hunting grounds, but also fishing areas and other food sources. The "right" to retain control over the resource depended upon its proper management and a socially accepted degree of sharing what it yielded. If accurate, Henderson has identified an Aboriginal land management system in which political control was exercised over productive resources in the interests of the overall community. Proper management of a resource site for seven generations gave the managerial family a "legacy" over the resource, but this legacy could be lost by mismanagement or greed.[63]

> Micmaw "property rights" were usually obtained through kinship rather than purchase. They were endowments or legacies. Everyone has claims, through birth or marriage, to the use of a great variety of sites

[60] James Sakej Youngblood Henderson, "Micmaw Land Tenure in Atlantic Canada" (1995), 18 *Dalhousie Law Journal* 196; also, Henderson, "First Nations Legal Inheritances in Canada: The Mikmaq Model," in *Canada's Legal Inheritances*, ed. by DeLoyd J. Guth and W. Wesley Pue (Winnipeg: Canadian Legal History Project, 2001), pp. 1 to 31.
[61] Plural for Micmaq.
[62] Henderson, "Micmaw Land Tenure in Atlantic Canada," *supra* note 60 at p. 230.
[63] *Ibid.*, at p. 235.

> and resources, which can also be claimed by others on the same ground. Often the word for kinship and ownership are the same. It is inconceivable in a Mikmaq world view that an individual could claim an exclusive use or entitlement to a particular site or that any family could lose their relationship to a site. This concept applied both to men and women.[64]

The system described included rights of inheritance, not to private property, but to "legacies" of management of productive resources. Henderson explained:

> What is not understood by outsiders was that each family or personal claim to a resource or space is based on permissions given by local, regional or national consensus. While these boundaries may be imprecise or shifting to an outsider, they are part of a complex tenure based on sharing rather than exclusive use.
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> ...The tenure is held for future generations. A family or an "individual" might enjoy wide administrative authority over a resource or space (a *legacy*), but they have no right to withhold the use of the resources or the products of their use to another insider. The system of kinship relations unites everyone in a web of complementary rights and responsibilities. ...The continued strength of any claim in the indigenous tenure is a function of sound management and generosity. These legacies are "strong" enough to create incentives to conserve, but "weak" enough to create incentives to share.
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> The Mikmaq legacy became vested in a family or person after seven generations of sound management and generosity. A right of succession or inheritance is based on actual services to the elderly managers as well as management of the resource, rather than kinship.
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> [A]ny district chief or family leader who was negligent or careless with the resources or did not deal in a generous and fair manner with other Mikmaq was deprived of respect, dignity, and ultimately their responsibilities [for management of the resource].[65]

Henderson's description of what he referred to as "Micmaw tenure" was of a society which recognised definite territorial boundaries and internal divisions within these boundaries. Within the overall territory, the land was held by the Micmaw Nation, as evidenced by its ability to make peace with other Aboriginal

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[64] *Ibid.*, at p. 234.
[65] *Ibid.*, at pp. 235 to 236.

peoples by ceding parts of the territory. Within the territory of the Confederacy, rights to exploitation of resources appeared to have been governed politically. Individuals could acquire usufructuary rights of exploitation of particular resources which, upon seven generations of proper management, became "vested" and apparently capable of inheritance. These "legacies" were, however, ultimately subject to political control if mismanaged by their "proprietors."

It is probably impossible to classify the Micmaw land tenure described by Henderson either as constituting a set of private or family ownership rules, or as a system of complete communal ownership of resources. The closest analogous classification in European categories was probably that of the private management of publicly owned resources for the benefit of the community, subject to political control. Their can be little doubt, however, that the overall territory of the Confederacy was held by its people.

Forward to Legal Analysis

As indicated at the outset, the above examples are not, nor are they intended to be, exhaustive or detailed examinations of pre-contact Aboriginal systems of land tenure in the territory which now comprises Canada. In contrast, the purpose of this Chapter has been to dispel any prevalent assumption that Canadian Aboriginal peoples did not have systems of land tenure or rules governing the use of the lands they occupied.

If simple territorial occupation is now all that can be demonstrated in respect of some Aboriginal peoples, there are legal consequences as to present day claims to ownership which should flow from this. If, in addition to territorial occupation, indigenous rules governing the use of land, or even systems of rules which amount to "rules of property," can be demonstrated, further and different legal consequences should follow. These legal consequences are examined in Chapter Two.

Chapter Three, in turn, examines a puzzling legal phenomenon best characterised by the consistent disregard by Canadian courts of any rules of land law by which they profess themselves to be bound, in land claim disputes involving Aboriginal peoples.

Chapter Two

Legal Origins of Aboriginal Entitlements to Land

> "The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected."[66]

Introduction

In *Calder v. Attorney General of British Columbia*, Judson J., speaking for the majority, said:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Royal Proclamation of 1763,[67] the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means, and it does not help one in the solution of this problem to call it a "personal or usufructuary right." ... [T]hey are asserting ... that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished.[68]

Judson J.'s statement, while having the apparent character of a legal proposition, was in fact more in the nature of an acknowledgement of a legal historical reality. Aboriginal peoples first inhabited the territories which ultimately came to comprise Canada.

This Chapter examines what were, or should have been, the legal consequences of this first occupation by Aboriginal peoples. In this analysis, it becomes necessary to examine the body of Imperial constitutional law and English common law which, for better and worse, has been received in all Canadian common law

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[66] Lord Denning, *Oyekan v. Adele*, [1957] 2 All E.R. 783 (P.C.) at p. 788.
[67] See the discussion of the *Royal Proclamation of 1763* and its probable legal consequences in Chapter 3.
[68] [1973] S.C.R. at p. 328; see the detailed discussion of the *Calder* case in Chapter 3.

provinces and territories,[69] and, in the twenty-first century, constitute the roots of the legal system now in effect in this country.[70]

In order to ascertain what legal principles Canadian courts were legally obliged to apply,[71] it is necessary to re-examine Imperial constitutional common law, the received English common law of property and possession, and the rights of the subject as against the Crown in respect of land. From these three distinct bodies of English law, the following broad propositions can be deduced, which ought to have governed the entitlements of Aboriginal peoples to land under Canadian law.

First, as a matter of Imperial constitutional common law, irrespective of the reception of English land law in Canada's common law jurisdictions, Aboriginal peoples' entitlements to land ought to have been recognised and given effect by the courts, in accordance with Aboriginal laws and systems of tenure, and wherever these could be ascertained. The Crown's "radical" title to land in Canada did not signify that the Crown possessed any beneficial interest in the land which it was capable of granting free of pre-existing entitlements.[72]

Secondly, where Aboriginal peoples were found to be in possession of land, the English common law presumption of seisin flowing from possession ought to have been applied by the courts, as against any

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[69] For a comprehensive treatment of the reception of English law in Canada, see J. E. Cote, "The Reception of English Law" (1977), 15 *Alberta Law Review* 29. The Province of Quebec, of course, is an exception, at least in respect of the law of property and civil rights within the province because it retained French law.

[70] It has been suggested to the author that such an analysis is unacceptable from the point of view of Aboriginal peoples, in that it pre-supposes the legitimacy of the reception of English statutory and common law principles as the governing legal principles in the geographical territory of Canada. In the present context, the only necessary response is that this is a political rather than a legal objection, and has no bearing upon the legal entitlements of Aboriginal peoples under the principles drawn from English law which were, or should have been, applied by Canadian courts. As will be seen, the most notable feature of the development of Canadian law as it relates to Aboriginal peoples has been the selective non-application of its own legal principles drawn from Imperial and English law, which ought to have governed.

[71] As opposed to the frequently shifting and often inconsistent set of "principles" which were in fact applied, without precedent or authority; see Chapter 3.

[72] *Le Case de Tanistry* (1608), Davis 28 [80 E.R. 507]; *Witrong v. Blany* (1674), 3 Keb. 401 [84 E.R. 789]; *Campbell v. Hall* (1774), 1 Cowp. 204 [98 E.R. 1045]; *Freeman v. Fairlie* (1828), 1 Moo. I.A. 305 [18 E.R. 117]; *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (P.C.); *Oyekan v. Adele*, [1957] 2 All E.R. 785 (P.C.). Moreover, there is no common law principle that the Crown beneficially owns land that cannot be shown to be owned by anyone else: see *Bristow v. Cormican*, [1878] 3 A.C. 641 (H.L.), *per* Lord Blackburn at p. 667.

other person who could not demonstrate a prior superior title to the land in question.[73] Common law rights flowed from possession of land. In the absence of a Crown grant, long possession would be explained by the presumption of a fictitious grant from the Crown, or alternatively by a presumption that all competing interests had been extinguished by prescription.[74]

Finally, Aboriginal peoples in possession of land at the time of the assertion of British sovereignty ought, in many cases, to have acquired these lands in fee simple, the highest estate in land recognised by the common law, by virtue of prescriptive rights against the Crown, established by statute in English law, and received in Canada by adoption,[75] based on their undeniably long-term occupation. These prescriptive rights would legally have ripened into full ownership prior to any litigation of land claims in respect of unceded territory.

It is therefore to an examination of these sources of Canadian law, which Canadian courts were obliged to recognise and apply domestically, that we must now turn.

Imperial constitutional common law

(1) Development of the doctrine

Canadian judges and lawyers have become accustomed to considering "constitutional law" as that law which is embodied in written documents constituting the structure and powers of governments, together with the judicial decisions which have interpreted these instruments. In fact, this is a highly incomplete

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[73] J. M. Lightwood, *Possession of Land* (London: Stevens and Sons, 1894); *Roe dem. Haldane and Urry v. Harvey* (1769), 4 Burr. 2484 [98 E.R. 302]; *Peaceable dem. Uncle v. Watson* (1811), 4 Taunt. 16 [128 E.R. 232]; *Asher v. Whitlock* (1865) L.R. 1 Q.B. 1; *The Lord Advocate v. Lord Lovat*, [1880] 5 A.C. 273 (H.L.); *Perry v. Clissold*, [1907] A.C. 73 (P.C.); *The Halifax Power Co. Ltd. v. Christie* (1915), N.S.R. 264 (C.A.); *Allen v. Roughley* (1955), 94 C.L.R. 98 (H.C.).

[74] *Allen v. Roughly* (1955), C.L.R. 98 (H.C.) at p. 138.

[75] *Regina v. McCormick* (1859), U.C.Q.B. 131; *Attorney General for New South Wales v. Love*, [1888] A.C. 679 (P.C.); *Emmerson v. Madison*, [1906] A.C. 569 (P.C.); *Hamilton v. The King* (1916), 54 S.C.R. 331 (S.C.C.); *Attorney General of Canada v. Krause* (1956), 3 D.L.R. (3d) 400 (Ont. C.A.).

conception of the content of constitutional law. During the period of British colonialism, there grew up a common law of Imperial expansion, found in the decisions of the English judges of the period. This body of law not surprisingly dealt, *inter alia*, with the legal consequences of the assertions of Crown sovereignty over increasingly large areas of the globe. In particular, legal principles were developed to take account of the pre-existing legal systems of new territories which, although already inhabited, came under the "protection" of the Crown, and to preserve the established regimes of property and civil rights of the indigenous inhabitants of these new territories.

Indeed, the term "Imperial constitutional common law" remains something of a misnomer, as its roots in the common law predate any significant overseas expansion of empire by Great Britain. The general principle of the cases may be simply stated: upon the acquisition of a new inhabited territory by the Crown, whether by conquest[76] or by the gradual incursion of British settlers ("settlement"),[77] the existing laws of the indigenous inhabitants of the new territory, and in particular their property rights, remained unaltered, unless subsequently changed by the Sovereign by some legally permissible method.[78] It is true that Sir Edward Coke C.J. appeared to have believed that this rule did not apply to the Crown's acquisition of "pagan" kingdoms,[79] but this view was later repudiated by Lord Mansfield as an "absurd exception" which probably had its origins in the "mad enthusiasm of the crusades."[80]

For present purposes, the important aspect of the doctrine was that civil obligations *inter se*, and in particular the systems of land tenure of the inhabitants of newly acquired territories, remained intact unless subsequently altered by the Sovereign by a legally permissible method. Most significantly, the preservation of indigenous interests in land according to indigenous laws, where they could be ascertained,

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[76] *Campbell v. Hall*, *supra* note 72.
[77] *Freeman v. Fairlie*, *supra* note 72.
[78] In the case of territories acquired by conquest or cession, moreover, what constituted the "Sovereign" depended, in turn, upon how the new territory was to be governed. Prior to the granting of an assembly, alterations to pre-existing indigenous laws could be made by the Monarch acting by order in council under the Royal Prerogative; after the meeting, or even the promise, of an assembly, whether elected or appointed, the Monarch's power unilaterally to alter indigenous laws was at an end, and such changes could only by made by Parliament: *Campbell v. Hall*, *supra* note 72.
[79] *Calvin's Case* (1608) 7 Co. R. 1 [77 E.R. 377].
[80] *Campbell v. Hall*, *supra* note 72, at 1 Cowp. at 209 [98 E.R. at 1048].

constituted an exception to the legal fiction that, under English law, all land ownership flowed ultimately from the Crown.

An early example of the application of this principle arose in the legal aftermath of the English conquest of Ireland, an event that significantly antedated the idea of the "British Empire," as this term would popularly come to be used. Prior to that conquest, there prevailed in Ireland with respect to land the system of "Tanistry," defined as "A system of succession (to real property) known in Ireland and also traced to the Barbarian laws of Europe whereby the eldest male member of the family, normally the deceased's eldest brother or a similar near relative, succeeded, in contrast to the feudal principle of succession by the eldest son."[81] By extra-judicial resolution in 1606, the system of Tanistry was abolished.[82] Not surprisingly, questions then arose as to the security of land titles that had originated under the pre-conquest system of succession.

In *Le Case de Tanistry*,[83] the Irish Court of King's Bench rejected the argument that, by virtue of the conquest the Crown had come into legal possession of all Irish land. In order for this result to occur, there would have had to be a record of the Crown having seized the land at the time of conquest and no such record existed. Consequently, where the Native Irish population had been left in possession of land acquired under the old law, their titles remained good but further devolution of land would occur under the new common law of succession introduced by the conqueror to replace Tanistry. The Crown acquired no more than a "paramount lordship" over (i.e. the "radical title" to) the Irish lands, with the exception of any land which it had seized as of record at the time of the conquest.

Speaking in the judicial language of the day, so-called Law French, the court *en banc* stated:

> Darrainment, ou fuit object per un del counsell ove le plaintife, que la Roigne Eliz. serra dit en possession de cest terre per vertue del primer conquest of Ireland, envers ... le feoffor, que ne puissoit deriver ascun

[81] *Oxford Companion to Law* (Oxford: Clarendon Press, 1980): "Tanistry"
[82] Hans S. Paulisch, *Sir John Davies and the Conquest of Ireland: A Study in Legal Imperialism* (Cambridge: Cambridge University Press, 1985), p. 78; see also F. H. Newark, "The Case of Tanistry," *Northern Ireland Legal Quarterly*, 9 (1950 – 2) 215.
[83] *Supra* note 72.

> title al cest terre de la Corone & p ceo son feoffment, per que le defendant claime, fuit void, esteant fait per intrudor sur le possession de la Roigne: *fuit resolve encounter objection, que la Roigne Eliz. ne serra dit en actuall possession de cest terre per virtue del primer conquest, si ne appiert per escun record que le prime conqueror ad seise cest terre al temps del conquest, & appropriate ceo particularment a luy mesme, come parcel de ses propre demesnes* [emphasis added].
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> Et p ceo, quant tiele Monarch Royall, que voet governer ses subjects per un just & positive ley, ad fait novell conquest de un realme, coment que ipso facto il ad le seignory paramount de touts les terres deins un realme, issint qu touts les terres sont tenus de luy mediate vel immediate, & il ad auxi le possession de touts les terres queux il voet actualment seiser & retainer en ses proper maines, pur son profit ou pleasure ... .[84]

Consequently, just as landholdings acquired under certain customary laws of various English localities had survived the Norman conquest of England,[85] landholdings acquired under the Irish system of Tanistry were not overturned by virtue of the change of sovereignty alone, and no fresh grants from the Crown were required to establish their security

The same principle appeared to have been applied relative to land holdings in Wales after its final subjugation to the authority of the English King. In *Witrong v. Blany*,[86] a question arose as to whether a writ of *scire facias* ran in Wales. Chief Justice Hale found that it did, but only because the indigenous laws of Wales had been altered by Parliament after the conquest to permit this. In the absence of such express modification by Parliament, the old Welsh laws of partible inheritance would have prevailed.

Most significantly, Chief Justice Hale held that, while it had been competent for Parliament to enact special legislation altering the laws of Wales after the conquest, since these laws did not touch upon the land

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[84] *Le Case de Tanistry*, *supra* note 72, at Davis 40 [80 E.R. at 528].

[85] For instance, gavelkinde in Kent; gavelkinde was the local Kentish system of land tenure at the time of the Norman conquest of England, identified as the rule of partible inheritance, under which land devolved equally upon all male children, or failing a male line upon all female children, of the owner: *Oxford Companion to Law* (Oxford: Clarendon Press, 1980), "Gavelkinde."

Kentish landholdings survived the conquest of England by the Normans, just as Irish landholdings survived the conquest of Ireland by the English and the abolition of Irish Tanistry as the system of devolution.

holdings of the indigenous Welsh inhabitants, no new grant from the English Crown was required to secure their property:

> The main point whether testatum sci. fa. may issue into Wales, I hold it may well issue thither; at the common law it cannot be denied, that Wales is a distinct principality of distinct laws and language, only held of England in tenure, not in demean. So no writs could issue into Wales but 6 Ed. 1, by conquest and attainder of David and Lluellin Slaine, he had vitae and necis potestatem, and as 7 Co. 17, he might alter laws or dispose of the lands as he pleases, *but there needs no new grant for admitting parties to continue in possession this of itself is a sufficient title to Christians* but infidel kingdoms[87] having laws against the Decalogue, they are abolished by conquest, till new established [emphasis added].[88]

These early cases, decided well before the "Age of Empire," were instructive. The point was that Aboriginal peoples in North America were *not* the first nations with distinct customs, laws and systems of land tenure which fell under English sovereignty. They were preceded by centuries at least by the Kentish, the Welsh, and the Irish peoples. The general common law principle was clearly that the laws in force in a newly acquired territory at the time of its acquisition, especially those relating to land tenure, remained operative after the change of sovereignty. It was, of course, open to Parliament to change those laws, but unless and until this occurred, the *lex loci* continued in force and land holdings were not abrogated or disturbed. Upon the change of sovereignty, the lands of the indigenous peoples were held of the Crown, but obviously not by virtue of any Crown grant.

Campbell v. Hall,[89] the case most frequently referred to as establishing the principle of Imperial constitutional common law that the landholdings of a conquered people are not affected by the conquest, consequently had its origins in the common law prior to any significant overseas expansion of the British Empire. *Campbell v. Hall* involved a dispute over a tax purportedly imposed by George III on goods exported from the Island of Grenada, which, like Quebec, had been ceded to the British by the Treaty of Paris in 1763. As in the case of Quebec, a prerogative enactment was made providing for the government of the new colony by an appointed local assembly. The King then purported to use the prerogative power

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[86] *Supra* note 72.
[87] Again, a dictum referable to the "absurd exception" stated by Sir Edward Coke in *Calvin's case*.
[88] *Witrong v. Blany*, *supra* note 72.

again to impose a tax on sugar exports from the island, in order to bring its taxation structure for foreign trade into accord with that which prevailed in other Carribean sugar islands already under the Crown's sovereignty. The plaintiff, a resident of the island, disputed the validity of the new tax, on grounds that the indigenous laws of the island were unaffected by cession unless changed by the Sovereign and that, by the order in council providing for a local assembly, the King had divested himself of his prerogative power to impose the tax. It did not matter whether the assembly had ever met.

Lord Mansfield accepted the plaintiff's argument that the tax was *ultra vires* the King's prerogative powers, and in the course of his judgment set down the legal principles which have ever since been held to be part of the Imperial constitutional common law relative to property rights of the inhabitants of conquered or ceded territories. After stating the plaintiff's case, Lord Mansfield continued:

> A great deal has been said, and many authorities cited relative to propositions, in which both sides seem to be perfectly agreed; and which, indeed, are too clear to be controverted. The stating some of those propositions which we think quite clear, will lead us to see with greater perspicuity, what is the question on the first point, and upon what hinge it turns. I will state the propositions at large, and the first is this:
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> A country conquered by British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain.
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> The 2d is, that the conquered inhabitants, once received under the King's protection, become subjects, and are universally to be considered in that light, not as enemies or aliens.
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> The 3d, that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.
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> The 4th, *that the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there.* Whoever purchases, lives or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca or the Isle of Man, or the plantations, has no privilege distinct from the natives [emphasis added].[90]

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[89] *Supra* note 72.

[90] As will become evident, this proposition, while never rejected, has never been respected by Canadian courts in cases involving the land tenure of Aboriginal peoples.

> The 5th, *that the laws of the conquered country continue in force, until they are altered by the conqueror: the absurd exception as to pagans, mentioned in Calvin's case, shews the universality of the maxim.* For that distinction could not exist before the Christian era; and in all probability arose from the mad enthusiasm of the Croisades (*sic*) ... [emphasis added].
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> The 6th, and last proposition is, that if the King (and when I say the King, I always mean the King without the concurrence of Parliament) has a power to alter the old and introduce new laws, he cannot make any change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put.[91]

In the result, Lord Mansfield found that the purported tax on exports was an alteration of the laws of the colony relative to property which it was not competent to impose by the prerogative power. The sums of money collected thereunder, as the property of the island's inhabitants, were ordered to be returned to them. As will become apparent in the analysis which follows, a clear analogy should be drawn between the Crown's obligation to return property in the form of money (the fruits of the land) and its legal obligations relative to the land *per se*.

The authority of *Campbell v. Hall* as part of Imperial constitutional common law, and hence as part of received Canadian constitutional common law, has never been doubted. It established two fundamentally important propositions. First, the laws and property rights of the indigenous inhabitants of a conquered or ceded territory remained in force *ex proprio vigore* unless altered by competent legislation. No new grant from the Crown was necessary to confirm or vindicate existing landholdings. Secondly, if competent legislation did alter the existing indigenous laws, the same rules must apply equally to the property of all inhabitants of the territory. In the context of the evolution of the law of Aboriginal title in Canada, the implications are therefore two-fold. To the extent that pre-contact Aboriginal laws and systems of land tenure had not been altered by competent legislation, they remained in force and should be enforced by Canadian courts. To the extent that a new system of property law had superceded traditional Aboriginal

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[91] *Supra* note 72, at 1 Cowp. 208 to 210 [98 E.R. at 1047 to 1048].

laws and systems of land tenure. Aboriginal peoples must enjoy its benefits equally with non-Aboriginal subjects.[92]

(2) The application of the doctrine outside Canada

The common law required the respect of indigenous property rights, in accordance with indigenous laws and institutions in the inhabited territories which fell under British sovereignty, well before significant British incursions into North America commenced.[93] The doctrine appears to have been applied frequently in cases which ought to have been considered binding by Canadian courts faced with similar situations. Many decisions of the Judicial Committee of the Privy Council arising out of property disputes in former British colonies with large Aboriginal populations were instructive.

In *Cook v. Sprigg*,[94] one Sigcau, the sovereign despot of Pondoland, made certain grants of land to the plaintiffs, who were the appellants before the Their Lordships' Board. It appeared that the laws of the Pondo people did not permit Sigcau, as despot, to make these alienations. In 1894, Pondoland was annexed to the Cape Colony,[95] the government of which refused to recognise the grants. The plaintiffs brought an action against the Cape Colony government for recovery of the lands they had been granted.

Their Lordships found in favour of the Cape Colony government. The Lord Chancellor said:

> A considerable amount of evidence appears to have been given with the object of shewing that the rights purported to be granted were contrary to the native laws and customs prevailing in Pondoland when they purported to be granted; that Sigcau was a lawless despot; and that any rights purporting to be granted by him were subject to his arbitrary power to recall them at any moment. ...
>
> Their Lordships do not differ with the finding in fact by the Chief Justice that at the time that Sigcau executed the instruments in question

[92] As will be seen in Chapter Three, the evolution of the concept of Aboriginal land title in Canada has respected neither of these legal principles.
[93] It is perhaps necessary to qualify the common law rule to the extent of stating that indigenous property rights were required to be respected *if* they could be ascertained: see *Re Southern Rhodesia*, [1919] A.C. 211 (P.C.).
[94] [1889] A.C. 572 (P.C.).
[95] Cape Colony Statutes, 1894, c. 5.

> he was the paramount chief of the Pondos, and that Sigcau understood perfectly well that he was purporting to grant such rights as the instruments which he executed purported to convey.[96]

The Board's finding against the appellants as to the absence of any obligation on the part of the Cape Colony government to give effect to Sigcau's land grants was explicable in terms of the pre-existing Pondo law prevailing at the time the purported alienations were made. If Pondo law did not permit Sigcau to make the alienations, they would have been void *ab initio*. If, in contrast, in accordance with Pondo law Sigcau did have authority to make the alienations, the same law would have allowed him to revoke them arbitrarily at any time without recourse against him. If such was the nature of the title the appellants had obtained from Sigcau's grant, then, *pari passu*, they had no greater right as against the government of the Cape Colony. Rather than a judicial declaration of the invalidity of land grants made pursuant to pre-existing native laws, the decision in *Cook v. Sprigg* is entirely explicable in terms of the common law requirement that native laws be enforced by the common law courts.

The later case of *West Rand Central Gold Mining Company Limited v. The King*[97] arose out of the subsequent war between the South African Republic and Great Britain. The war was lost by the South African Republic, which then ceased to exist and was annexed to other British possessions in southern Africa. In the course of the war, the government of the Republic confiscated gold belonging to the plaintiffs for "safe keeping," ostensibly to be returned at the end of hostilities. In the result, the Republic ceased to exist and the plaintiffs sued the Crown, as the Republic's sovereign successor, for recovery of the gold or its value.

The court found for the defendant Crown, distinguishing between the obligation of the conquering state to respect the property rights of the indigenous population of the conquered state, and the lack of any obligation of the Crown to succeed to the public liabilities of the conquered government. Lord Alverstone C.J. said:

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[96] [1889] A.C. at pp. 577 to 578.
[97] [1905] 2 K.B. 391.

> Lord Robert Cecil[98] argued that all contractual obligations incurred by a conquered state, before war actually breaks out, pass upon annexation to the conqueror, no matter what their nature, origin or history. He could not indeed do otherwise, for it is clear that if any distinction is to be made it must be upon grounds which, without depriving the liability of its character of a legal obligation against the vanquished State, make it inexpedient for the conquering State to adopt that liability as against itself. ...
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> The broad proposition which thus formed the basis of Lord Robert Cecil's argument almost answers itself, for there must have been, in all times, contracts made by States before conquest such as no conqueror would ever think of carrying out. Some illustrations will occur in the course of our subsequent remarks. ...
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> A country has issued obligations to such an amount as would wholly destroy the national credit, and the war, which ends in annexation of the country by another Power, may have been brought about be the very state of insolvency to which the conquered country has been reduced by its own misconduct. Can any valid reason be suggested why the country which has made war and succeeded should take upon itself the liability to pay out of its own resources the debts of the insolvent state, and what difference can it make that in the instrument of annexation or cessation of hostilities matters of this kind are not provided for?[99]

The plaintiffs' counsel had argued on the basis of *United States v. Perchman*[100] that the public liabilities of the conquered state should be honoured by the Crown. But in that case Marshall C.J. had simply said:[101]

> It is very unusual even in cases of conquest for the conqueror to do more than displace the Sovereign and assume dominion over the country. The modern usage of nations which has become law would be violated; that sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled. [102]

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[98] The plaintiffs' counsel.
[99] [1905] 2 K.B. at pp. 400 to 403.
[100] (1833), 7 Peters 51 (U.S.S.C.).
[101] *Ibid.*, at p. 86.
[102] Compare Marshall C.J.'s statements with Lord Mansfield's 4th and 5th propositions in *Campbell v. Hall*, *supra*, note 72, with which they are consistent.

This argument, in the court's opinion, was entirely beside the point:

> It must not be forgotten that the obligations of conquering States with regard to private property of private individuals, *particularly land* as to which title has already been perfected before the conquest or annexation, are altogether different from the obligations which arise in respect of personal rights by contract. As is said in more cases than one, cession of territory does not mean the confiscation of the property of individuals within that territory[103] [emphasis added].

In consequence, there was no inconsistency between the repudiation by the Crown of the public liabilities of the conquered peoples' government and the Crown's positive obligation to respect their perfected rights to property, particularly land.[104] And to the extent that "perfected rights" to land existed, they must have been perfected in accordance with the pre-existing indigenous laws, not the English law of property.

The judgments in the cases considered thus far relative to the application of the principles in *Campbell v. Hall* demonstrated that *common law* required that the property rights of indigenous populations be fully respected, *qua* indigenous rules of property, upon a transition of sovereignty. It did not matter whether the indigenous populations (Kentish, Welsh, Irish, Mohawk, Cree, or Haida) were of European origin or were populations more traditionally subsumed under the category "aboriginal." The legal effect of the transition from one sovereignty to another was to preserve, rather than to abrogate or destroy, the property rights of the indigenous population.

To this must be added one particular qualification. Constitutional common law required the preservation of pre-existing property rights upon a transition of sovereignty, *provided that these rights could be ascertained by the court.* An example of the importance of this qualification could be discerned from the radically different conclusions reached by the Privy Council in the cases of *Re Southern Rhodesia*[105] and *Amodu Tijani v. Secretary, Southern Nigeria.*[106]

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[103] As *per* Lord Alverstone C.J., [1905] 2 K.B. at p. 411.
[104] The emphasis placed by Lord Alverstone C.J. on rights to land is particularly significant in the Canadian context.
[105] [1918] A.C. 211 (P.C.).
[106] [1921] 2 A.C. 399 (P.C.).

In *Re Southern Rhodesia*, the question arose as to ownership of unpatented lands falling within the territory of what is now the state of Zimbabwe. The region had hitherto been administered by the British South Africa Company in much the same way as the Hudson's Bay Company administered large parts of what is now western Canada prior to 1870. Upon the gradual withdrawal of the Company from the affairs of the colony, it was contended that the unpatented lands belonged, variously, to the Imperial Crown, to the Crown in Right of the Colony, to the Company, and to the indigenous native population. Arguments were heard in support of the ownership claims of each contender. *Prima facie*, this was a case in which one might have expected the Aboriginal claim to be a strong one, based on occupancy of the lands from time immemorial. The Privy Council, however, was faced with the dilemma that, while the principles of *Campbell v. Hall* required that Aboriginal property rights be respected, no ascertainable Aboriginal property rights, or even laws, could be discovered.

In 1888, Queen Victoria had recognised one Lobengula as the paramount Sovereign of the Mashona and Matabele peoples who occupied most of the territory in question. The difficulty appeared in Lobengula's form of government. He was not a hereditary or dynastic king, nor was he in any meaningful sense chosen by his people. His legitimacy depended upon raw force and fear. Lobengula's rule could without prejudice be characterised as that of an arbitrary tyrant, who considered himself unrestrained by laws. He also claimed personal ownership of most of the property (principally cattle) of his people, which he could grant or forfeit at his whim. Lord Sumner described the regime of Lobengula in the following terms:

> After a fashion, Lobengula's was a regular government in which the actual rule was his. He assigned to individuals "gardens" for their personal cultivation. Under a system of short tillage and long fallows no occupation lasted long, except, perhaps, that of the kraals themselves, which he apparently respected. The community was tribally organized. It had passed beyond the purely nomadic stage, though still remaining fluid. It practised a rude agriculture, chiefly of mealies. Its wealth was mainly in cattle, and of that wealth the great bulk belonged to the king.
>
> No principle of legitimacy attached to the dynasty of Lobengula. Though he succeeded his father and left sons, there was neither successor nor pretender to his throne. He had under him a kind of senate and a kind of popular assembly. He was expected to consult the council of indunas or chiefs in matters of moment. The assent of the assembled people added authority to his public acts, and to their

> resentment or superstition he sacrificed his indunas as evil counsellors or ministers.[107]

For a time in the 1880s, the Company carried out its activities in the region with the express consent of Lobengula, who even purported to grant land and mineral concessions from time to time. However, at some time in 1892 Lobengula's warriors attacked a Company outpost and war ensued. In the following hostilities, Lobengula fled the country and eventually died of smallpox or tropical fever. "King Lobengula's kingdom perished with him."[108] From this point, the territory appeared to have descended into a state of anarchy. The king, who had arbitrarily owned most of the kingdom's property, was gone. There was no indigenous civil authority to replace him.

Aware that the principles of *Campbell v. Hall* required indigenous laws and property rights to be respected, the Privy Council searched for these without success. In language which by present day standards may seem embarrassingly eurocentric and teleological, Lord Sumner attempted to evaluate the Aboriginal laws and property rights which the common law authorities required him to respect:

> [I]t was necessary that the argument should go the length of showing that the rights, whatever exactly they were, belonged to the category of rights of private property, such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and foreborne to diminish or modify them.
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> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low on the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions of civilized societies. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case, it would make each and every person by a fictional inheritance a landed proprietor "richer than all his tribe." *On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law* [emphasis added].

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[107] [1918] A.C. at pp. 214 to 215.
[108] As *per* Lord Sumner, *ibid.* at p. 221.

> Lobengula's duties, if describable as those of a trustee,[109] were duties of imperfect obligation. Except by fear or force he could not be made amenable. He was the father of his people, but his people may have had no more definite rights than if they had been the natural offspring of their chieftain.
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> This fact makes further inquiry into the nature of native rights unnecessary. If they were not in the nature of private rights, they were at the disposal of the Crown when Lobengula fled and his dominions were conquered.
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> Whoever now owns the unalienated lands, the natives do not.[110]

The Privy Council was equally unable to assent to the proposition that the unalienated lands belonged to the Company. Almost by default, the Imperial Crown was found vested with the radical title to the lands, with the Company having acted in the capacity of a Crown agent for the purpose of granting land patents.

The unfortunate result for the Aboriginal population in the *Southern Rhodesia* case points to the limiting condition of the principles of Imperial constitutional common law: in order for indigenous property rights to be protected, they must be capable of ascertainment. The society of the Matabele and the Mashona peoples was one in which it was not clear that the Aboriginal population enjoyed any property rights even under their own laws, except by the principle that the kingdom's wealth was owned by King Lobengula, and the property rights of his subjects (and, indeed, their very lives) were subject to his arbitrary largesse and arbitrary forfeiture. In the Privy Council's opinion, this did not amount to a system of "law."

But *Re Southern Rhodesia* almost certainly represents the extreme case. In other decisions involving the property rights of Aboriginal peoples, the Privy Council was easily able to discern systems of local laws

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[109] This remark appears to have been made in response to counsel's argument that, while Lobengula claimed ownership of most of the property of his people, he held this property in a capacity analogous to that of a trustee to the people's *cestui que* trust.
[110] [1919] A.C. at pp. 233 to 235.

and property rights, and to give effect to them in their own terms notwithstanding that they differed radically from English real property law concepts.

In *Amodu Tijani v. Secretary, Southern Nigeria*[111] a cognisable system of local laws and land tenure was found and given effect. The dispute arose out of the taking of lands belonging to Tijani, a White Cap chief in Lagos, for public purposes. The legal question was the amount of compensation payable. The court of first instance found that, under the Southern Nigerian *lex loci*, the value of the plaintiff's proprietary right was simply equal to the value of the nominal tribute paid to him by the Aboriginal communities that he licensed to use the land. The Privy Council disagreed and found that the lower court's ruling had been based on a fundamental misunderstanding of the indigenous system of land tenure that had prevailed in the vicinity of Lagos for hundreds of years, and which courts of common law were, by common law principles, bound to uphold.

Viscount Haldane, delivering the decision of the Board, described the evolution and content of the relevant *lex loci* historically as follows:

> About the beginning of the eighteenth century the Island of Lagos was held by a chief called Olofin. He had parcelled out the island and some of the mainland among some sixteen subordinate chiefs, called "Whitecap" in recognition of their dominion over the portions parcelled out to them. About 1790 Lagos was successfully invaded by the neighbouring Benins. They did not remain in occupation, but left a representative ruler whose title was the "Eleko." The successive Elekos in the end became the Kings of Lagos, although for a long time they acknowledged the sovereignty of the King of the Benins, and paid tribute to him. The Benins appear to have interfered but little with the customs and arrangements of the island. About the year 1850 payment of tribute was refused, and the King of Lagos asserted his independence. At this period, Lagos had become a centre of the slave trade, and this trade centre the British Government was determined to suppress. A Protectorate was at first established, and a little later it was decided to take possession of the island. The then king was named Docemo.[112] In 1861 he made a treaty of cession by which he ceded to the British Crown the port and island of Lagos with all the rights, profits, territories and appurtenances thereto belonging. In 1862 the ceded territories were erected into a separate British government, with

[111] [1921] 2 A.C. 399 (P.C.).
[112] In fact, the incumbent King was of the House of Docemo, a distinction which later assumed considerable importance relative to Native ownership of property in *Oyekan v. Adele*, [1957] 2 All E.R. 785 (P.C.).

> the title "Settlement of Lagos." In 1874 this became part of the Gold Coast. In 1886 Lagos was again made a separate colony, and finally, in 1906, it became part of the colony of Southern Nigeria.[113]

Viscount Haldane took care to preface his remarks with a general caution relative to the interpretation of Aboriginal land title. The system of landholding described by Viscount Haldane had many of the attributes of a quasi-feudal form of tenure involving the payment of quasi-military tribute in exchange for a communal right of usufruct. It was clearly on a different footing from the Aboriginal "rights" which had existed under King Lobengula in the *Southern Rhodesia* case. It constituted a cognisable system of rules which required analysis and application.

> Their Lordships make the preliminary observation that in interpreting native title to land, not only in Southern Nigeria, but in other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. *In such cases, the Sovereign has a pure legal estate, to which beneficial rights may or may not be attached*[114] [emphasis added].
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> In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of the community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which individual members are admitted to enjoyment, and even to a right of transmitting individual enjoyment as members by assignment *inter vivos* or by succession.
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[113] [1921] 2 A.C. at p. 406.
[114] In other words, the "radical" title of the Sovereign might be no greater than the legal title of the trustee to its *cestui que* trust.

> Even when machinery has been established for defining as far as possible the rights of individuals by introducing Crown grants as evidence of title, *such machinery has apparently not been directed to the modification of substantive rights, but rather to the definition of those already in existence and to the preservation of records of that existence*[115] [emphasis added].

Viscount Haldane's description above was of a system of land tenure which was at the same time communal and based upon tribute payable to the White Cap chiefs for usufructuary enjoyment. Apparently, even Crown grants could not extinguish the existing system of tenure in favour of an individual to whom the grant was made. Since the Crown had no beneficial interest in the land, it could not grant what it did not possess:

> In the light afforded by the narrative, it is not admissible to conclude that the Crown is generally speaking entitled to the beneficial ownership of the land as having passed to the Crown as to displace any presumptive title of the natives ... . A mere change in sovereignty is not presumed as meant to disturb the rights of private owners; and the general terms of a cession are prima facie to be construed accordingly. *The introduction of the system of Crown grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing* [emphasis added].
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> The Chief is only the agent through whom the transaction [*i.e.*, the expropriation of the land for public works with compensation] is to take place, and he is to be dealt with as representing not only his own but the other interests affected.[116]

In the result, compensation was found payable to the plaintiff on the basis of the value of the land to the entire usufructuary community which held the land of Tijani, and not simply on the basis of the nominal value of the tribute which would be denied him once the beneficial interest in the land passed to the Crown absolutely under the expropriation, with the consequent extinguishment of the usufruct held of him on the basis of that tribute. The proceeds of the compensation were ordered to be paid to the individual members of the community using the land, in accordance with some estimate of their beneficial interest in it.

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[115] [1921] A.C. at pp. 403 to 404; the principle that Crown grants of land are qualified by a variant of the maxim *nemo dat quod non habet* is considered *infra*.
[116] [1921] A.C. at pp. 407 to 408.

The reason for the difference between the result in the *Southern Rhodesia* case and that in *Amodu Tijani* was clearly the possibility, in the latter case, of ascertaining a cognisable Aboriginal *lex loci* which, once understood, must at common law be given effect to. The case of the lawless tyrant Lobengula was likely to be the radical and unusual case; in short, where an organised society had broken down into a prevailing state of anarchy in which a system of property rights cannot be ascertained. In such a case it was judicially impossible to ascertain any cognisable Aboriginal law or custom relative to property. But if such a law or custom was capable of judicial ascertainment, the principles of Imperial constitutional common law required its application. These observations were vital, because once an Aboriginal system of land tenure had been judicially understood, the application of common law principles precluded the extinguishment of Aboriginal land titles even by Crown grants: *nemo dat quod non habet*.[117]

These common law principles have been applied in modern cases.[118] For example, in *Oyekan v. Adele*,[119] in a dispute over particular property situated in Lagos, Lord Denning found that Aboriginal laws of land tenure trumped a purported Crown grant of the land *ex facie* made in fee simple. The dispute arose out of a purported Crown grant of the Royal Palace in Lagos made in 1870. The first Oba (King) of Lagos, one Ado, ruled from 1630 to 1689. By the law of Lagos, the Oba was entitled to reside in the Iga Idunganram (Royal Palace). The Oba's office was not hereditary, and by the law of Lagos he was selected by the White Cap chiefs and the heads of the important Houses in the region. Ado was of the House of Docemo, and by coincidence or influence all his successors were of the same House until the death of the Oba Falolu in 1949.

By the treaty of 1861 referred to by Viscount Haldane in *Amodu Tijani's* case, the then Oba ceded Lagos to Great Britain with a view to the suppression of the slave trade. In 1870, the Crown made a grant of the Iga to the then Oba, which on its face conferred an interest in fee simple. Upon the death of Falolu in 1949, the

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[117] This is consistent with the decision in *Bristow v. Cormican*, [1878] 3 A.C. 641 (H.L.) where Lord Blackburn stated, pp. 665 to 666, that there is no common law principle by which the Crown is presumed to own the lands in which it has the "radical title." If the Crown pretends to beneficial ownership of land, it must prove such ownership in the same way as the subject.

[118] But, will be seen in Chapter Three, they have been consistently ignored by the Canadian courts.

White Cap chiefs selected a new Oba, but not the candidate proposed by the House of Docemo. The House of Docemo then sued for possession of the Iga, relying upon the Crown grant in fee simple to the House of Docemo made in 1870.

When the case reached the Privy Council, Lord Denning, delivering the opinion of the Board, decided that notwithstanding the Crown grant of the Iga to the House of Docemo, the Crown could only grant what it possessed, which, in this case, was the radical title to the Iga as qualified by the *lex loci* of Lagos. According to that law, the chosen Oba was entitled to the Iga, irrespective of the fact that at the time of the grant the incumbent had been of the House of Docemo. It was not open to the Crown, by purported grant, to alter or derogate from the local rights of property as determined by the local laws:

> Their Lordships find it fully established by the evidence and by the concurrent findings of the courts below that, before the Treaty of Cession, the Oba of Lagos by native custom had a right to live in the Iga. He had this right by virtue of office. On his death the Iga did not pass to his heirs or to his family but to his successor in office. It was the traditional home of the Obas where each of them lived.[120]
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> Their Lordships are inclined to think that the only rights of the Oba which passed to the Crown [by the Treaty of Cession] were the rights which he possessed in his official capacity as Oba, and not those which he possessed in his private capacity.[121]

Consequently, the grant in fee simple to the House of Docemo in 1870 was ineffective as against the new incumbent Oba, because the Crown could not grant what it had never possessed, *i.e.*, beneficial title to the Iga in fee simple, unfettered by the local law of Lagos. Nor could a purported Crown grant in fee simple alter or extinguish property rights which already existed by virtue of pre-existing Native law.

Lord Denning then went further and reaffirmed the common law principle that a change of sovereignty did not affect the property rights of indigenous inhabitants, provided these could be ascertained by the court:

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[119] [1957] 2 All E.R. 785 (P.C.).
[120] *Ibid.*, at p. 787.
[121] *Ibid.*, at p. 789.

> In inquiring ... what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has *by native law* an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, *even though these are of a kind unknown to English law*. Furthermore, if a dispute arises as to the right to occupy a piece of land, it will be determined according to native law and custom, without importing English conceptions of property law[122] [emphasis added].

Accordingly, the common law required the ascertainment and application of Native law. The common law rule was, therefore, that while competent legislation may alter Aboriginal laws or extinguish Aboriginal land tenure, purported Crown grants of land, or other prerogative acts, done in the absence of such legislation, took effect only subject to unextinguished Aboriginal laws and systems of tenure. They could not of themselves create new property rights which the Crown did not previously possess, nor could they alter or extinguish property rights which Aboriginal peoples already possessed in accordance with their own laws and systems of government.

(3) Questions of Proof

As these cases reveal, the common law, specifically the Imperial constitutional common law, did not trump or extinguish Aboriginal property rights. If anything, the reverse was the case. In the absence of competent legislation altering or extinguishing Aboriginal laws and property rights, the common law required that they be respected in their own terms. Even a grant of unpatented land in fee simple would be ineffective as against a prior unextinguished Aboriginal claim, provided the court could ascertain what the claim was *qua* Aboriginal law.

The practical qualification to the application of the rule was essentially evidentiary. In the *Southern Rhodesia* case the Privy Council found ownership of the unpatented lands to be in the Imperial Crown, but not because the Crown was presumed by law to possess any beneficial interest in unpatented lands adverse

and superior to the title of the indigenous population. In contrast the rights, if any, of the indigenous population were simply not ascertainable on the evidence, or at least the Privy Council was unable to ascertain them from the evidentiary record before it. It was unlikely that such situations would be common. Common law courts (except, as will be seen, the Canadian courts) have been receptive to proof of traditional Aboriginal laws of land tenure by traditional Aboriginal methods, principally by the reception in evidence of oral histories by members of societies which possess oral rather than written traditions.[123]

For instance, in *Kobina Angu v. Cudjoe Attah*,[124] a dispute arose as to the right to tribute claimed by the plaintiff in respect of land occupied by the defendant. Sir Arthur Channel saw no intrinsic difficulty in establishing the rights of the parties in accordance with Native land law through the oral proof of the content of that law in open court:

> The land law of the Gold Coast Colony is based on native customs. As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the Courts, become so notorious that the courts take judicial notice of them.[125] In the Gold Coast Colony the principal customs as to the tenure of land have now reached the stage at which the Courts recognize them, and the law has become as it were crystallized. There is little statutory law relating to land. There is no land registry. There is an Ordinance (No. 1 of 1895) as to registration, but it only provides for a registry of "instruments," giving priority to those which are duly registered. It has no real bearing on the present case ... .[126]

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[122] *Ibid.*, at p. 788.

[123] The reception into evidence of oral histories to establish Aboriginal systems of land tenure and territorial boundaries was not accepted in Canada prior to 1997, despite the ample common law precedent in favour of the probative value of this type of evidence: *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193 (S.C.C.). It is quite unlikely that Canadian courts had been universally unaware of these authorities. Nevertheless, even in *Delgamuukw*, the Supreme Court of Canada referred to none of them and treated the probative value of evidence given by way of oral histories as if this was its own surprising discovery. In fact, as a matter of law there was nothing new or novel about it. This, along with the Canadian courts' general reluctance to apply accepted common law principles to land claims brought by Aboriginal peoples, will be discussed in Chapter Three.

[124] (1915) [1874 – 1928 P.C. Gold Coast] 43.

[125] Compare this with the complete rejection of the probative value of oral evidence of Aboriginal laws by McEachern C.J. at the trial level in *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.) One must assume that McEachern C.J. was either unaware of, or was unwilling to apply the common law authorities with respect to the appropriate weight to be assigned to this kind of evidence.

[126] *Kobina Angu*, *supra* note 124, at p. 44.

In the case in question, the authority of a chief's "linguist"[127] in establishing the content of Native customary law was accepted.

Similarly, in *Stool of Abinabina v. Chief Kojo Enyamadu*,[128] a case involving a dispute as to ownership of land, Lord Cohen found that the trial judge had been in error in excluding all evidence of title other than evidence of "such positive and numerous acts within living memory sufficiently frequent and positive to justify the inference that he [the plaintiff] is the exclusive owner."[129] Sending the case back for a new trial in accordance with correct evidentiary principles, he said "Both courts below failed to have regard to the evidence of history and tradition in this case *which, alone, if accepted, was sufficient to establish the appellant's title*"[130] [emphasis added].

These were not unique or isolated cases. Common law courts have decided on numerous other occasions that in proof of Aboriginal title, "traditional" (*i.e.*, oral) evidence is not only admissible but may in itself be determinative of the dispute.[131] The consistent tendency as late as 1997 of Canadian courts to ignore such authorities is difficult to account for in legal terms. It seems quite unlikely that they could have been universally unaware of them.

Conclusions as to Imperial constitutional common law

The common law authorities referred to in this section have remained the law of Canada,[132] irrespective of the various statutory enactments specifically adopting English law as providing the rules for deciding

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[127] A Native officer described as "represent[ing] and speak[ing] for the Chief on ceremonial occasions, and [having] a somewhat extensive authority": *Koniba Angu, supra* note 124 at p. 46.
[128] [1953] A.C. 207 (P.C.).
[129] *Ibid.*, at p. 210.
[130] *Ibid.*
[131] See, for instance, *Abotche Kponuglo v. Adja Kodadja* (1933), 2 W.A.C.A. 24; *Nchirahene Kojo Ado v. Buoyemhene Kwado Wusu* (1936), 4 W.A.C.A. 96; *Ohene Tekyi Akyin III v. Kobina Abaka II* (1939), 5 W.A.C.A. 49 at p. 54; *Chief Kweku Dadzie v. Atta Kojo and Kojo Appeanya* (1940), 6 W.A.C.A. 139.
[132] This is true irrespective of the statutory adoption of the common law rules relative to property and civil rights in Canadian common law jurisdictions. The *Royal Proclamation of 1763* introduced the entirety of English common law to the new British colony of Quebec. This must be taken to have included at least Lord Mansfield's six constitutional propositions in *Campbell v. Hall*, and the authorities that descend from or relied upon his decision in that case. The reason for the statutory re-adoption of the English common

disputes involving property and civil rights passed at various dates by common law Canadian provinces. As part of the body of Imperial constitutional common law, they, as much as the Canadian *Charter of Rights and Freedoms*,[133] form part of the constitution of Canada. What are the implications for Aboriginal claims to land in Canada?

First, it should now be evident that common law principles did not extinguish Aboriginal systems of land tenure. Only competent legislation could do this.[134] Indigenous laws and systems of land tenure remained intact irrespective of a change in sovereignty. The rule appeared to be the same whether the change in sovereignty came about by conquest[135] or settlement.[136]

Secondly, common law principles required the application of Aboriginal laws until they were altered by the legislature.[137] Crown grants of land could not accomplish this result. Indeed, the Crown must prove its own title to the land it purported to grant in order for Crown grants to have had lawful effect.[138] In Canada, moreover, it would appear that the only legislature competent to make alterations to pre-existing systems of Aboriginal land tenure is the federal Parliament. Provincial laws purporting to alter or extinguish Aboriginal tenure encroached upon Parliament's jurisdiction under s. 91(24) of the *Constitution Act*, 1867, and consequently were *ultra vires*.[139]

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law of property and civil rights in Upper Canada in 1792 was the exclusion of this part of the common law from the Colony of Quebec by the *Quebec Act* of 1774 (U.K.), discussed in Chapter Three.

[133] *Constitution Act, 1982*, enacted by the *Canada Act (U.K.)*, 1982, c. 11, Schedule B.

[134] *Campbell v. Hall*, *supra* note 72.

[135] *Ibid.*

[136] *Freeman v. Fairlie* (1828), 1 Moo. Ind. App. 306 [18 E.R. 117]. In this case, the Master (J. Stephen) stated that the true distinction was not between territories acquired by "conquest" or by "settlement" but, in contrast, between acquired territories in which, at the time of acquisition, there existed "any civil institutions and laws" and those in which there did not: 18 E.R. at p. 128. In the former case, the pre-existing laws and institutions of the indigenous inhabitants remained in force *proprio vigore* unless changed in some legally permissible manner, while in the latter case English law "followed" the settlers as their birthright and became the law of the territory. The Master's opinion was affirmed by the Lord Chancellor [Lord Lyndhurst]: 18 E.R. at pp. 137 to 143.

[137] Lord Mansfield's 5th proposition in *Campbell v. Hall*, *supra* note 72.

[138] *Bristow v. Cormican*, [1878] 3 A.C. 641 (H.L.), *per* Lord Blackburn at p. 655.

[139] *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193 (S.C.C.), *per* Lamer C.J. at pp. 267 to 273. It would appear also that since 1982 the competence even of the federal Parliament has been constrained by s. 35(1) of the *Constitution Act, 1982*, which "recognizes and affirms" Aboriginal rights existing as of that date.

Crown grants of unpatented lands could not have the effect of extinguishing Aboriginal title.[140] Such grants were either ineffectual, or were effective only to the extent of the beneficial interest in the land which the Crown actually had to convey. There was no legal presumption that the Crown's radical title to land vested in it a fee simple estate capable of forming the subject matter of a grant or, indeed, any beneficial interest in the land.[141] Consequently, a Crown grant of land in fee simple did not demonstrate that the Crown actually had the equivalent estate in land to convey, and such conveyances took effect, if at all, subject to the pre-existing unextinguished systems of tenure of the Aboriginal population and the interests they recognized.[142]

The only qualification to the rule appeared to be that the pre-existing Aboriginal laws and systems of tenure must be ascertainable by evidence. There had never been any evidentiary impediment[143] to the proof of Aboriginal interests in land, *qua* Aboriginal laws, by "traditional" (*i.e.*, oral) evidence, led by Aboriginal peoples whose cultures included oral rather than written traditions.

Finally, it has always been open to Parliament[144] to change Aboriginal laws by competent legislation. But in the absence of legislation to the contrary, the same legal rules must apply to all subjects equally. It has not legitimately been open to the courts to apply one set of common law rules to determine the proprietary entitlements of one segment of the population and another set of rules to another group.[145]

As will be seen in Chapter Three, in defining Aboriginal title to land in Canada the courts have respected none of these common law principles. It is highly unlikely that, since the first assertion of British

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[140] *Oyekan v. Adele*, supra note 72.
[141] *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (P.C.); *Bristow v. Cormican* [1878] 3 A.C. 641 (H.L.).
[142] *Oyekan v. Adele*, *supra* note 72.
[143] Except, interestingly, one created by Canadian courts. Consider the treatment of "traditional" evidence by McEachern C.J.B.C. in *Delgamuukw v. British Columbia* (1991), 79 D.L.R. 185 (B.C.S.C.), and the authorities *supra* note 131.
[144] Subject, since 1982, to the constraints of s. 35(1) of the *Constitution Act, 1982*.
[145] As *per* Lord Mansfield's 4th proposition in *Campbell v. Hall*, *supra*, note 72. As will be seen in Chapter Three, the Canadian courts have consistently applied precisely this form of legally impermissible distinction in adjudicating Aboriginal common law land entitlements.

sovereignty until the present date they have been universally unaware of them. The explanation for this selective non-application of common law principles probably requires an extra-legal explanation.

The Common Law and the Protection of Possession

(1) The Reception of English Law as a New Legal Order

As seen from the analysis of Imperial constitutional common law, Aboriginal property rights, *qua* Aboriginal (indigenous) laws and customs of land tenure, could not be affected except by competent legislation which brought into being a new regime of property rights. In the absence of such competent legislation, the common law required the ascertainment and application of the pre-existing Native law. It was by no means clear that any such competent legislation had ever been enacted in Canada. The Supreme Court of Canada has held that provincial legislation purporting to do so would be *ultra vires* the legislature,[146] and while the federal Parliament has established reserves under the *Indian Act*,[147] it has been by no means clear that the *Indian Act* applied to, or should apply to, lands in which Aboriginal peoples held interests *qua* unsupplanted Aboriginal systems of land tenure, or alternatively to which they have common law claims.[148]

It is nevertheless true that the present law of real property in Canadian common law provinces and territories derived from the English common law relating to land. It is certainly correct to state that at various dates, by various methods, all Canadian provinces (except Quebec) adopted the law of England as supplying the rules for decision-making in cases involving real property.[149] Thus, this body of law had

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[146] As *per* Lamer C.J. in *Delgamuukw v. British Columbia, supra,* note 138 at pp. 267 to 273.
[147] R.S.C. 1985, c. I-5.
[148] It is true that Dickson J. did equate the Aboriginal interest in common law title lands with the Indian possessory interest in reserves created under the *Indian Act* [*Guerin v. The Queen* (1984), 13 D.L.R. (4th) 321 (S.C.C.)] but, as will be seen in Chapter Three this view was neither supported by authority nor internally consistent, in that the fee simple in Indian reserve lands was in the Crown by statute, whereas lands owned by Aboriginal peoples at common law, by definition, deprived the Crown of the fee.
[149] The dates of reception of English law and the modes of reception are as follows: Newfoundland and Labrador, 31 December 1832 as decided in *Young v. Blaikie* (1822), 1 Nfld. L.R. 283, a date apparently

been, and remains, Canadian law which Canadian courts have been under an obligation to apply. While it was by no means clear how or why such adoptions could have the effect of altering or extinguishing pre-existing Aboriginal systems of land tenure,[150] it was pertinent, on the assumption that they could have had this effect, to consider how Aboriginal land claims would be decided by a consistent application of the English land law which all provinces except Quebec adopted.

In the course of this analysis, it will be important to recall Lord Mansfield's fourth proposition stated in *Campbell v. Hall*, namely that "the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof: and is the rule of decision for all questions that arise there."[151] In consequence, if the correct legal position is that the reception of English law put an end to Aboriginal laws of land tenure, then *ex hypothesi*, the common law should apply to Aboriginal claims for land in the same way and to the same extent as it does in the case of non-Aboriginal subjects.

(2) The English Common Law of Property and Possession

Quite apart from limitation periods and prescriptive titles to land, at common law all title to land flows ultimately from possession. The basic principle has for centuries been that the person or persons in

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corresponding to the first meeting of the Legislative Assembly in the colony [an argument can be made that the correct reception date is actually much earlier than this, in that the statute 32 Geo. III, c. 46 (1792) established courts in the colony and directed them to apply English law]; Nova Scotia, 3 October 1758, as decided in *Uniacke v. Dickson* (1848), 2 N.S.R. 287; New Brunswick, 3 October 1758, by virtue of its annexation to Nova Scotia; Prince Edward Island, 7 October 1763, by virtue of the *Royal Proclamation* of that date; Ontario, 7 October 1763, by virtue of the *Royal Proclamation*, and again on 15 October 1792, by virtue of the local statue 32 Geo. III, c. 1 (U.C.) after the colony's partition from Lower Canada in 1791 by the *Constitutional Act*, 31 Geo. III, c. 31 (Imp.); Manitoba, Saskatchewan and Alberta, possibly from 2 May 1670, by virtue of the Hudson's Bay Company Charter of that date which provided that English law was to apply in Rupert's Land; Manitoba later enacted local statute 38 Vict. c. 12, setting 15 July 1870 as the reception date for English law, and the subsequent enactments creating Saskatchewan, Alberta, the Yukon Territory and the North West Territory expressly preserved the reception date established by Manitoba; British Columbia, 1858, by virtue of local statute No. 7 of 1867. See, in general J. E. Cote, *supra* note 69.

[150] To the extent that the statutes of reception were passed by Provincial legislatures after Confederation they could not have extinguished existing Aboriginal title; we are told that provincial legislatures lack the constitutional competence to do so. To the extent that provincial legislation purports to do so it is, *pro tanto*, *ultra vires*: *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193 (S.C.C.), *per* Lamer C.J. at pp. 267 to 273.

possession of land have a title good against all the world, unless an adverse claimant can demonstrate a prior, better title. Writing of the English common law of possession in the mid-nineteenth century, the period during which most Canadian provinces chose to receive the common law of real property, Lightwood wrote:

> [T]he cases in which a possession is known to be adverse, and in which the possessor relies entirely on the Statute of Limitations to complete his title, are rare. In English law, all titles ... rest ultimately on possession, and the nature of the title is not altered by the fact that the present possession under it has been acquired by some recognized mode of transfer or devolution. Such change of possession from one person to another, all holding under the same title, may have gone on for centuries, and, if this is known, the title is indefeasable. In the majority of cases, however, the title cannot be carried back for more than a comparatively short period, and the real guarantee of safety is the probability that any outstanding rights there may have been are barred.[152]

Indeed, the general principle was that "actual possession is taken to be also civil possession [*i.e.*, the type of possession from which an inference of ownership will be drawn by the courts]," unless otherwise explained by demonstration of some prior better right to possession in another.[153] "The *jus possessionis* is the ownership *de facto*, and confers all the advantages of a *jus proprietas* as against strangers."[154]

Lightwood summarised the English law of possession of land as follows:

> [The] statement of the cases enables us to carry somewhat further the summary which has already been given. Bare possession ... does not give a title to recover in ejectment; seisin in fee, although tortious, does give a title, *and any possession, however short, is evidence of seisin in fee.* But this is only evidence, and the presumption of seisin in fee arising from possession may be rebutted, positively, by showing some other interest in the possessor,[155] or negatively, by giving evidence of an outstanding fee, which has not been got in by conveyance or otherwise, or terminated by disseisin[156] [emphasis added].

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[151] *Supra* note 91.
[152] John Mason Lightwood, *Possession of Land* (London: Stevens and Sons, Limited, 1894).
[153] *Ibid.*, at p. 26.
[154] *Ibid.*, at p. 76.
[155] *I.e.*, that the possessor had some lesser interest than fee simple because he held his estate of another, which could not be true of Canada's original Aboriginal inhabitants prior to British sovereignty.

If possession of land, even for a very short period, is evidence of seisin[157] in fee simple, then, *pari passu*, uninterrupted possession of land for hundreds, or even thousands of years, must constitute the strongest evidence of seisin.

Such evidence might be rebutted by demonstration of a prior and better title in another claimant; however, the effect of the doctrine in the context of Aboriginal land title was practically to transform the *prima facie* presumption of ownership which flowed from possession into an irrebuttable presumption of ownership. It was simply necessary to pose the question of how an adverse claimant could possibly demonstrate a pre-existing better title than Aboriginal peoples, who have occupied land "from time such that the memory of man runneth not to the contrary." Prior to the assertion of British sovereignty, there was no power capable of creating a competing interest in the land. This circumstance, of itself, would appear to exclude the possibility of rebutting the presumption of ownership which flowed from possession by the demonstration of a pre-existing superior title. Equally, prior to the assertion of British sovereignty, it could not be shown that Canada's Aboriginal inhabitants possessed some lesser estate, *i.e.*, by holding their land of another or, at least, not of the Crown.

After the transition of sovereignty a Crown grant of unpatented lands was ineffective if the beneficial fee simple to the land was not in the Crown to grant.[158] At its highest, a Crown grant of unceded Aboriginal land made subsequent to the change in sovereignty would take effect only to the extent of the Crown's beneficial interest in the land, and would be faced squarely by the presumption of ownership in fee simple

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[156] Lightwood, *supra* note 152 at p. 121, *i.e.*, by showing a pre-existing superior title, which nobody could show as against Canada's original Aboriginal inhabitants, there having existed prior to British sovereignty no power of record capable of creating any such interest.

[157] It is noteworthy that the medieval English word "seisen" derived directly from the Anglo-French word "saisine", which represented possession of land by occupation (*i.e.* land-*holding*). Seisin has formally been defined as "possession of land by one who actually occupied and used it and whose right to do so strengthened with the passage of time." *Oxford Companion to Law* (Oxford: Clarendon Press, 1980): "seisin." In consequence, applying English real property law concepts, it would be problematic to deny that Aboriginal peoples were "seised" of the lands they occupied at the time of European contact.

[158] *Oyekan v. Adele*, [1957] 2 All E.R. 785 (P.C.); *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (P.C.).

arising from actual prior possession by Aboriginal peoples. The Crown's "radical" title would thus be a naked title, devoid of any beneficial interest capable of forming the subject matter of a grant.

Lightwood's description of the English common law of possession and ownership of land is supported by the authority of the major reported cases on the subject, none of which has been overruled, and most of which have been consistently followed in resolving legal disputes relative to land.[159] A brief examination of the case law will demonstrate the continuity of the essential principles.

One may begin with the ancient authority of *Stokes v. Berry*,[160] where Holt C.J. stated that:

> If A has possession of lands for twenty years without interruption, and then B gets possession, upon which A is put to his ejectment, though A is plaintiff, yet the possession of twenty years shall be a good title in him, as if he had still been in possession.

While it was not clear from the report whether the Chief Justice was relying upon a prescriptive right or simply upon the inference of ownership to be drawn from possession, in either event, Aboriginal peoples would appear to be in a unique position relative to the application of the principle he pronounced. If "the possession of twenty years shall be a good title," *a fortiori* uninterrupted possession for hundreds of years should be a good title indeed.

The subsequent cases, however, were even more clear that, without reliance upon limitation periods or prescriptive title, possession *per se* was *prima facie* evidence of ownership of land, rebuttable only by the production of a prior, better title. In *Roe dem. Haldane and Urry v. Harvey*,[161] the defendant was in possession of property claimed by the plaintiff. It was not clear that the defendant could demonstrate any title in himself, and the plaintiff brought an action for ejectment relying upon his rights under two supposed predecessors in title, Haldane and Urry. The ultimate root of title had been in one Holmes, who devised the property to Haldane absolutely, subject to a life estate in one John Blatchford under whom the plaintiff did

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[159] But not in Canada, as examined in Chapter Three, in Canada, where the received common law of real property has been applied *except* in cases involving Aboriginal claims for ownership of land, in clear violation of Lord Mansfield's fourth proposition in *Campbell v. Hall*.

[160] (1699), Holt. K.B. 264 [91 E.R. 1044].

not claim. At trial, it was proved that Haldane had conveyed her estate to Urry, so that the plaintiff could not claim under her. As to Urry, the deed of conveyance was not produced. Consequently, the plaintiff could prove no prior interest in either of his supposed predecessors in title. In the result, the defendant's possession was left undisturbed and an estate in fee simple imputed to him, notwithstanding that it was unclear how he had got into possession in the first place.

The case was tried before Lord Mansfield and Aston J. The report said that:

> Lord Mansfield reasoned from the nature of an ejectment, and the course of proceeding upon it. He laid it down as a position, "that in this action, the plaintiff cannot recover, but upon the strength of his own title." He can not found his claim upon the weakness of the defendant's title. For, possession gives the defendant a right against every man who can not shew a good title.[162]

Aston J. concurred, saying "In an ejectment, the party who would change possession must make out a title."[163] The principle stated was clear and is still applicable. Possession of property *simpliciter* gave the person in possession the right of ownership against any challenger who could not demonstrate a previous, better title. It did not matter whether the possessor could show any title in himself beyond the mere fact of possession.

Lord Mansfield reiterated the proposition in *Denn ex dim. Tarzwell v. Barnard*,[164] a complicated case in which the defendant was in possession of property and could not establish any good title to justify his possession. The plaintiffs, however, could not demonstrate any title better than the defendant's. Lord Mansfield said:

> The defendant has not attempted to shew any title. The argument on behalf of the defendant has proceeded upon a supposition of a precise title set up. But I confess I do not see it in that light. The title is a

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[161] (1769), 4 Burr. 2484 [98 E.R. 302].
[162] *Ibid.*, at 4 Burr. 2487 [98 E.R. 304]; that is, a title demonstrably better than that of the person in actual possession.
[163] *Ibid.*
[164] (1777), 2 Cowp. 595 [98 E.R. 1259].

> possession for 20 years. ... If no other title appears, a clear possession of 20 years is evidence of a fee ... .[165]

The principles had not changed by the beginning of the nineteenth century. In *Peaceable dem. Uncle v. Watson*,[166] the defendant was in possession of property which appeared to be leased. The plaintiff, however, was unable to prove that he held the property by his own title or of an ancestor, and was therefore nonsuited in his action for ejectment. A title in fee simple was then imputed to the defendant. Mansfield C.J. sitting in appeal said simply "The opinion [of the trial judge] is unanswerable. The ground of the rejection is this. Possession is *prima facie* evidence of seisin in fee simple." Lawrence J. concurred, stating that the plaintiff, in order to succeed, "*must first shew that the Defendant is in possession of the premises sought to be recovered, and next, that the Plaintiff has a better title*"[167] [emphasis added].

The case of *Asher v. Whitlock*[168] demonstrated the principle that possession was *prima facie* evidence of ownership in its purest form. One Williamson, an acknowledged trespasser, enclosed the land of another, built a house on it, and devised it to his wife for so long as she should remain unmarried, remainder to his daughter. After Williamson's death, his wife lived on the property with her daughter and married Whitlock, thereby terminating her own estate and crystallising the contingent interest of her daughter. Both wife and daughter subsequently died, but Whitlock continued to live on the property. The daughter's heir at law brought an action for ejectment against Whitlock and succeeded on the strength of the daughter's interest under the will of Williamson. The court found that it did not matter that Williamson had not any title in himself, and concluded that his mere possession (admittedly wrongful) of the property created in him an interest in the land capable of devolution at law. Cockburn C.J. said "I take it as clearly established

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[165] *Ibid.*, at 2 Cowp. 597 [98 E.R. at 1260]; Lord Mansfield was not here relying upon prescriptive title under any Statute of Limitations, but reached his conclusion solely on the basis of the common law principles of possession and ownership of land.

[166] (1811), 4 Taunt. 16 [128 E.R. 232].

[167] Essentially the same result was reached in *Doe dim. Smith and Payne v. Webber* (1834), 1 Ad. & E. 119 [110 E.R. 1152], where Parke J. said that possession was of itself *prima facie* evidence of ownership in fee simple, and nonsuited the plaintiff who was unable to prove any better title than the defendant in possession. In *Doe dem. Humphrey v. Martin* (1841) Car. & M. 32 [174 E.R. 395], the opposite result was reached, but on the basis of the same principle; the defendant's possession of land was found to raise a rebuttable presumption of ownership in fee simple, but the plaintiff was able to rebut the presumption, in this case by proving the collection of rents.

[168] (1865) L.R. 1 Q.B. 1.

that possession is good against all the world except the person who can show a good title; and it would be mischievous to change this established doctrine."[169] Mellor J. concurred, saying "The fact of possession is *prima facie* evidence of seisin in fee. The law gives credit to possession unless explained."[170]

The reason for examining these early cases in some detail, aside from the fact that they are still relied upon as correct pronouncements relative to the common law of real property, is the historical fact that this was the state of the common law of real property, adopted by all Canadian common law jurisdictions, precisely at the points in time when contact with Aboriginal peoples was being made and competing claims were first arising as to the proper ownership of large tracts of unceded land. In a common law court of the period, had the same principles been applied, the Aboriginal population should have been found to be the lawful owners of their ancestral lands by the very common law principles imported by the settlers.[171]

The common law of possession and the presumption of ownership that flows from it have not changed significantly since the early cases. *Ex hypothesi*, if common law courts regarded them as correctly stating the law, the expected result would be their application to land disputes involving Aboriginal peoples and non-Aboriginal subjects alike, in accordance with Lord Mansfield's fourth proposition in *Campbell v. Hall*. In cases involving non-Aboriginal litigants, the principles appeared to be applied diligently.[172]

For instance, in *Perry v. Clissold*,[173] the plaintiff's predecessor enclosed and rented out vacant land. It was known at the time that he was not the true owner, nor was the fee simple in the Crown. The true owner was simply unknown. Under the *Lands for Public Purposes Acquisition Act*,[174] the land was expropriated for the purpose of building a school. The responsible minister, however, refused to pay out the statutorily mandated compensation to Clissold's heir at law, on the ground that Clissold did not own the land and had

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[169] *Ibid.*, at p. 5.
[170] *Ibid.*, at p. 6.
[171] As will be seen in Chapter Three, while these common law principles have been expressly adopted in all Canadian common law jurisdictions, no Canadian court has yet considered them applicable to Aboriginal claims for ownership of land. As Aboriginal peoples are "subjects" in the meaning of Lord Mansfield's six propositions in *Campbell v. Hall*, the discrepancy is difficult to account for in legal terms.
[172] As will be seen in Chapter Three, in cases of Aboriginal land claims they have consistently been ignored.
[173] [1907] A.C. 73 (P.C.).

not occupied it long enough to obtain a prescriptive title under the local Statute of Limitations. Clissold brought an application for *mandamus* requiring the minister to pay.

On appeal to the Privy Council, Their Lordships decided that the *mandamus* should issue. Lord McNaghten said:

> On the part of the Minister it was contended that, upon the plaintiff's own showing, Clissold was a mere trespasser, without any estate or interest in the land.
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> Their Lordships are unable to agree with this contention.
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> *It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner.* And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title [emphasis added].
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> Their Lordships are of opinion that it is impossible to say that no *prima facie* case for compensation has been disclosed. ... [O]r that the Governor, or responsible Ministers acting under his instructions, *should take advantage of the infirmity of anyone's title in order to acquire his land for nothing.* Even where the true owner, after diligent inquiry, cannot be found the Act contemplates payment of the compensation into Court to be dealt with by a Court of Equity[175] [emphasis added].

It would be difficult to conceive of a title to land more "infirm" than that of the claimant in *Perry v. Clissold.* Clissold's "title" was that of an acknowledged trespasser upon land admittedly owned by someone else. He had been in possession for less than the statutory period required to obtain even a prescriptive title by adverse possession. But his interest in the land, slender though it was, appeared at common law to be a compensable interest in land for the purposes of expropriatory legislation and,

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[174] 44 Vict. No. 16 (N.S.W.).
[175] [1907] A.C. at pp. 79 to 80.

presumably, an interest in land capable of devolution or assignment.[176] One need scarcely point out that the interest of Aboriginal peoples in their (unceded) traditional lands must be considerably greater than was that of Clissold's successor.

Similarly, in the case of *Halifax Power Co. Ltd. v. Christie*,[177] the plaintiff claimed to be the owner of land which the defendant had been logging for many years previously. Its action for trespass and damages was dismissed, notwithstanding that the defendant could produce no deed nor prove any grant from the Crown. The Court of Appeal affirmed the judgment of Graham E.J., who had gone so far as to "presume" a deed in the case of a person who had been in possession of land for a long time uninterrupted, even though it would have been sufficient to ground title upon a prescriptive right:

> [A] purchaser of real estate must not trust merely to the papers and records but must enquire of the person in possession whether he claims to be the owner of the premises.[178]
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> [A] person in proving his title need not trace it back to the Crown, but may trace it back to some one who has been in possession of the land. That has always been a useful thing, because, from loss of deeds and neglect to register, and looseness in the description of grants, the land marks having disappeared, a very large proportion of titles could not be traced back to the Crown.[179]

Once again, possession, rather than a grant from the Crown, was found to be the root of title to land at common law. The Crown grant was not what gave rise to the right of possession and ownership. It was the lengthy and unchallenged possession of the land by the occupant from which a grant from the Crown would fictitiously be presumed.

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[176] On the principle set out in *Asher v. Whitlock*, (1865), L.R. 1 Q.B. 1, which was followed in *Perry v. Clishold*.
[177] (1915), N.S.R. 264 (C.A.).
[178] Citing *Cunard v. Irvine*, James Reports (Nova Scotia) 31.
[179] (1915), N.S.R. at pp. 270 to 271.

The point that Crown grants might be fictitious, and were presumed upon finding a person in possession of land, was reaffirmed in *Allen v. Roughley*.[180] The case involved the administration of an estate. The testator's title to part of the lands involved could not be proved by purchase or a Crown grant, nor made certain by prescription under the locally applicable Statute of Limitations. The Australian High Court had no difficulty, however, in finding that the testator's possessory right, while unconfirmed by deed and unperfected by time, was capable of devolution and, indeed, was probably an estate in fee simple. Dixon J. said:

> The inference appears to me to be plain enough that upon his death the testator was possessed of the land. Whatever may have been the infirmity of his title ... if it amounted to no more than a possessory right, it devolved upon his trustees under the devise to them and was subject to the trusts of his will.
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> In the first place, the principle that possession of real estate, or the reception of the rents or profits from the person in possession, is *prima facie* evidence of the highest estate in property, namely a seisin in fee, is a *rule of general application*. It relates to the possession of a party at any given point of time, present or past [emphasis added].
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> If an existing possession is disturbed, the person in possession can sue the disturber as a trespasser. Proof that he is in possession confers upon him a good title against the whole world, except those who show a better title.[181]

Since the principle is stated to be a "rule of general application" then, *ex hypothesi*, it should apply to Aboriginal claimants in the same way.

Fullagar J. concurred, stating that "The defendant is in possession, and therefore presumably entitled in fee simple.[182] ... It was once thought that a plaintiff who relied on possession must prove possession for at least

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[180] (1955) 94 C.L.R. 98 (H.C.).
[181] *Ibid.*, at pp. 107 to 108, 115.
[182] *Ibid.*, at p. 128.

twenty years: but it is now well established that proof of anterior possession for any period is sufficient to make a *prima facie* case."[183]

Kitto J. went further, stating that:

> If A. then, is possessed of land, to say *that is evidence of his seisin in fee means that his possession tends to prove the fact that a* [Crown] *grant of land has been made to him or to his predecessors*, or that it has come to him or them by virtue of twenty[184] or sixty[185] years' possession. There is necessarily implied the further presumption that if anyone else has been in possession as owner within twenty years, then by conveyance or some other lawful means his title has been transferred[186] [emphasis added].

The common law of possession, and the title which flowed from it, had thus been constant in its principles from the most early cases to the most modern. *Prima facie*, possession of land raised the presumption that the possessor had the "highest estate in property, namely a seisin in fee."[187] This was a "rule of general application." The presumption was rebuttable only by a person who could show a prior, better title. Documents of land title were not determinative. If possession was otherwise unexplained, a Crown grant of the land to those in possession would be presumed, or, alternatively, the court would presume that all competing interests have been extinguished by the passage of time.

These principles have often and readily been applied by the courts in cases *not* involving the claims to land of Aboriginal peoples. Of course, in the case of Aboriginal peoples, the conscientious application of the same common law rules would frequently, if not always, elevate the rebuttable presumption of ownership in fee simple into an irrebutable presumption, in that no claimant could come forward with a title better than those already in possession, and in whose favour a court would presumably be obliged to impute a

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[183] *Ibid.*, at p. 130; Significantly, Fullagar J. relied on the old common law authorities relative to possession and ownership as correctly stating the law in modern times: *Asher v. Whitlock* (1865) L.R. 1 Q.B. 1; *Whale v. Hitchcock* (1876), 34 L.T. (N.S.) 136; *Dawson v. Pyne* (1895), 16 N.S.W.L.R. 116; *Richards v. Richards* (1731), 15 East. 293 [104 E.R. 855].

[184] Referable to prescriptive rights to land by one subject as against another under the locally applicable Statute of Limitations.

[185] Referable to prescriptive rights to land of the subject as against the Crown under the *Nullum Tempus Act*, 9 Geo. III, c. 16, discussed *infra*.

[186] (1955), 94 C.L.R. at p. 138.

[187] As *per* Dixon J., (1955) 94 C.L.R. at p. 108.

fictitious Crown grant in fee simple. This result may account in large part for the selective non-application of the common law rules of real property by Canadian courts, described in Chapter Three.

(4) Proof of Possession

On the basis of the above analysis, it would appear that, if the English common law has been the governing law of real property in Canadian common law jurisdictions, then proof of Aboriginal title would require proof of anterior possession of the land *simpliciter*. If no pre-existing superior title could be shown, the presumption of ownership in fee simple would become irrebuttable.

Was there, therefore, anything about the common law criteria for the establishment of possession which would prevent Aboriginal land claims framed in these terms from succeeding? In other words, was there any indication in the common law of real property that the various historical patterns and activities of Aboriginal occupation did not amount to "possession" of the land in the common law sense? On the authorities, the answer is: clearly not.

The continuing common law position relative to possession, both in the English cases expressly adopted as Canadian law, and in cases arising out of purely domestic Canadian disputes, can be simply stated. Persons are in possession of land if they are using the land in accordance with the types of uses which one would expect a reasonable person to make of the land at the time, given the nature of the land and the needs of the persons using it. Moreover, in the absence of contrary evidence, possession of part of a tract of land, as determined by reasonable use, raises a presumption that the whole of the contiguous land is also so possessed, provided it is of the same essential quality and nature, and capable of use in the same manner.[188]

[188] As *per* Lord Blackburn in *Bristow v. Cormican*, [1878] 3 A.C. 641 at p. 670; see also *Jones v. Williams*, 2 M. & W. 326 [150 E.R. 981].

In *Curzon v. Lomax*,[189] a dispute arose over land the true ownership of which was unknown. The defendant had been using the land and the plaintiff claimed it. Lord Ellenborough C.J. found the defendant to be in possession of the land by virtue of the use he had made of it. He said:

> The question in the cause respected the right to the soil. The right to the soil was evidenced by acts of ownership exercised on it; not by presumptive evidence of property arising from supposed boundaries, the rights to which have never been ascertained by possession. In this case, every act of ownership that could be exercised had been done: the ponds had been fished, persons had been prevented from taking the soil, and a tree had been felled. That evidence of actual ownership must prevail against supposed unexercised rights.[190]

The judgment did not rely in any way upon prescriptive rights or limitation periods. The land had been used in the normal manner in which land of its kind could be used. This constituted legal possession, from which the presumption of ownership arose.

Similarly, in *Harper v. Charlesworth*,[191] the plaintiff was in the habit of going shooting for game on Crown land for a few months of each year when the game was plentiful. Another individual was in the habit of gathering grass from the land, but only with the plaintiff's permission. Bayley J. found that the evidence of shooting game and gathering grass was sufficient evidence of possession to entitle the plaintiff to succeed against the defendant in an action for trespass.

> The first question is, whether the plaintiff had any actual possession of the land where the trespass was committed. ... It appears to me that there was strong evidence to shew that there was actual possession in the plaintiff. The property belonged and the timber was reserved to the King; but every description of enjoyment was not exercised by the King, or by any person claiming under him. ... Now what was the land capable of yielding? It was woodland, with rides on it, and there was a considerable quantity of game on it; and, therefore, it afforded to any person going there an opportunity of killing game. The plaintiff himself did not appear to have any other enjoyment of the land than that of shooting the game; he usually came about August and remained till November. Wallace had the grass, and he took it by licence, not from the Crown but from the plaintiff, and that licence did not vest the possession in Wallace, but was a privilege only which the plaintiff had

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[189] (1803), 5 Esp. 60 [170 E.R. 737] (K.B.).
[190] *Ibid.*, 170 E.R. at p. 738; consider this formulation in connection with the "evidence of actual ownership" constituted by the activities carried out by Aboriginal peoples on Crown lands, in contrast to the "supposed unexercised rights" of the Crown.
[191] (1825), 4 B. & C. 525 [107 E.R. 1174].

> conferred upon him. ... If the learned Judge had been desired to put the question to the jury, he could not with propriety have directed them to come to the conclusion that there was not an actual possession.[192]

As a preliminary observation, it was not out of place to note that these uses, sufficient at common law to constitute possession – felling trees, fishing in ponds, taking vegetation, and hunting for game – were precisely the sorts of uses made by many Aboriginal peoples of the lands they frequented. *Pari passu*, they too were in possession of the land, in the meaning of the common law.

In *Sherren v. Pearson*,[193] the question was whether the isolated taking of trees from an unenclosed wilderness property, without the knowledge of the owner, was sufficient possession to attract the operation of the relevant local Statute of Limitations. Ritchie C.J. found that the defendant's activities were merely isolated acts of trespass rather than evidence of possession:

> In this case, then, there is nothing to indicate that the party at any time made an entry on the land with a view to taking possession of it under a claim of title or any open visible acts. There is no evidence of anything but isolated acts of trespass having no connection one with the other, no evidence of any open, visible continuous possession which might have been known, to the owner, but simply cutting without any open and exclusive possession.[194]

The case, however, was more significant for its negative findings. The isolated acts of trespass by the defendant were not sufficient to put the owner of the wilderness lands in question out of possession. Gwynne J., citing *Davis v. Henderson*,[195] noted at page 696, as follows:

> The term "possession" has no definite meaning.
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> What is there to be done to constitute possession of wild land? If the rightful owner enter upon any part of it he enters in law upon the whole of it. ...
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[192] *Ibid.*, 4 B. & C. at 583 to 585 [170 E.R. at pp. 1177 to 1178].
[193] (1887), 14 S.C.R. 581.
[194] *Ibid.*, at p. 591.
[195] (1869, 29 U.C.Q.B. 344 at p. 353.

> Now how is wild land possessed? It is settled that it need not be enclosed – what better test can there be of its possession than the person whose possession is questioned should have used it just the same as any other owner uses his wild land. ... To require any more or greater possession than this will be to defeat the beneficial object of the statute of limitations, which was to secure peace and put an end to litigation by extinguishing these dilatory claims.

From this formulation, it would be no impediment to Aboriginal claims that they possessed, in the common law sense, the land to which they claimed ownership, that the land was not enclosed in the European fashion, or that they did not frequent all the land at all times. Acts of ownership, commensurate with what uses the land would reasonably permit, sufficiently supported a claim for possession even of those parts of the land which were seldomly frequented, or not at all.

A similar result, involving even more slender "acts of ownership," arose in *Kirby v. Cowderoy*,[196] another case involving possession of "wild" lands. The land in question was situated in British Columbia, and had been mortgaged to the plaintiff by the defendant. The plaintiff never paid anything on account of principal or interest, and in order to preserve his security the defendant had paid the annual taxes on the land. The land was located in the vicinity of New Westminster; and when, after the passage of time, it had acquired some marketable value, the plaintiff sought to exercise his right of redemption under the mortgage.

On appeal to the Privy Council, the Board found that the defendant mortgagee had been in possession of the land beyond the time required to obtain a prescriptive title to it, by performing the only act with respect to the land of which it had been capable at the time, *i.e.*, paying the annual taxes. Lord Shaw reaffirmed the principle that possession at common law meant nothing more than putting land to the uses which a reasonable owner would do, commensurate with the quality and situation of the land, and the needs of the owner:

> It appears to be established, in short, that (1.) for over twenty years before the institution of this suit the appellant had, so far as this wild land was concerned, performed the only act of possession of which it appeared to be capable, namely, he had paid all the taxation upon it ... .

[196] [1912] A.C. 599 (P.C.).

> On the general subject of possession, the general language of Lord O'Hagan in *The Lord Advocate v. Lord Lovat*[197] – language cited with approval by Lord Macnaghten in *Johnson v. O'Neill*[198] – appears to be applicable to the present case. Possession "must be considered in every case with reference to the peculiar circumstances ... the character of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests; all these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of a possession."[199]

Other cases could be examined,[200] but from those considered above the general characteristics of common law possession were quite clear. Possession was proved by showing acts of use which a reasonable owner would make of the land, given its characteristics, his situation, and what the land would yield. Enclosure was not necessary, particularly in the case of "wild" lands, where possession of a part raises a presumption of possession of all the contiguous, similarly situated land.

The uses or acts of ownership necessary to establish common law possession were clearly, sufficiently compendious to encompass the activities of Aboriginal peoples on the land which now comprises Canada. One might safely concur with Baldwin J. of the United States Supreme Court in *Mitchel v. United States* where he said "[The Indians'] hunting grounds were as much in their actual possession as the cleared fields of the whites."[201]

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[197] [1880] 5 A.C. 273 (H.L.) at p. 288; this case involved possessory rights to a salmon stream. It was held that the fact of taking salmon regularly from some parts of the stream, infrequently from others, and possibly never from other parts, was sufficient evidence to constitute common law possession of the entire stream for the purpose of salmon fishing.

[198] [1911] A.C. 583 (H.L.).

[199] [1912] A.C. at pp. 602 to 603.

[200] See, for instance *The Halifax Power Co. Ltd. v. Christie*, *supra* note 177, at p. 270 ["All that tends to prove possession as ownership of parts of the tract tends to prove such ownership of the whole tract."]; *Cadija Umma v. S. Don Manis Appu*, [1939] A.C. 136 (P.C.) [cutting grass on swampy land found to be sufficient evidence of possession]; *Wuta-Ofei v. Danquah*, [1961] 3 All E.R. 596 (P.C.) [erection of four pillars in accordance with native custom found to be sufficient evidence of possession]; *Red House Farms (Thorndon) Ltd. v. Catchpole* (1977) E.G. 798 (C.A.) [shooting pigeons over unenclosed wild land found to be sufficient evidence of possession to ground a prescriptive title by adverse possession].

[201] (1835), 9 Peters 711 at p. 746 (U.S.S.C.).

(5) Conclusions from common law possession and ownership

Assuming that the common law rules of land law constituted the body of law that governed land disputes in Canada's common law jurisdictions, and assuming that, in accordance with Lord Mansfield's fourth proposition in *Campbell v. Hall*, the courts are to apply the same set of rules to all subjects pleading before them, and assuming, of course, that Aboriginal peoples are also "subjects" (*i.e.*, "citizens"), the expected consequences for Aboriginal claims to ownership of occupied unceded lands would appear to be as follows.

First, Aboriginal peoples "possessed" the contested lands in the common law sense. They did this for hundreds, or even thousands, of years.

Secondly, this common law possession raised a rebuttable presumption of ownership. But the presumption could only be rebutted by a person who came forward with a prior, superior title to the land. A subsequent Crown grant will not do. The presumption of ownership therefore became irrebuttable. Moreover, the common law presumed that long occupation was explained by a fictitious grant from the Crown, or by the probable expiry of all limitation periods.[202]

On the principles of real property law adopted in all Canadian common law jurisdictions, quite apart from prescriptive title and adverse possession, the expected result would appear to have been declarations of ownership in fee simple made by the courts in favour of Aboriginal peoples relative to those traditional lands unceded by treaty and still occupied. Obviously, the result has been nothing like this. This circumstance will be examined in detail in Chapter Three.

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[202] As *per* Kitto J., *Allen v. Roughley* (1955), C.L.R. at p. 138.

Prescriptive Rights as Against the Crown

What rights to land may the subject acquire as against the Crown by the passage of time? Any analysis of the common law of ownership based upon possession of land is entirely independent of the question of what prescriptive rights, if any, existed at the time of the adoption of English law in Canada, or were then in existence as unperfected contingent interests in land with the potential to ripen into full and indefeasable ownership with the passage of time.

In undertaking this analysis, two propositions must be borne in mind. First, the land which now comprises Canada became "Crown land" upon the date of the assertion of British sovereignty. Whether any beneficial interest then attached to the Crown's radical title does not matter, because the analysis is unaffected even if the Crown did acquire such rights.[203] Secondly, the deliberate choice to receive English law as the rule for decisions in matters of real property entailed, in each case, the reception of English statutes of general application as of the date of reception.[204] In all, or almost all, common law jurisdictions in Canada the reception of English statutes included the statute 9 Geo. III c. 16 (1769) [*Nullum Tempus Act*][205] The statute was brief enough to be reproduced here in its entirety:

> Whereas an Act of Parliament was made and passed in the Twenty-First year of the reign of King *James* the First, intituled, An Act for the general Quiet of all of the Subjects against all Pretences of Concealment whatsoever; and thereby the Right and Title of the King, His Heirs and Successors, and to all Manors, Lands, Tenements, Tythes, and Hereditaments (except Liberties and Franchises) were limited to Sixty years next before the Beginning of the said Session of Parliament; and all other Provisions and Regulations were therein made, for securing to all His Majesty's Subjects the free and quiet enjoyment of all Manors, Lands and Hereditaments, which they, or

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[203] It is not correct, however, to state that the Crown acquired any ownership interest in land simply by virtue of its underlying "radical" title: *Bristow v. Cormican*, [1878] 3 A.C. (H.L.), *per* Lord Blackburn at pp. 665 to 666. If the Crown pretends to a beneficial interest in land, it must prove this in the same manner as the subject. There is authority to the effect that the Crown did acquire a beneficial title to the vacant lands it colonized, but lands already inhabited by Aboriginal populations could not properly have been classified as vacant. See, K. McNeil, "The Onus of Proof of Aboriginal Title," (1999), 37 *Osgoode Hall Law Journal* 776 at p. 778, note 11.

[204] See J. E. Cote, *supra* note 69 for a comprehensive treatment of this subject.

[205] The statute obtains its popular name from the latin maxim ***nullum tempus occurrit regi***, a reference to the common law doctrine prior to its enactment that limitation periods did not run against the Crown.

> those under whom they claimed, respectively had held, enjoyed, or whereof they had taken the Rents, Revenues, or Profits, for the Space of Sixty Years next before the Beginning of the said Session of Parliament; And Whereas the said Act is now by Efflux of Time, become ineffectual to answer the good End and Purpose of securing the general Quiet of the Subject against all Pretenses of Concealment whatsoever; Wherefore be it enacted by the King's Most Excellent Majesty, by and with the Assent and Consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, *That The King's Majesty, His Heirs, or Successors, shall not at any Time hereafter sue, impeach, question, or implead, any Person or Persons, Bodies Politick or Corporate, for or in anywise concerning any Manors, Lands, Tenements, Rents, Tythes, or Hereditaments whatsoever (other than Liberties and Franchises) or for or in any wise concerning the Revenues, Issues, or Profits thereof, or make any Title, Claim, Challenge, or Demand, of, in, or to the same, or any of them, by reason of any Right or Title which hath not first accrued and grown, or which shall not hereafter accrue and grow, within the Space of Sixty Years next before the filing, issuing, or commencing of every such Action, Bill, Plaint, Information, Commission, or other Suit or Proceeding, as shall at any Time or Times hereafter be filed, issued or commenced for recovering the same*, or in respect thereof, unless His Majesty, or some of His Progenitors, Predecessors, or Ancestors, Heirs, or Successors, or some other Person or Persons, Bodies Politick or Corporate, under whom His Majesty, His Heirs, or Successors, any Thing hath or lawfully claimeth, or shall have or lawfully claim, have or shall have been answered by Force and Virtue of any such Right or title to the same, the Rents, Issues, or Profits thereof, or the Rents, Issues, or Profits of any Honour, Manor, or other Hereditament, whereof the Premises in Question shall be Part or Parcel, within the said Space of Sixty Years; and that the same have or shall have been duly in charge to His Majesty, or some of His Progenitors, Predecessors, or Ancestors, Heirs, or Successors, or have or shall have stood *insurper* of Record within the Space of Sixty Years [emphasis added].

As is evident from the Act's language, its intent and purpose was to create a limitation period which would run against the Crown in its claims, *inter alia*, for land. In effect, a person or persons in peaceable possession of Crown land for a period of sixty years obtained a prescriptive title to the land as against the Crown, and the Crown's interest in the land was extinguished by the barring of its remedy. The *Nullum Tempus Act* became the law of the Canadian common law jurisdictions upon their various adoptions of English land law,[206] and its implications for Aboriginal ownership of land remain significant.

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[206] Some provinces have since re-enacted the sixty year limitation period binding the Crown in Right of the Province in actions for the recovery of land in their own Limitation Acts: New Brunswick; Ontario; Saskatchewan; Prince Edward Island. Other provinces still have in force the original English legislation in effect at their reception dates: British Columbia; Alberta; Newfoundland; Manitoba; Nova Scotia; Northwest Territories. In the absence of any general federal statute, it would appear that the Federal Crown is still limited by the sixty year period established by the English *Nullum Tempus Act* of 1769. See J.S.

If, upon the reception date of English land law in a common law province, any persons (Aboriginal or otherwise) had been in occupation of Crown land for a period of sixty years they obtained a prescriptive title in fee simple to the occupied land. In this connection it was pertinent that the correct characterisation of land as "Crown Land" came about at the time of the assertion of British sovereignty, which might significantly pre-date the actual reception of English law.[207]

The significance of this rather obscure English statute for the determination of property rights as between the Crown and subjects in Canada is very real. It has been applied in many cases in different common law provinces in disputes over land between the Crown and non-Aboriginal citizens. For instance, in *Regina v. McCormick*,[208] one McKee had entered upon Crown land and occupied it from 1789.[209] The occupation of the land by McKee and his successors was continuous up to the trial date in 1859. *Prima facie*, McCormick, the successor of McKee, had obtained title to the land in fee simple by prescription.

Robinson C.J. had no difficulty in deciding that the *Nullum Tempus Act* was part of the law of Upper Canada by virtue of the local statute 32 Geo. III, c. 1 (U.C.) by the force of which the English law had been received.[210] He found against the defendant, however, on the dual grounds that the Crown could not have known of McKee's adverse possession and that of his successors, and, perhaps more significantly, because the lands in question were subject to "Indian title." He reasoned:

Williams, *Limitation of Actions in Canada* (Toronto: Butterworths, 1980), at pp. 170 to 173 ("Actions by the Crown").

[207] By way of example, British sovereignty was asserted over what is now Southern Ontario in 1763 [Treaty of Paris], whereas English land law was not received into Upper Canada until 1792, some twenty-nine years later. The consequence would appear to be that Aboriginal populations inhabiting Crown land in Ontario as of 1763, and continuing in occupation in 1792, would acquire a prescriptive title to the land against the Crown by 1823, provided they were still in occupation. In British Columbia the relevant dates would be 1846 for assertion of sovereignty [Treaty of Oregon] and 1858 for the reception of English law, and the calculation of the time for obtaining prescriptive title would run from the date of sovereignty, the earliest date at which the lands could be characterised as "Crown" lands.

[208] (1859), U.C.Q.B. 131.

[209] *I.e.*, some three years before the reception of English land law in Upper Canada but twenty-six years after the land had become Crown land. By the time of the reception of English land law in 1792, the statute had been running in his favour for twenty-nine years.

[210] (1859), U.C.Q.B. at p. 133.

> But for all that appears this island had not for sixty years been part of the organized territory of the province, in which the title of the original Indian inhabitants had been extinguished, or if the Indian title had been extinguished, the land may never have been surveyed and laid out by the Crown with a view to granting it.[211]

To the extent that the result seemed to have turned on the continuance of Indian title to the land, *quaere*, what the result would have been had the action been brought by or on behalf of the Aboriginal population? On the Chief Justice's reasoning, the Act did not avail the defendant either because the lands never belonged to the Crown beneficially (because they belonged to the Indians), or because the defendant had never asserted that he intended to own the land adversely to the Crown, which the Indians did assert.

In *Attorney-General for New South Wales v. Love*,[212] one Keith had occupied unsurveyed Crown lands for more than sixty years prior to the filing of an Information of Intrusion by the Attorney-General. Keith had conveyed the land to Love who, in turn, settled it in trust for himself for life, remainder to his wife in fee simple. The Supreme Court of New South Wales found the *Nullum Tempus Act* to have been in force in that state since the reception of English land law in the Colony in 1849, and affirmed the defendant's title in the following language:

> We feel convinced that there are hundreds of titles which, so far as the Crown is concerned, depend on this statute. If it were once supposed that the Crown had the power of putting any person who, or whose predecessors, had been in possession for sixty years to the proof of his documentary title, this would cause so much doubt and confusion in the transfer of property that we believe in many instances the value of certain properties would be deteriorated, and in some instances be rendered practically unmarketable. We entertain no doubt as to the Act being in force.[213]

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[211] *Ibid.*, at p. 135; if the fact that the land had not yet been surveyed preparatory to the making of Crown grants formed part of the *ratio decidendi* for rejecting McCormick's claim to title, then the decision must now be taken to have been overruled, *pro tanto*, by *Attorney-General for New South Wales v. Love*, [1888] A.C. 679 (P.C.), which was expressly adopted as a correct statement of the law by the Supreme Court of Canada in *Hamilton v. The King* (1916), 54 S.C.R. 331. Both decisions are examined, *infra*.

[212] [1888] A.C. 679 (P.C.).

[213] *Ibid.*, at pp. 681 to 682 (N.S.W.S.C.).

The Attorney-General's appeal to the Privy Council was dismissed, the Lord Chancellor finding both that the *Nullum Tempus Act* was in force in the colony and that it did not matter that there was no record or survey of the ungranted Crown lands in question.[214]

In *Emmerson v. Madison*,[215] the plaintiff received a Crown grant of land in New Brunswick in 1895. The land had been in the possession of the defendant and his predecessors for the previous fifty-six years. The Supreme Court of New Brunswick found for the defendant in the plaintiff's action for ejectment, but was reversed on appeal to the Privy Council. Sir Alfred Wills, delivering the opinion of the Board, said "The period of occupation was some three or four years short of the time necessary under the *Nullum Tempus Act* to give a right as against the Crown by length of occupation."[216] The implication was that, had the Crown grant been made some three or four years later, it would have been a nullity, because any beneficial interest the Crown may have had in the land would already have vested in the defendant by the operation of the statute.

Hamilton v. The King[217] was a case where the defendant's right had crystallised as against the Crown by the passage of time. The appellant's predecessor took possession of Crown land in Ontario in 1832, and the land was held continuously by his successors until the Crown filed an Information of Intrusion in 1914. The Supreme Court of Canada decided that Hamilton's possession had ripened into full ownership of the land by 1892, *i.e.*, sixty years after the original taking of possession by her predecessor. Idington J., relying upon Lightwood's *Treatise on Time Limitations*[218] found that the Act not only barred the Crown's remedy but created a new estate in the occupant:

> The first clause in section 1 is negative and exclusive of the right of the King; the second is affirmative and establishes the estate of the subject. In effect, the second corresponds to sec. 34 of the R.P.L.A., 1833,[219] which extinguishes title as against which the statute has run. "These

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[214] *Ibid.*, at pp. 683 to 686 (P.C.).
[215] [1906] A.C. 569 (P.C.).
[216] *Ibid.*, at pp. 573 to 574.
[217] (1916), 54 S.C.R. 331.
[218] John Mason Lightwood, *The time limit on actions: being a treatise on the statute of limitations and the equitable doctrine of laches* (London: Butterworth, 1909).
[219] The English *Real Property Limitations Act* of 1833.

> distinct clauses," said Blackburn M.R., in *Tuthill v. Rogers*[220] "had objects perfectly different.
>
> The first was a limitation to the suit, and barred the remedy of the Crown; the second, by confirming for all time thereafter the estate had *or claimed* by the subject and enjoyed for sixty years, against the Crown's title, barred and extinguished that title and transferred it to the subject[221] [emphasis in the original text].

Idington J. further adopted *Attorney-General for New South Wales v. Love*[222] as correctly stating the Canadian position.[223] Consequently, the fact that occupied Crown land may be unsurveyed "wild" land has no bearing upon the operation of the statute.

The *Nullum Tempus Act*, or its provincial re-enactments in locally applicable Statutes of Limitation, has been part of Canadian law in each of the common law jurisdictions since their respective reception dates for the English law of property. Other cases could be cited.[224] The principal point, however, is that Canadian courts, while applying the statute readily in cases involving non-Aboriginal litigants, have never given any indication that Aboriginal land claims could be governed by the same principles of prescriptive title.[225]

Instead, the infinitely more onerous criteria of possession from "time immemorial"[226] or exclusive possession at the date of British sovereignty, which may be proved by continuous post-sovereignty occupation to the present date,[227] (as opposed to sixty years adverse possession *vis-a-vis* the Crown) have been the "prescriptive" criteria announced by the courts in respect of common law Aboriginal land claims. The mystery of this double standard will be explored further in Chapter Three.

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[220] 1 Jo. & La T. 36 at p. 62.
[221] (1916), 54 S.C.R. at p. 360.
[222] [1888] A.C. 679 (P.C.).
[223] (1916), 54 S.C.R. at p. 362.
[224] For instance, *Attorney General of Canada v. Krause* (1956), 3 D.L.R. (3d) 200 (Ont. C.A.), where the defendant and his predecessors, admittedly having been in *occupation* for longer than the prescriptive period, failed in their claim for title principally because their acts of occupation were too infrequent and intermittent to amount to *possession* of the land at common law. As indicated above, this would rarely be the case in respect of Aboriginal land claimants.
[225] The modern day repeal of the statute, or of its provincial re-enactments in locally applicable Statutes of Limitation, would have no bearing upon the present argument. The repeal could operate only prospectively, and would not extinguish prescriptive titles which had already crystallised prior to the repeal. This would include any land rights of Aboriginal peoples which had already ripened into full rights of ownership.
[226] *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313.

Chapter Three

The Law's Crooked Path

> "Any legal system that would accord a greater interest in land to a wrongdoer, after just ten years of adverse possession, than it would to Aboriginal peoples who have rightfully occupied and used lands for hundreds, or even thousands, of years, is not entitled to respect."[228]

Introduction

Chapter Two examined the inherited English and Imperial legal principles which govern the ownership of land in Canada. *Pari passu*, the same principles should be available to Aboriginal peoples seeking to vindicate their own entitlements to land. Equal benefit of citizenship requires no less.[229] The present Chapter examines historically the selective non-application of these legal principles in cases involving Aboriginal claims for ownership of their traditional lands.

Some legal scholars have convincingly argued that existing and accepted common law authorities provide a solid jurisprudential basis for Aboriginal claims to ownership of large portions of their ancestral lands in Canada.[230] The English, Commonwealth and Canadian authorities examined in Chapter Two support this

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[227] *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193 (S.C.C.).
[228] K. McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997), 36 *Alberta Law Review* 117 at p. 138.
[229] It is pertinent to ask what form of remedies could be granted to Aboriginal peoples on the legal principles set out in Chapter Two. While the precise form of pleading is not within the scope of this thesis, it is likely that claims would have to be advanced as a form of representative or class action on behalf of an Aboriginal Nation. Remedies where ownership was proved according to regular common law principles might include declarations of joint tenancies in fee simple in the lands claimed.
[230] See, for instance, P. W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2000) at p. 35; H. Foster, "Aboriginal Title and the Provincial Obligation to Respect It." (1998), *The Advocate*, Vol. 56, Part 2 at p. 221; K. McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997), 36 Alta. L.R. 117; M. Walters, "British Imperial Constitutional Law and Aboriginal Rights" (1992) 17 Queen's L. J. 350; K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989); J. C. Smith, "The

proposition. These common law authorities have been readily accepted and consistently applied by Canadian courts in disputes involving non-Aboriginal parties.[231] This Chapter presents an interpretation of the evolution of the concept of Aboriginal title as it has repeatedly been constructed and reconstructed by Canadian courts, seemingly irrespective of the applicable legal authorities. The analysis challenges this evolution. The articulation of Aboriginal title by the Canadian courts has not constituted a high water mark of Canadian legal reasoning. In fact, the following characteristics accurately describe the Canadian courts' treatment of Aboriginal land title, as it has evolved over time the to present day:

(1) First, Canadian courts elevated an *obiter dictum* by Lord Watson in the Privy Council's decision in *St. Catherine's Milling and Lumber Company v. The Queen on the information of The Attorney General of Ontario*[232] to the status of received legal doctrine, considered as binding on Canadian courts.

(2) Secondly, there was one single attempt, eighty-five years later by the Supreme Court of Canada, conscientiously to apply uncontroversial common law principles of land ownership, normally applied in cases involving non-Aboriginal Canadian citizens, to common law land claims involving Canadian Aboriginal peoples.[233]

(3) Thirdly, while purporting to recognise Aboriginal title as an interest in land, the judiciary cut down this "title" from an interest in land *per se* to a bundle of limited rights to perform specific activities on the land to which title was asserted.[234]

(4) Fourthly, there has been a consistent judicial disinclination to apply accepted principles of common law to Aboriginal land claims, resulting in the judicial invention of an empty category of so called "*sui generis*" Aboriginal title,[235] which has been inappropriately carried forward by a novel path of reasoning alien to recognised common law principles.[236]

(5) Finally, there has been consistent judicial disregard for the Canadian, English and Commonwealth principles of land law which one might reasonably have expected to have governed Canadian courts in their resolution of Aboriginal claims for possession and ownership of land.[237]

Concept of Native Title," (1974), 24 U.T.L.J. 1; K. M. Narvey, "The Royal Proclamation of 1763, The Common Law, and Native Title to Land within the Territory Granted to the Hudson's Bay Company" (1974), 38 Sask. L. R. 123; and K. Lysyk, "The Indian Title Question in Canada" (1973) 51 Can. Bar. Rev. 450.

[231] See the authorities cited *supra* at notes 72 and 73.

[232] [1888] A.C. 46 (P.C.).

[233] *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313.

[234] *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, [1979] 3 C.N.L.R. 17 (F.C.T.D.); *Attorney General for Ontario v. Bear Island Foundation*, [1985] 1 C.N.L.R. 1 (Ont. S.C.).

[235] *Guerin v. The Queen* (1984), 13 D.L.R. (4th) 321 (S.C.C.).

[236] *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193 (S.C.C.).

[237] See *supra*, notes 72 and 73.

The result has been[238] the judicial adoption of such unhelpful concepts as the "personal and usufructuary"[239] and "*sui generis*"[240] rights of Canadian Aboriginal peoples to their ancestral lands. This has left the content of Aboriginal land title in Canadian law at best uncertain and, at worst, subject to serious limitations on its commercial exploitation, notwithstanding the Supreme Court of Canada's recent pronouncement that one of the most important incidents of the ownership of land is its economic dimension.[241]

The British Claim to Canada

The British acquisition of Canada, according to European treaty law, was completed by the fall of Quebec in 1759 and the capitulation of Montreal in 1760.[242] What were (or should have been) the legal consequences of this final European based assertion of sovereignty for the inhabitants of the new British territorial possessions? The answer was found in the English common law of the period. Professor Hogg states the general principle succinctly in the following terms:

> When a colony was acquired by British conquest (or cession), as opposed to settlement, the rule of the common law was that the law of the conquered people continued in force in the colony, except as to matters involving the relationship between the conquered people and the new British sovereign. The effect of this rule was that the pre-existing private law (including criminal law) of the colony continued in force, while the public law of the colony (establishing British governmental institutions) was replaced by English law.[243]

As seen in Chapter Two, the immediate effect of this common law doctrine was that the legal systems and the property and civil rights, particularly systems of land tenure, of the inhabitants of the new territories

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[238] Even in *Delgamuulw*; see *supra*, note 236.
[239] *Province of Ontario v. Dominion of Canada*, [1909] S.C.R. 1.
[240] *Guerin v. The Queen*, *supra*, note 235.
[241] *Delgamuukw v. British Columbia*, *supra*, note 236, at page 265.
[242] Technically, sovereignty was not complete until the cession of Quebec by the Treaty of Paris, 10 February 1763. Sovereignty over British Columbia was not settled until the Treaty of Oregon in 1843. See, K. McNeil, "Aboriginal Nations and Quebecois Boundaries," in Daniel Drache and Roberto Perin, eds., *Negotiating with a Sovereign Quebec* (Toronto: James Lorimer, 1992), p. 107.
[243] Peter W. Hogg, *Constitutional Law of Canada* (Toronto, Carswell: 2000) at p. 35, citing as authority *Campbell v. Hall*; see, *supra* note 72. The rule appears to have been the same in the case of colonies acquired by "settlement" provided that the indigenous inhabitants of the territory had a pre-existing system of laws and political institutions: *Freemen v. Fairlie*, supra note 72.

(French Canadian and Aboriginal), were legally unaffected by conquest, until altered by the Sovereign in some legally permissible manner.

By prerogative enactment promulgated in 1763[244], the common law was introduced to the ceded colony of Quebec, then occupied by French speaking Canadians and Aboriginal peoples. Thus, for the first eleven years of its existence, the new British colony of Quebec was governed, both as to matters affecting the property and civil rights of its inhabitants, and in matters of criminal law, by the common law of England. At the request of the colony's French speaking inhabitants, however, the Imperial Parliament enacted the *Quebec Act* of 1774,[245] which reinstated the French law relative to property and civil rights, based on the *Coutume de Paris* (but did not restore the old French criminal law regime). Finally, seventeen years later, the Imperial Parliament passed the *Constitutional Act*, 1791,[246] which provided for the division of the colony of Quebec into Upper Canada and Lower Canada, predominantly English speaking and French speaking respectively, as to their European inhabitants. Section 33 of the new Act provided that the laws of the former colony of Quebec (the French civil law of property and civil rights) would continue in force, unless and until altered by legislation passed by either of the new Assemblies effective within their respective geographical boundaries.

The first Act passed by the new colony of Upper Canada restored the English common law of real property to the colony, providing that "in all matters ... relative to property and civil rights, resort shall be had to the

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[244] *Royal Proclamation* of 1763 (U.K.), R.S.C. 1985, Appendix II, No. 1; it is critical to note that, while enacted under the Royal Prerogative and having the force of law in the absence of legislation, the *Royal Proclamation* had, and has, the force of statute. It has never been repealed or amended: see *The King v. Lady McMaster*, [1926] Ex. C.R. 68 at p. 72, *per* Maclean J. In view of the enactment by the United Kingdom Parliament of s. 35(1) of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), c. 11, *quaere*: whether the *Royal Proclamation* now could be altered, as to its impact upon Canada's Aboriginal peoples, without the necessity of a constitutional amendment?

It should be noted that at least one provincial court of appeal has suggested that the Crown's exclusive right, established by the *Royal Proclamation*, to purchase "Indian land," was repealed by implication with enactment of the *Quebec Act*, 1774 (U.K.), R.S.C. 1985, Appendix II, No. 2, discussed *infra*: *Chippewas of Sarnia Band v. Attorney General of Canada et al.* (2001), 51 O.R. (3d) 641 (C.A.). The Supreme Court of Canada has yet to decide this question, but should it ultimately agree with the Ontario Court of Appeal as to this point, then the supposedly inalienable character of Aboriginal title lands pronounced in its decision in *Delgamuukw* will be even more difficult to account for in legal terms.

[245] *Quebec Act*, 1774 (U.K.), R.S.C. 1985, Appendix II, No. 2.

[246] *Constitutional Act*, 1791 (U.K.), R.S.C. 1985, Appendix II, No. 3.

laws of England as the rule for the decision of the same."[247] The private law of Quebec thus having been settled by the *Quebec Act*, 1774, and the English common law subsequently received in Upper Canada and, before or after that date, throughout the various other territories which came to comprise Canada,[248] it remained to be seen what the effect of the *Royal Proclamation* of 1763 and the reception of the common law were (or should have been) upon the property and civil rights of Canada's first indigenous peoples, the various Aboriginal Nations then in occupation of most of the newly acquired territories.

The Original Protective Instrument

In addition to introducing the common law into the newly acquired colony of Quebec, the *Royal Proclamation* of 1763 made specific provision for Natives and their traditional lands. The instrument is worth examining in detail, in that it has affected the reasoning of Canadian courts relative to Aboriginal land claims to the present day. In its relevant part, the *Proclamation* provided as follows:

> And whereas it is just and reasonable, and essential to our Interest, and the security of our colonies, that the several Nations or Tribes of Indians with whom we are connected, and who live under our protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, *having not been ceded to or purchased by us*, are reserved to them or any of them as their Hunting Grounds – We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in ... our Colon[y] of Quebec ... do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any patents for Lands, *beyond the Bounds of their respective Governments*, as described in their Commissions; as also that no Governor or Commander in Chief of any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be Known, to grant Warrants of Survey, or pass patents for any lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any lands whatsoever, which, not having been ceded to or purchased by Us as aforesaid, *are reserved to the said Indians, or any of them* [emphasis added].
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> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, *to reserve* under our Sovereignty, Protection, and

[247] S.U.C., 1792 (32 Geo. III) c.1, s.1.

[248] Consequently, in most parts of Canada one might reasonably have anticipated that the courts would decide the land rights of Canadian Aboriginal peoples in accordance with the English law of real property. For a detailed account of the reception of the common law see: J. E. Cote, "The Reception of English Law," supra note 69; and, generally, Hogg, *supra* note 243, at pp. 29 to 46.

Dominion, *for the use of the said Indians*, all the Lands and Territories not included within the Limits of Our Said New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid [emphasis added].

And We do hereby strictly forbid, on Pain of our displeasure, all our loving subjects from making any Purchase or Settlements whatever, or taking possession of any of the Lands above reserved, without our especial leave and Licence for the Purpose First obtained [emphasis added].

And, We do further strictly enjoin and require all Persons whatever who have either willfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved for the said Indians as aforesaid, to remove themselves from such settlements.

And Whereas Great Frauds and Abuses have been committed *in purchasing Lands of the Indians*, to the Great Prejudice of Our Interests, and to the Great Dissatisfaction of the said Indians; In Order, therefore, to prevent such Irregularities for the future, and to the End that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council, strictly enjoin and require, *that no private person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought it proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us*, in our Name, at some public Meeting or Assembly of the said Indians, to be held for the Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for the Purpose; and We do, by the Advice of our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever, provided that every Person who may incline to Trade with the said Indians do Take out a Licence for carrying on such trade from the Governor or Commander in Chief of any of our Colonies respectively where such Person shall reside, and also give Security to observe such Regulations as We shall at any Time think fit, by ourselves or our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of Such Trade [emphasis added].

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And We do further expressly enjoin and require all Officers whatever, as well Military as those Employed in the Management of Indian Affairs, within the Territories *reserved as aforesaid for the Use of the*

> *said Indians*, to seize and apprehend all Persons whatever, who standing charged with Treason, Misprisons of Treason, Murders, or other Felonies and Misdemeanors, shall fly from Justice and take Refuge in the said Territory, and to send them under a proper Guard to the Colony where the Crime was committed of which they stand accused, in order to take their Trial for the same[249] [emphasis added].

For present purposes, four characteristics of the *Royal Proclamation* of 1763 should be noted. First, and most obviously, it "reserved" vast tracts of territory to their Native inhabitants at the time. Secondly, it reserved to these Aboriginal peoples the exclusive capacity to sell or cede these lands (one of the primary *indicia* of ownership at common law), with the sole limitation that such sale or cession be made to the Crown alone. This limitation on alienability constituted a legal disability placed upon the commercial freedom of non-Aboriginal would-be purchasers of "Indian land," and not a derogation from Aboriginal ownership of the land, whatever the incidents of that ownership might have been. Thirdly, while not stated in the portion of the *Proclamation* reproduced above, it introduced the English common law of property and civil rights, including the English law of real property, to the new colony, with the later exception for the colony of Lower Canada (Quebec).[250] Finally, the *Proclamation* provided no jurisprudential foundation for concepts of "personal and usufructuary," or "*sui generis*" Aboriginal land title subsequently asserted by Canadian courts and the Judicial Committee of the Privy Council.

The Elevation of *Obiter Dictum* to Received Doctrine

It is a generally accepted principle of common law (*stare decisis*) that where a higher court pronounces unambiguously upon a point of law, lower courts must follow the position articulated by the higher court in analogous cases. Where a higher court is silent as to the point of law in question, lower courts remain unfettered. Finally, where a higher court *expressly* refrains from stating any opinion on a point of law urged upon it by counsel, that point of law has *expressly* been left undecided. What is *not* supposed to happen, however, is that lower courts take as *definitively* decided the very point of law which a higher court

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[249] *Royal Proclamation* of 1763, reproduced in part in Thomas Isaac, *Aboriginal Law: Cases, Materials, and Commentary*, 2nd ed. (Saskatoon: Purich Publishing, 1999) at pp. 14 to 16.
[250] By virtue of the *Quebec Act*, 1774, *supra* note 245.

has *expressly declined* to decide. Curiously, this is where the Canadian courts began in their legal assertions about the nature and quality of Aboriginal land title.

The earliest post-Confederation decision of any import on the matter was *St. Catherine's Milling and Lumber Company v. The Queen, on the information of the Attorney-General for Ontario.*[251] As in the case of much early litigation touching "Indian title," Canadian Aboriginal peoples were not parties to this dispute and, indeed, very likely were unaware of the litigation at all. The dispute was between the Dominion of Canada and the Province of Ontario and the legal issue was which order of government, federal or provincial, owned lands which, admittedly, had been validly surrendered by the "Indians" by Treaty in 1873.[252] The Dominion Government had granted a licence to harvest timber on the surrendered lands, and the Government of Ontario sought an injunction and damages against the Appellant company for trespass, alleging that the lands in question, once disencumbered of "Indian title," belonged to the Province. The case was decided in favour of Ontario by the Supreme Court of Canada, and an appeal was taken to the Judicial Committee of the Privy Council, in London.

The Privy Council affirmed the judgment of the Supreme Court of Canada on the jurisdictional issue of land ownership, *i.e.*, that land, once disencumbered of "Indian title," belonged to the Province in which it was situated.[253] For present purposes, however, all that need concern us was what The Board (*per* Lord Watson) *did* say, and *expressly refrained* from saying, about the nature of the Aboriginal interest in the land *prior* to its surrender. Counsel for the Dominion Government argued that the Aboriginal interest prior to its surrender in 1873 had been a complete proprietary interest. *Ex facie*, their Lordships rejected this position. Lord Watson made the following remarks:[254]

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[251] [1888] A.C. 26 (P.C.).
[252] *North West Angle Treaty No. 3* of 3 October 1873 between the Dominion government and the Saulteaux Tribe of Ojibwa Indians.
[253] Consequently, the licence issued by the Dominion Government was *ultra vires* federal jurisdiction, and therefore a nullity.
[254] [1888] A.C. at p. 54. Arguably, in order to reject the submissions of counsel for the Dominion, the Privy Council had by implication to decide that Indian title was something less than full ownership of land; however, the point was not expressly decided and, indeed, Lord Watson expressly declined to decide the "precise quality" of that right. See note 236, *infra*.

> [T]here has been no change since the year 1763[255] in the character of the interest which (the) Indian inhabitants of the lands had in the lands surrendered in the treaty. Their possession, such as it was, can only be ascribed to the Royal Proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded or purchased" by the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew (*sic*) that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign.

In the same paragraph, however, the following statement appeared:[256]

> There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but *their Lordships do not consider it necessary to express any opinion on this point.* It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial paramount estate, which became a *plenum dominium* whenever that (Indian) title was surrendered or otherwise extinguished [emphasis added].

Accordingly, the only legal question asked and answered by the Privy Council in the *St. Catherine's Milling* case was whether a Province or the Dominion owned lands situated in the Province once "Indian title" had been removed. As to the precise nature of "Indian title," The Board did "not consider it necessary to express any opinion on this point."

Curiously, however, the *St. Catherine's Milling* case was taken by the Canadian courts for the next eighty-five years as *definitive* of the character of Aboriginal land title in Canada.[257] This is strange, in that "the precise quality of the Indian right" was a point upon which the Privy Council *expressly* refrained from stating any opinion, although apparently invited to do so by counsel. Lord Watson's remarks in this connection were clearly made *in obiter*. Had the Privy Council intended to limit Aboriginal title to a personal and usufructuary right dependent upon the good will of the Sovereign, the statement could properly have been regarded as made *per incuriam*. This would have been inconsistent with Lord

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[255] Probably a reference to the *Royal Proclamation* of that year.
[256] [1888] A.C. at p. 55.
[257] The theory of Aboriginal title as a "personal and usufructuary right" existing at the pleasure of the Sovereign, while not completely abandoned until quite recently, was at least criticised as being analytically

Mansfield's decision in *Campbell v. Hall,*[258] which established the constitutional common law principle that the *lex loci* governing the property and civil rights of the inhabitants of newly acquired territorial possessions remained in force *ex proprio vigore,* until altered by competent legislation.[259] No inquiry was made in the *St. Catherine's Milling* case as to what this *lex loci* might be and what interests in land it recognised.

But perhaps a more plausible interpretation of the Board's decision in the *St. Catherine's Milling* case was that Lord Watson actually meant what he said. He expressly refrained from stating any opinion on the content or quality of unextinguished Native land title, and declined to choose between the various theories evidently advanced by counsel. Any comment as to "personal and usufructuary" rights in land occupied by the "Indians" was therefore, arguably, *obiter dictum.* In any event, Lord Watson arrived at his conclusions on the footing that the *Royal Proclamation* of 1763 was the origin of Aboriginal title. His account of that title, therefore, could not apply to Aboriginal title arising at common law. Accordingly, these remarks could not have been legally determinative of the content or quality of Native title and should not have been considered as stating any legal principle binding on Canadian courts.

Why, then, did Canadian courts, for the following eighty-five years, characterise Aboriginal title as a "personal and usufructuary right dependent upon the good will of the Sovereign," on the ostensible basis that this is what the Privy Council had decided in the *St. Catherine's Milling* case?[260] The answer is to be gleaned from the succeeding Canadian case law, and possibly from economic considerations which, consciously or unconsciously, may have informed it.

"unhelpful" in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, *per* Judson J. at p 328. See the discussion of the *Calder* case, *infra.*

[258] See, *supra* note 72.

[259] *Ibid.*

[260] See, for instance, Duff J.'s characterisation of "Indian title" as a "mere usufruct" in *Province of Ontario v. Dominion of Canada* [1909] S.C.R. 1 at p. 125; and Arnup J.A.'s comparable remarks in *Isaac v. Davey* (1974), 3 O.R. (2d) 610 (C.A.), sixty-five years later.

In the early case of *Province of Ontario v. Dominion of Canada*[261] (once again, litigation in which no Aboriginal peoples were represented), the Dominion Government found itself in the interesting position of arguing that "Indian title" was far more than "a personal and usufructuary right dependent upon the goodwill of the Sovereign," and that it amounted, before cession, sale or extinguishment, to something comparable to an equitable fee simple. The legal issue in the case was whether, by entering into the *North West Angle Treaty No. 3* in 1873,[262] and thereby removing the burden of Native title from extensive tracts of land within the boundaries of the Province of Ontario, the Dominion Government had acquired a restitutionary entitlement to be reimbursed by Ontario for the costs of removing this title from the lands which thereby fell to it.[263] Neither Ontario nor the Dominion denied that some form of Native title existed until sold, ceded or otherwise extinguished.

Fortunately, the argument in the case, as well as the judgment, was reported. Newcombe K.C. for the Dominion Government correctly argued that the nature and quality of Native title had not been decided by the Privy Council in the *St. Catherine's Milling* case and urged that the judgment of Chief Justice Strong in the Supreme Court of Canada in the same case came closer to stating the position correctly. He argued:

> Now it seems to have been supposed in the Ontario courts that the Indian title was nothing except such as might be recognized as a matter of grace; that they had no legal right; that they might be recognized or not, as the [public] authorities determined. But that is not the case, as shown by Chief Justice Strong.[264]
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> [P]revious to this surrender, from the time of Confederation down to the time of the surrender the Indians had an interest in the land other than that of the province and *an interest capable of being vindicated in competition with the beneficial interest of the province.* So that, my Lords, they had a title ... of occupation and possession; a title which made it legally impossible for the province to administer the lands, to make grants and administer the lands in the way in which they have administered them since the surrender was made [emphasis added].
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[261] [1909] S.C.R. 1.
[262] *Supra* note 252.
[263] By virtue of the only legal issue actually decided by the Privy Council in the *St. Catherine's Milling* case, *supra, i.e.*, that once disencumbered of "Indian title," lands previously so encumbered belonged to the Province in which they were situated.
[264] (1887), 13 Can. S.C.R. 577; Newcombe K.C. did not emphasise that Strong C.J. had written the dissenting opinion in the appeal before the Supreme Court of Canada.

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> Therefore, I submit that the Indians had title inconsistent with the right of Ontario to do any of the things with this land which she immediately proceeded to do after this treaty was made.[265]

Indeed, in further argument Crown counsel went beyond this position and urged upon the Court a conception of Native title almost indistinguishable from fee simple:

> The Indians were scattered all over the country, from one end to the other, in various provinces. The same band very often inhabited different parts of the same province. ... At the same time *they owned their property*, if we may call it so, their territories, under various provincial governments [emphasis added].
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> [D]oes any one suppose that if they had no title to surrender that we would have gone up there and paid a lot of money to them to take a covenant from them to keep the peace?[266]

This interesting argument by the Dominion Government fell on an unreceptive court. Davies J. (dissenting on the legal issue of Ontario's obligation to reimburse the Dominion Government for the costs of negotiating the surrender) referred to "Indian title" more than sixteen times in his judgment, but maintained that Lord Watson had decided in the *St. Catherine's Milling* case that such "title" was personal and usufructuary only, and existed at the good will of the Sovereign.[267] Idington J. was even more dismissive, referring to the Native title question as: "A line of policy adopted [*sic*] of prudence, humanity and justice adopted [*sic*] by the British Crown to be observed in all future dealings with the Indians in respect of such rights as they might suppose themselves to possess."[268] Duff J., as indicated above, preferred to dismiss the Native interest in their lands as "a mere usufruct."[269]

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[265] Argument, reported at [1909] S.C.R. at pp. 37 to 39.
[266] *Ibid.*, at pp. 56 to 61.
[267] As seen above, Lord Watson decided nothing of the kind.
[268] As *per* Idington J., [1909] S.C.R. at p. 103.
[269] *Ibid.*, at p. 125.

Why did the Supreme Court of Canada elevate Lord Watson's *obiter dictum* of 1888[270] to the status of binding legal doctrine in 1909,[271] when Lord Watson had specifically refrained from expressing any opinion on the nature of Native title? One possible explanation was that the courts were prepared to apply the common law authorities such as *Campbell v. Hall*[272] and *Freeman v. Fairlie*[273] only selectively in matters of property and civil rights. In matters of property, at least in cases involving Aboriginal claims to ownership of land, the common law principles embodied in the authorities appeared to have been ignored. In matters of other civil rights of lesser economic significance, the principles were applied.

An example of this distinction was the apparent lack of difficulty Canadian courts experienced in recognising as valid marriages solemnized according to traditional Aboriginal laws. The subject matter of litigation in such cases clearly involved the civil rights of the Aboriginal parties. But it did not involve their property. For instance, in *Re Noah Estate*[274] Sissons J. had no difficulty in affirming the validity of a marriage accomplished by traditional Inuit custom.[275] Finding the argument against validity to be "fanciful and scandalous,"[276] he applied the reasoning of Wetmore J. in the much earlier case of *The Queen v. Nan-E-Quis-A-Ka*,[277] where he said at pp. 212 to 213 that:

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[270] *St. Catherine's Milling* case, *supra* note 254.
[271] *Ontario v. Canada*, *supra* note 239.
[272] See *supra* note 72.
[273] *Ibid.*
[274] (1961), 32 D.L.R. (2d) 185 (N.W.T.T.C.).
[275] This was by no means an isolated case. The judicial recognition of the continuance of Aboriginal pre-contact laws relative to "property and civil rights" continues to the present day in cases *not* involving rights to land. See, for example, *Connolly v. Woolrich and Johnson* (1867), 17 R.J.R.Q. 75 (Que. S.C.), affirmed *sub nom. Johnstone v. Connolly* (1869), 17 R.J.R.Q. 266 (Que. C.A.) [validity of Cree customary marriage]; *R. v. Nan-E-Quis-A-Ka* (1899), 1 Terr. L.R. 211 (N.W.T.S.C.) [validity of polygamous Indian marriage]; *The Queen v. Bear's Shin Bone* (1899), 4 Terr. L.R. 173 (N.W.T.S.C.) [validity of polygamous Indian marriage for purposes of criminal prosecution]; *Re Adoption of Katie* (1961), 32 D.L.R. (2d) 686 (N.W.T.T.C.) [validity of traditional Inuit adoption]; *Re Beaulieu's Adoption Petition* (1969), 3 D.L.R. (3d) 479 (N.W.T.T.C.) [validity of traditional Inuit adoption]; *Re Tucktoo and Kitchooalik* (1972), 27 D.L.R. (3d) 225 (N.W.T.T.C.) [validity of traditional Inuit adoption]; *Re Wah-Shee* (1975), 57 D.L.R. (3d) 743 (N.W.T.S.C.) [validity of traditional Indian adoption]; *Re Tagornak*, [1984] 1 C.N.L.R. 185 (N.W.T.S.C.) [validity of traditional Inuit adoption involving a caucasian adoptive father and an Inuit adoptive mother]; *Wilson v. Wilson* (B.C.S.C.), unreported, June 6, 1991 [application of Nisga'a customary law of child guardianship]. See, generally, Norman K. Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada," [1984] 4 C.N.L.R. 1.
[276] (1961), 32 D.L.R. (2d) at p. 195.
[277] (1889), 1 Terr. L.R. 211; Wetmore J.'s reasoning was quite consistent with that of Lord Mansfield in *Campbell v. Hall*, *supra*, note 72.

> The charter (of the Hudson's Bay Company) did introduce the English law, but it did not at the same time make it applicable generally or indiscriminately; *it did not abrogate Indian laws and usages* ... [emphasis added].

If the Hudson's Bay Company Charter "did not abrogate Indian laws and usages" one might wonder why it should have been thought that it altered or abrogated pre-existing Native systems of land tenure. It is instructive to compare the court's liberal holding in *Nan-E-Quis-A-Ka*, relative to civil rights *other* than property rights, with the inapplicable *obiter dictum* one year earlier relative to the "personal and usufructuary" rights of the "Indians" to their lands stated by Lord Watson (as one of the many possible alternatives apparently suggested by counsel in the "great deal of learned discussion at the bar as to the precise quality of the Indian interest," to which he referred at page 55 of his judgment). Since common law authorities clearly recognised continuance of systems of property and civil rights of Aboriginal peoples,[278] the apparent exception as to land rights was difficult to explain, at least in legal terms.

As seen in Chapter Two, common law authorities outside Canada clearly recognised the continuance of indigenous systems of property and civil rights. Consequently, the apparent exception in Canadian jurisprudence relative to Aboriginal land tenure was difficult to account for. While never articulated by the courts, the answer may lie in the much greater economic significance of land ownership in comparison to that of other traditional civil rights for which Aboriginal peoples might seek judicial vindication.

The (One and Only) Attempt to Apply Common Law Principles

Some eighty-five years after Lord Watson's *obiter dictum* in the *St. Catherine's Milling* case, the possibility of Aboriginal title to traditional Aboriginal lands in accordance with the normal principles of real property law was judicially recognised by the Supreme Court of Canada. By this period, the position of the federal government relative to the existence of Aboriginal land title had undergone a complete reversal. By the late 1960s, the official position of the federal government was that Aboriginal title did not

[278] *Campbell v. Hall*; *Freeman v. Fairlie*, *supra*, note 72.

exist in Canada.[279] This new policy position was soon judicially rejected in the 1973 case of *Calder v. Attorney-General of British Columbia.*[280]

In *Calder*, the appellants brought an action on their own behalf, and on behalf of all members of the Nisga'a Tribal Council and four other Bands, for a declaration that their "Indian title" to certain ancestral lands in the vicinity of the Nass Valley in British Columbia had never been extinguished. These lands had never been ceded to or purchased by the Crown, by treaty or otherwise. The claim was rejected by the Supreme Court of British Columbia[281] and by the British Columbia Court of Appeal.[282]

The Supreme Court of Canada's judgment in *Calder*, while divided on the continued existence of Nisga'a land tenure in the claimed region, was remarkable in a number of respects. First, after eighty-five years, the "personal and usufructuary" theory of Aboriginal land title was criticised as being analytically "unhelpful." Secondly, the judgment affirmed that pre-contact Aboriginal tenure, if not extinguished, survived as a matter of common law. Notwithstanding this finding, the court made no attempt to define its quality or characteristics, possibly because the common law of real property was well understood at the time, such that no elaboration of its incidents and content was thought necessary. Thirdly, the theory that Aboriginal title arose solely from the *Royal Proclamation* of 1763, or any other legislative or prerogative act of recognition, was rejected. Finally, the judgment represented the first, and to date the only, conscientious attempt by the Supreme Court of Canada to apply to Aboriginal peoples' land claims the same common law principles of land ownership which had been, and still are, routinely applied in cases involving non-Aboriginal litigants.[283]

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[279] Canada, *Statement of the Government of Canada on Indian Policy* (White Paper), presented to the First Session of the Twenty-eighth Parliament by the Hon. Jean Chretien (Ottawa: Department of Indian Affairs and Northern Development, 1969).
[280] [1973] S.C.R. 313.
[281] (1969), 8 D.L.R. (3rd) 59 (B.C.S.C.).
[282] (1970) 13 D.L.R. (3d) 64 (C.A.).
[283] It should be noted that this approach was unique and short-lived. By 1984, the Supreme Court of Canada had departed from, without ever formally rejecting, the application of common law principles of real property to Aboriginal land claims, in favour of its new (and present) concept of "*sui generis*" Aboriginal title: *Guerin v. The Queen* (1984), 13 D.L.R. (4th) 321 (S.C.C.). The new *sui generis* concept,

The Nisga'a's appeal in *Calder* was dismissed on technical grounds in that, as of the appeal, it appeared that a fiat to bring an action against the Crown in Right of British Columbia had not been obtained.[284] The remainder of the Court, however, divided, not on the question of whether Aboriginal title existed at common law, but on whether the admittedly pre-existing Aboriginal title of the Nisga'a had been extinguished. Judson J. (Martland and Ritchie JJ. concurring) found that Aboriginal title had once existed, but had been extinguished prior to the commencement of the action; Hall J. (Spence and Laskin JJ. concurring) found that Aboriginal title had existed and still survived.

In *Calder*, even the prevailing judgment, written by Judson J.,[285] recognised that Aboriginal title to land existed at common law, and did not, as suggested by Lord Watson (as one of a number of possibilities suggested by counsel in the *St. Catherine's Milling* case), owe its origins solely to the *Royal Proclamation* of 1763. After quoting extensively from the *St. Catherine's Milling* case, Judson J. said:

> I do not take these reasons (in the *St. Catherine's Milling* case) to mean that the Proclamation was the exclusive source of Indian title. The territory under consideration in the *St. Catherine's* appeal was clearly within the geographical limits set out in the Proclamation.[286]

At page 328, he continued with the following remarkable passage:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. *This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right."* What they are asserting in this action is that they have the right to continue to live on their lands as their forefathers had lived and that this right has never

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aside from being a judicial invention of questionable pedigree, was as analytically unhelpful as the older formulation of "personal and usufructory" land rights. See the discussion of *Guerin*, *infra*.

[284] See the judgment of Pigeon J. in *Calder*, [1973] S.C.R. at pp. 422 to 427.

[285] Judson J.'s judgment in *Calder* was a majority judgment on the procedural issue of the necessity of a fiat to sue the Crown in Right of British Columbia and by default, the prevailing plurality judgment on the issue of extinguishment of title.

[286] [1973] S.C.R. at pp. 322 to 323: Judson J. found that the *Royal Proclamation* was not a source of Aboriginal title to land in British Columbia, and there has been no subsequent decision in which a majority of the Court has disagreed with this finding. For British Columbia First Nations, therefore, proof of common law Aboriginal title without reliance on the *Royal Proclamation* may be the only legal route, outside land claims negotiations with governments, to obtain legal recognition of their title to ancestral lands.

> been lawfully extinguished. There can be no question that this right was dependent on the goodwill of the Sovereign [emphasis added].[287]

The significance of Judson J.'s judgment was his finding, consistent with the common law authorities he cited, that no act of a government or legislature was necessary to create Aboriginal title. It existed at common law, by virtue of Aboriginal possession of land. In view of the common law authorities relative to possession and ownership examined in Chapter Two, this was not a surprising conclusion.

Citing *United States v. Santa Fe Pacific Ry. Co.*[288] Judson J. concluded that:

> [It is not true] ... that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the *Cramer*[289] case, "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive."

Judson J. did not find it necessary to elaborate upon the quality or content of Aboriginal land title, probably because he found that it had been lawfully extinguished by Prerogative Ordinances made by Sir James Douglas and other colonial governors prior to British Columbia's entry into Confederation in 1871, and by provincial legislation thereafter. He concluded:

> In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy of the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.[290]

Hall J. disagreed with Judson J. on the issue of extinguishment. He did not consider it necessary to define the incidents or quality of unextinguished Aboriginal title which, given the outcome of the appeal, did not

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[287] [1973] S.C.R. at p. 328. Surely Judson J. must have been wrong in asserting that "this right was dependent upon the goodwill of the Sovereign." He must have meant that it was dependent upon the goodwill of Parliament, in that, as a matter of constitutional common law, the Crown had no prerogative power to alter or derogate from the property rights of the inhabitants of a territory once a legislative assembly had been granted or promised: see *Campbell v. Hall*, *supra* note 72. The legal issue actually decided in the appeal was, therefore, whether the Appellants' original Aboriginal title had existed but had subsequently been extinguished by competent legislation, or had existed and still survived.

[288] (1941) 314 U.S. 339 at p. 347.

[289] *Cramer et al. v. United States* (1923), 261 U.S. 219 (U.S.S.C.), at p. 229.

[290] [1973] S.C.R. at p. 344.

have to be decided by the Court. He stated: "The exact nature and extent of the Indian right or title does not need to be established in this litigation. The issue here is whether any right or title the Indians possess as occupants of the land from time immemorial has been extinguished."[291]

Following Commonwealth and American common law jurisprudence, Hall J. agreed with Judson J., both as to the analytical inutility of the characterisation of Aboriginal land title as a "personal and usufructuary right," and that Aboriginal title did not owe its origins (or, at least not its sole origin, in that he concluded, unlike Judson J., that the *Royal Proclamation* did extend to British Columbia) to the *Royal Proclamation* of 1763, but existed at common law by virtue of unchallenged possession. This was quite consistent with the common law doctrine that all ownership flows ultimately from possession.

As to the concept of the "personal and usufructuary right," Hall J. relied upon Commonwealth jurisprudence received into Canadian common law. Quoting from Lord Haldane's judgment in *Amodu Tijani v. Secretary, Southern Nigeria*[292] he adopted the following passage as correctly stating the Canadian legal position:

> Their Lordships make the preliminary observation that in interpreting native title to land, not only in Southern Nigeria, but in other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence which have grown up throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification or burden on the radical or final title of the sovereign where that exists. *In such cases the title of the Sovereign is a mere legal estate, to which beneficial rights may or may not attach* [emphasis added].[293]
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[291] [1973] S.C.R. at p. 352; this was certainly an interesting characterisation of the legal issue under litigation by a judge who found that *unextinguished* Aboriginal title *did* exist. The essence of the Nisga'a's claim was for ownership of land, not for a declaration that certain undefined rights relative to that land had not been extinguished.
[292] [1921] 2 A.C. 399 (P.C.).
[293] *Ibid.*, as *per* Lord Haldane, at pp. 402 to 404 cited with approval by Hall J. at [1973] S.C.R. 354.

> Their Lordships think that the learned Chief Justice in the judgement thus summarized, which virtually excludes the legal reality of the community usufruct, has failed to recognize the real character of the title to land occupied by a native community. That title, as they had pointed out, is *prima facie* based, not on such individual ownership as English law has made familiar, but on a communal usufructuary occupation, *which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference* [emphasis added].[294]

The implication is that, even if it were legally correct to characterise Aboriginal title as a "personal and usufructuary right" (which was very questionable given Lord Watson's statement in the *St. Catherine's Milling* case that the Privy Council would not decide this issue), this would be determinative of almost nothing. The right might amount to the equivalent of a communally held equitable fee simple, which constrained governmental rights of action to "comparatively limited rights of administrative interference."[295] In such cases, the Crown's position would be analogous to that of a bare trustee, to the Aboriginal population's *cestui que* trust, vested in them.

On the question of the origins of Aboriginal title, while Hall J. found that the *Royal Proclamation* of 1763 did extend to British Columbia by operation of the *Colonial Laws Validity Act*,[296] he equally found that this was not the *sole* origin of Aboriginal land title. Aboriginal title to ancestral lands existed, until extinguished, by virtue of the ordinary common law principles relative to possession and ownership of land, which the Canadian courts had consistently applied, *except* in cases involving Aboriginal peoples, for the preceding eighty-five years:

> Possession is of itself at common law proof of ownership: Cheshire, *Modern Law of Real Property*, 10th ed., p. 659, and Megarry and Wade, *The Law of Real Property*, 3rd ed., p. 999. Unchallenged possession is admitted here.[297]
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[294] As *per* Lord Haldane in *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] A.C. at pp. 409 to 410, adopted by Hall J. at [1973] S.C.R. 401, as correctly representing the Canadian legal position.
[295] *Ibid.*
[296] (1865), 28 & 29 Vic., c. 63 (Imp.), referred to by Hall J. at [1973] S.C.R. at pp. 394 to 395.
[297] [1973] S.C.R. at p. 368.

> In enumerating the *indicia* of ownership, the trial judge overlooked that possession is of itself proof of ownership. *Prima facie*, therefore, the Nishgas are the owners of the lands that have been in their possession from time immemorial and, therefore, the burden of establishing that their right has been extinguished rests squarely on the respondent.[298]

Clearly, Hall J. was expressing no new or novel legal principle. His position was completely in accord with the Canadian, English and Commonwealth common law of real property applied by Canadian courts for more than a century, *except* in cases involving Aboriginal claims for ownership of land. What was novel was that this was the first time that generally accepted and well understood common law principles of land law were applied to a dispute about land claimed by Aboriginal peoples. Hall J. also observed that these same common law principles very early been applied to land claims by other Aboriginal peoples, in other jurisdictions, including the United States. Quoting with evident approval from the 1823 decision of Marshall C.J. in *Johnson v. McIntosh*, Hall J. bolstered his position that, at common law, Aboriginal peoples' claims to ownership of ancestral lands did not depend upon any act of recognition by the state:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire.
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> The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no other Europeans could interfere. It was a right which all asserted for themselves and to the assertion of which, by others, all assented.
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> The relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.
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> In the establishment of these relations, the rights of the original inhabitants were, in no case, entirely disregarded. *They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion* ... [emphasis added].[299]

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[298] *Ibid.*, at p. 375.

[299] (1823), 8 Wheaton 543; 21 U.S. 240, *per* Marshall C.J., quoted with approval by Hall J. at [1973] S.C.R. at pp. 381 to 382.

According to Hall J., "The same considerations applied in Canada."[300] These "same considerations" included the clearly established principles in *Campbell v. Hall*[301] and *Freeman v. Fairlie*[302] which, it would seem, no Canadian court had previously considered applicable to ownership of land by Aboriginal peoples. Hall J. concluded his analysis by differing with Judson J. only on the question of extinguishment: "It would, accordingly, appear to be beyond doubt that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and the intention must be "clear and plain". There is no such proof in the case at bar; no legislation to that effect."[303] Accordingly, by application of long recognised common law principles, novel only in their consistent non-application by Canadian courts to the land claims of Aboriginal peoples, Hall J. would have found the Nisga'a to be the owners of their lands.

What significance should then be attributed to the Supreme Court's judgment in *Calder*? For the Nisga'a, of course, there was none, in that the prevailing judgments of Judson and Pigeon JJ. found either that their title had been extinguished, or that the absence of a fiat from the Crown in Right of British Columbia precluded their action altogether.[304] In terms of the evolution of the Canadian jurisprudence relative to Aboriginal land claims, however, the judgment constituted a clear rejection of the utility of the "personal and usufructuary" theory of Aboriginal title, which had wrongly dominated Canadian judicial thinking on the matter for eighty-five years following the *St. Catherine's Milling* case. It also rejected the notion that Aboriginal title did not exist at common law, and affirmed the proposition that Aboriginal title did not depend on any formal act of entitlement or recognition by the state.

Curiously, however, the judgment in *Calder* represents the only decision of the Supreme Court of Canada, before or since,[305] in which a conscientious attempt was made to define Aboriginal title as a common law concept, in terms of the same well developed principles of land law which the courts regularly applied to

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[300] [1973] S.C.R. at p. 386.
[301] *Supra* note 72.
[302] *Ibid.*
[303] [1973] S.C.R. at p. 404.
[304] The *Calder* decision did, however, produce the *political* consequence of the official withdrawal of the Federal Government's 1969 White Paper: see, Statement of the Hon. Jean Chretien, Minister of Indian Affairs and Northern Development, relative to the land claims of Indian and Inuit Peoples (Ottawa: 8 August 1973).

disputes over land ownership not involving Aboriginal peoples. Inexplicably, *Calder* was and remains an anomaly in the Canadian jurisprudence of Aboriginal title.

Within ten years, the Supreme Court of Canada had redefined Aboriginal land title yet again in a manner which returned to the previous pattern of ignoring the common law of real property in the case of Aboriginal claims, while applying it in the case of other Canadians.[306] In the interim, while the legal possibility of Aboriginal ownership of land at common law could no longer be dismissed, intervening judicial pronouncements began to cut down the content of Aboriginal "title" from land ownership, to specific rights, to perform specific limited activities, on the land to which ownership was claimed.

The Judicial Confusion Between Ownership of Land and its Use

Following the decision in *Calder*, one might reasonably have supposed that certain legal propositions as to Aboriginal land title had been settled. Both Judson and Hall JJ. had agreed that the *Royal Proclamation* of 1763 was not the source of Aboriginal title, or at least not its sole source; that Aboriginal title existed at common law and arose by virtue of possession; and that such title, if established, persisted until lawfully extinguished. But, as indicated above, Canadian courts have subsequently made the decision in *Calder* an anomaly. After *Calder*, decisions of the provincial superior courts and the Federal Court of Canada paid scant attention to the possibility that Aboriginal peoples might own their lands in accordance with the same law of real property which they applied to other Canadian citizens. They evinced a consistent disinclination to concede that Aboriginal land title could have the same quality or incidents as accompany ownership of land by non-Aboriginal citizens. Three examples serve to demonstrate this.

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[305] Including the decision in *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193 (S.C.C.), discussed *infra*.

[306] In *Guerin v. The Queen* (1984), 13 D.L.R. (4th) 321 (S.C.C.), the Supreme Court of Canada inexplicably departed from, without ever formally rejecting, the promising approach of applying the same legal principles to Aboriginal land claims as the courts apply to disputes over land involving other Canadians, *i.e.*, the normal principles of real property law. The invention of "*sui generis*" Aboriginal title by Dickson J. in *Guerin* has remained the accepted legal approach ever since, although the stated content of "*sui generis* Aboriginal title," from one judgment to the next, has varied.

The first was the decision of the Federal Court of Canada in *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*[307], decided only six years after the Supreme Court's judgment in *Calder*. The Inuit of Baker Lake asserted a claim for Aboriginal title to a large tract of land which had formerly fallen within the area covered by the 1670 Charter of the Hudson's Bay Company. The action included claims for trespass and damages against various mining companies which were conducting operations, under government license, on the lands which the plaintiffs claimed. The case was tried and decided by Mahoney J.

Mahoney J. first stated that, even if the *Royal Proclamation* of 1763 was a source of Aboriginal title, it could not form a basis for the plaintiffs' claim because the lands covered by the Charter of the Hudson's Bay Company had been expressly excluded from the lands to which the *Proclamation* applied.[308] Nevertheless, following *Calder*, he accepted that Aboriginal title could exist at common law, independently of the *Royal Proclamation*:

> In *Calder v. Attorney-General of British Columbia*,[309] the six members of the Supreme Court who found it necessary to consider the substantive issues, which dealt with territory outside the geographic limits of the Proclamation, all held that an aboriginal title recognized at common law had existed.
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> While it appears that the judgement of Pigeon J.[310] embodies the *ratio decidendi* of the Supreme Court, the clear agreement of the other six judges on the point is solid authority for the general proposition that the law of Canada recognizes the existence of an aboriginal title independent of The Royal Proclamation or any other prerogative act or legislation. It arises at common law.[311]

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[307] [1979] 3 C.N.L.R. 17 (F.C.T.D.).

[308] Here Mahoney J. relied on the Supreme Court of Canada's conclusions to this effect with respect to former Hudson's Bay Company Charter lands in *R. v. Sigeareak*, [1966] S.C.R. 645. K. M. Narvey, in "The Royal Proclamation of 7 October 1763, the Common Law, and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company" (1973), 38 Sask. L. Rev. 123, advanced a highly persuasive counter-argument that the *Proclamation* did apply in Hudson's Bay Company territories, based both on a contemporary grammatical analysis of the document itself, and on his detailed historical observations that it was the invariable British practice in its North American colonies, from Florida to Quebec, both before and after 1763, for the Crown to purchase the lands of the Indians prior to permitting settlement to proceed.

[309] [1973] S.C.R. 645.

[310] As to the necessity of a fiat, see *supra* note 284.

Thus far Mahoney J.'s reasoning appeared to follow *Calder* as the governing authority. He then proceeded, not inconsistently with *Calder*, (which had not addressed this point) to set out the criteria which he opined must be satisfied[312] if a common law claim for Aboriginal title was to succeed:

> The elements which the Plaintiffs must prove to establish an aboriginal title cognizable at common law are:
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> (1) That they and their ancestors were members of an organized society.
> (2) That the organized society occupied the specific territory over which they assert the aboriginal title.
> (3) That the occupation was to the exclusion of other organized societies.
> (4) That the occupation was an established fact at the time sovereignty was asserted by England.[313]

As to Mahoney J.'s construction of the above "test", he cannot be criticised for straying from Canadian legal authority, in that the *Calder* decision had left open the question of how Aboriginal title might be proved. But Mahoney J. made a positive finding that the plaintiffs had satisfied his new "test" for the proof of Aboriginal title, and then proceeded to make a remedial declaration of "title" unlike anything previously known to law.

> [T]here appears to be no valid reason to demand proof of the existence of a society more elaborately structured than is necessary to demonstrate that there existed among the aborigines a recognition of claimed rights, sufficiently defined to permit their recognition by the common law upon its advent in the territory. The thrust of all the authorities is not that the common law deprives aborigines of their enjoyment of their land in any particular *but, rather, that it can give effect only to those incidents of that enjoyment that were, themselves, given effect by the regime that prevailed before*[314] [emphasis added].

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[311] [1979] 3 C.N.L.R. at p. 44.

[312] In this, however, Mahoney J. departed radically from recognised real property principles relative to proof of title. The special "test" he proposed for proof of Aboriginal title is difficult if not impossible to reconcile with the common law presumption of ownership which flows from possession for any period of time, or with prescriptive rights against the Crown under the *Nullum Tempus Act* and its successor legislation, considered in Chapter Two. It also failed to address the legal possibility that a pre-existing Aboriginal land tenure *qua* pre-existing indigenous laws had survived the transition to British sovereignty.

[313] [1979] 3 C.N.L.R. 43.

[314] This is a completely novel proposition never, to my knowledge, articulated by a court relative to common law land claims *not* involving Aboriginal peoples. It is without precedent or authority and at odds with the very concept of "ownership" of land as this is normally understood by judges, lawyers and landowners.

> The fact is that the aboriginal Inuit had an organized society. It was not a society with very elaborate institutions, but it was a society organized to exploit the resources available on the barrens and essential to sustain human life there. That was about all they could do: hunt and fish and survive. *The aboriginal title (sic) here encompasses only the right to hunt and fish as their ancestors did*[315] [emphasis added].

With respect, this result is difficult to understand. Mahoney J. affirmed the existence of Aboriginal title as an interest in land arising at common law. He proposed a legal test for the proof of Aboriginal title, albeit a "test" which no court would have considered applicable to non-Aboriginal litigants. He then found Aboriginal title to be proved on the basis of this test. But the relief he granted was not the declaration of ownership which one would expect to flow from title but only "the right to hunt and fish as their ancestors did." The "personal and usufructuary" concept of the Aboriginal interest in land had crept back in at the last stage of the analysis. It was unusual, to say the least, to equate ownership of land with the right to "hunt and fish and survive."[316] The limitation was even more difficult to understand in light of Mahoney J.'s finding that the fact "that their (the Plaintiffs') society has materially changed in recent years is of no relevance."[317]

Even on the most benign reading, the *Baker Lake* decision placed severe constraints upon the commercial and economic utility of Aboriginal title, even where the claimants could satisfy Mahoney J.'s new four-fold test. At the very least, one would have expected that a finding of Aboriginal title would logically have necessitated a concurrent finding that the Mining Company defendants were trespassers. Clearly, the result did not conform to the concept of land ownership found in cases not involving Aboriginal peoples, which would include the right to exclude trespassers, and the right of the owner to exploit the land as he or she saw fit.

A second example of the judicial divergence from a conscientious application of common law principles to claims for ownership of land by Aboriginal peoples is found in the 1985 decision of the Supreme Court of

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[315] [1979] 3 C.N.L.R. at pp. 46 to 47; in effect, a claim for ownership was cut down to a declaration of rights to engage in limited specified activities on the land to which ownership was claimed.
[316] "That was about all they could do: hunt and fish and survive." (*sic*), *per* Mahoney J., *Ibid.*, at p. 47.
[317] *Ibid.*, at p. 47; a further novel proposition unsupported by authority.

Ontario in *Attorney-General for Ontario v. Bear Island Foundation.*[318] The Ontario Government sought a declaration that all lands within an area claimed by the Temagami Band were unpatented Crown lands under the *Public Lands Act*,[319] such that the Temagami had no interest whatsoever in them. The Temagami brought a counterclaim asserting Aboriginal title to the lands in question, and further asserting that the content of such title amounted to nothing less than the equitable fee simple in the land.[320] Steele J. allowed Ontario's action and dismissed the counterclaim on the alternative factual grounds that the Temagami had proven no historical connection with the land,[321] that the land had been validly surrendered by the Robinson-Huron Treaty of 1850,[322] or by the later "adhesion" of the Temagami to that Treaty even if their ancestors were not parties to it,[323] or that any residual Aboriginal rights or title to the land had been extinguished prior to 1982.[324] What was most noteworthy about the decision, however, was Steele J.'s legal characterisation of Aboriginal title, made in the alternative, in the event that an appellate court found that he had misapprehended the evidence.

Citing *Calder*, Steele J. (correctly) acknowledged that Aboriginal title existed at common law, and did not depend upon any affirmative act of recognition by the state.[325] Next, he proceeded to the (clearly incorrect) assertion that the *Calder* case established that Aboriginal common law rights to land were "personal and usufructuary,"[326] a return to Lord Watson's *obiter dictum* in the *St. Catherine's Milling* case and the very

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[318] [1985] 1 C.N.L.R. 1 (Ont. S.C.); appeal dismissed, (1989), 58 D.L.R. (4th) 117 (Ont. C.A.); appeal dismissed, (1991), 83 D.L.R. (4th) 381 (S.C.C.).
[319] R.S.O. 1980, c. 413.
[320] The plaintiffs by counterclaim actually asserted their action on behalf of the "Teme-Angama Anishnabe," ("the Tribe"), an entity they recognised amongst themselves, and also on behalf of the Temagami Band of Indians as constituted under the *Indian Act*, R.S.C. 1985, c. I-5. Of these two, the latter probably had a better claim to legal status.
[321] [1985] 1 C.N.L.R. at p. 34.
[322] *Ibid.*, at p. 86.
[323] *Ibid.*, at pp. 92 to 95.
[324] *Ibid.*, at p. 81: "The opening up of land pursuant to ... legislation (*or even in the absence of legislation*) is sufficient to extinguish aboriginal rights" [emphasis added]. This proposition is irreconcilable with what Hall J. stated in *Calder*; see, *supra* note 303. For the extinguishment of Aboriginal title, Hall J. would have required a legislative act and, indeed, a legislative act which was "clear and plain" in its intent : [1973] S.C.R. at p. 404. It was also inconsistent with the even older common law principle that the Sovereign has no prerogative power to interfere with the property rights of the subject: see *Campbell v. Hall, supra* note 72.
[325] [1985] 1 C.N.L.R. at p. 12.
[326] *Ibid.*, at. p. 32.

proposition rejected by Judson J. for the majority in *Calder*.[327] On the basis of this questionable premise, Steele J. then proceeded to revert to the "personal and usufructuary" characterisation of Aboriginal title, with the further restriction that even if Aboriginal title to the disputed land had been established on the evidence, and in accordance with the new "test" (applicable, apparently, only to Aboriginal peoples) articulated by Mahoney J. in *Baker Lake*, no new uses would flow from such title beyond the uses made of the land by the Temagami at the time of the assertion of British sovereignty.[328]

> I conclude that the Royal Proclamation *and* common law gave to the Indians only the aboriginal right to continue using the lands for the purposes and in the manner enjoyed in 1763, and not the right to any new uses to which they might put the land. *I list the traditional uses for basic survival and personal ornamentation existing as of 1763*[329] [emphasis added].
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> The Privy Council made it clear ... that the Indians were not, prior to surrender, owners in fee simple of the territories, and that a fee simple interest was not the character of the Indian Interest.[330]
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> To summarize, the *St. Catherine's Milling Case* stands for the proposition that, as a result of conquest, on Proclamation lands aboriginal title is personal and usufructuary only, and exists solely at the pleasure of the Crown.[331]

On a reading of Steele J.'s judgment, one was left with the impression that the *Calder* case, while referred to, never actually occurred. Lord Watson's *obiter dictum* as to "personal and usufructuary rights" in the *St.*

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[327] As *per* Judson J. at [1973] S.C.R. at p.328: "The fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. *This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructory right*" [emphasis added].

[328] No authority was offered for this additional restriction.

[329] [1985] 1 C.N.L.R. at pp. 20 to 21.

[330] *Ibid.*, at p. 28; this statement was clearly wrong in view of what Lord Watson actually said: "There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, *but their Lordships do not consider it necessary to express any opinion on the point*" [emphasis added]: [1888] A.C. at p. 55 (P.C.).

[331] *Ibid.*; as already seen, the *St. Catherine's Milling* case stands for no such proposition at all. Indeed, the Crown had no prerogative power to interfere with the property rights of any subject: *Campbell v. Hall*, *supra* note 72.

Catherine's Milling case was re-elevated to the level of received, indeed binding, legal doctrine, notwithstanding its rejection as an unhelpful concept by the Supreme Court of Canada in *Calder*. In fairness to Steele J., it could only be said that other courts of coordinate and superior jurisdiction had been behaving in much the same manner.

Consider, for instance, the judgment in *Isaac v. Davey*,[332] a decision of the Ontario Court of Appeal, arguably binding upon Steele J. In the *Isaac* case, Arnup J.A. had said:

> For the purposes of this case, *it is sufficient to say that Indian title in Ontario has been "a personal and usufructuary right, dependent upon the goodwill of the Sovereign"*. Indian lands were reserved for the use of the Indians, as their hunting grounds, under the Sovereign's protection and dominion. The Crown at all times held a substantial and paramount estate underlying the Indian title. The Crown's interest became absolute whenever the Indian title was surrendered or otherwise extinguished. These are the words of the Privy Council (*per* Lord Watson) in *St. Catherine's Milling and Lumber Co. v. The Queen* ... and this statement of the legal position has been followed ever since[333] [citations in text omitted; emphasis added].

Steele J. may have considered himself bound in his *Bear Island* decision by what Arnup J.A. had said in *Isaac*, albeit *in obiter*, as to the nature of Aboriginal title. But it was quite surprising that Arnup J.A. was apparently uninfluenced by the judgments of *both* Judson *and* Hall JJ. in *Calder*, decided only one year before (to the extent of completely omitting any reference to the *Calder* decision from his judgment), where the "personal and usufructuary" formulation was rejected as analytically "unhelpful" in determining the legal nature of Aboriginal title. At the conclusion of his Reasons for Judgment in *Bear Island*, Steele J. reiterated that "The aboriginal rights of Indians are personal and usufructuary."[334]

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[332] (1974) 3 O.R. (2d) 610 (C.A.); affirmed, (1977), 77 D.L.R. (3rd) 481 (S.C.C.); *Isaac* did not address land title directly, but is still instructive for Arnup J.A.'s characterisation of Aboriginal title as "personal and usufructuary," irrespective of the Supreme Court's rejection of that formulation in *Calder*.

[333] (1974), 5 O.R. (2d) 610 (C.A) at p. 620 Again it is instructive to compare Arnup J.A.'s theory of the law with what Lord Watson actually did say, *supra* note 256. It is also difficult to understand how Arnup J.A. could have reached his conclusions as to the "personal and usufructory" quality of Aboriginal title given the Supreme Court of Canada's rejection of this position in its decision in *Calder*, only one year earlier. It is even more interesting that there is not one single reference to the *Calder* decision in Arnup J.A.'s Reasons for Judgment. It is unlikely that he was unaware of it.

[334] [1985] 1 C.N.L.R. at p. 118.

What was most notable about the judgments in *Baker Lake*, *Bear Island* and *Isaac* was that, despite the clear guidance of the Supreme Court of Canada in *Calder*, common law claims made by Aboriginal peoples for title to land (*i.e.*, ownership) in these cases were not decided in accordance with common law principles. In *Baker Lake* a finding of title was made, albeit by way of a "test" which no court would have considered applicable to non-Aboriginal claimants, while in *Bear Island* title was found not to have been proved on the evidence. In both instances, however, disputes involving ownership of land were treated as if the maximum remedy available to the court was a declaration granting the plaintiffs certain *in personam* usufructuary rights to perform a certain set of limited activities on the land to which title (*i.e.*, ownership) was claimed. The logical outcome of a finding of title would have been a declaration granting rights *in rem* against the land itself. In both cases, claims for ownership were cut down into claims for limited rights to use the land, fixed in time at the assertion of British sovereignty.[335] Clearly, the courts exhibited considerable confusion between rights to real property *in rem* and *in personam*, the former constituting the nature of the claims made, and the latter characterising the nature of the remedies said to be available, when remedies were granted.

One need scarcely observe that title to land meant much more than this at common law. Ownership of land and use thereof remain legally distinct concepts. The finding of Aboriginal title in *Baker Lake*, and the definition of Aboriginal title in *Bear Island*, were completely inconsistent with the conclusions which were, or should have been, drawn from them. Arnup J.A.'s statements in *Isaac* were inexplicable in light of the majority judgment in *Calder*. One can only conclude that the courts in the post-*Calder* period were either unable or unwilling to apply the common law of real property, accepted in disputes between non-Aboriginal litigants, in cases involving claims to ownership of land by Aboriginal peoples.

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[335] In *Baker Lake*, the claim for ownership was converted into a right to "hunt and fish and survive" [1979] 3 C.N.L.R. at p. 47; in *Bear Island*, the claim for ownership (while not made out on the evidence) would have been converted into a right to use the land "for basic survival and personal ornamentation as of 1763" had Steele J.'s factual findings relative to proof of title been different: [1985] 1 C.N.L.R. 21. Neither formulation was consistent with the incidents of land ownership as generally understood in Canadian law.

The Modern Position: "*Sui Generis*" Land Rights

As the cases demonstrated, in the aftermath of the decision in *Calder*, Canadian courts acknowledged the legal possibility of "Aboriginal title," but imposed tests for its proof which would never have been applied outside Aboriginal land title litigation and, if proved, cut down such "title" from full ownership of land to limited packages of rights to perform various activities on the land to which ownership was asserted.[336] Clearly, a judicial reluctance existed to carry the implications of land title, *i.e.*, ownership of land, by Aboriginal peoples, described by the Supreme Court of Canada in the *Calder* case, to their necessary legal conclusions. The best that could be said was that there seems to have been a pervasive judicial confusion between the legally distinct concepts of land ownership and land use. This same confusion continues to the present.[337]

The Supreme Court of Canada, however, has done no better. Within eleven years of its decision in *Calder*, it diverged from, without ever formally rejecting, the concept of Aboriginal title as a normal interest in land arising at common law, with all its legal implications as to use, alienation to purchasers for valuable consideration, and economic exploitation, in favour of a new, judicially invented category of "*sui generis*" Aboriginal land rights.[338] "*Sui generis*", literally "a thing of its own class," was an empty category and arguably was the judicial tool invented to allow the courts to escape the full legal implications of the existence of Aboriginal title at common law, with all the normal incidents of ownership and use which would flow from it. It asserted uniqueness without specifying any content.

The *Guerin* case involved reserve land of the Musqueam people; however, Dickson J. asserted that the principles which governed the quality of the Aboriginal interest in Indian reserves also governed Aboriginal title to land where it existed at common law.[339] The *Guerin* case arose out of a breach of

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[336] *Hamlet of Baker Lake v. Minister of Indian and Northern Affa*irs, [1979] 3 C.N.L.R. 17 (F.C.T.D.); *Attorney-General for Ontario v. Bear Island Foundation*, [1985] 1 C.N.L.R. 1 (Ont. S.C.).
[337] This is true even of the concept of "*sui generis* Aboriginal title" adopted by Lamer C.J. in his decision in *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193 (S.C.C.), discussed *infra*.
[338] *Guerin v. The Queen* (1984), 13 D.L.R. (4th) 321 (S.C.C.).
[339] *Ibid.*, at p. 337; no authority capable of supporting this proposition, or any other reason why it should be accepted, was offered by Dickson J. He seemed to have considered the Privy Council's decision in the case

fiduciary duty owed by the federal government to the Musqueam people. In brief, the Musqueam agreed to surrender a portion of their reserve for development as a golf course. The land was to be leased on agreed terms. Representatives of the federal government proceeded to obtain a lease of the surrendered land on terms much less favourable than those authorised by the Musqueam, and then concealed lease's terms from the Musqueam for a number of years. When the Musqueam eventually obtained a copy of the lease, they commenced an action against the federal government for damages for breach of trust, breach of fiduciary duty and equitable fraud. It was proved at trial that, had the Musqueam known the actual terms of the lease, they would never have consented to enter into it. The trial judge found a breach of trust and awarded

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of *Attorney-General for Quebec* v. *Attorney-General for Canada*, [1921] 1 A.C. 401 (the *Star Chrome Co.* case) as supporting his assertion about the nature of the Aboriginal interest in common law title lands. In that case, the Privy Council was asked to rule upon the legal consequences of a defect in title when an Indian band in Quebec surrendered land set aside for it as a reserve under a statute of the United Province of Canada [14 &15 Vict. (Can.), c. 106]. The Dominion Government purported to sell the surrendered land to a private purchaser. By a series of further land transactions, the land ultimately was bought by Dame Rosalie Thompson, who sold it to the Star Chrome Mining Co. Ltd. The legal question, asked and answered by the Privy Council, was whether the land, once surrendered to the Crown, belonged to the Dominion or the Province. Correctly applying *St. Catherine's Milling and Lumber Company* v. *The Queen*, [1888] A.C. 46 (P.C.), Mr. Justice Duff delivered The Board's opinion that, once disencumbered of Indian title, the land belonged to the Province, so that the Dominion Government had never possessed a title it could alienate. Consequently, Dame Rosalie Thompson had never acquired title, and the Star Chrome Co. was entitled to rescision and damages against her in respect of the purported sale.

In *obiter*, at pp. 410 to 411, Duff J. opined that the setting aside of the reserve for the Indians in the first place had not enlarged their interest in the land "as laid down in the *Proclamation* of 1763," and which was "a personal and usufructory right dependent upon the good-will of the Sovereign." But in citing *Calder*, Dickson J. must have been aware that the *Proclamation* was not the sole source of Aboriginal (Indian) title, which existed at common law by virtue of possession. At its highest, therefore, Dickson J.'s assertion that the Indian interest in reserve lands and tribal lands was the same could only mean that the Indian interest in reserve lands was no greater than whatever interest in land the *Proclamation* protected. The *Star Chrome Co.* case said *nothing* about the Aboriginal ownership interest in ancestral lands at common law, independently of any interest protected by the *Proclamation* or by federal statutes such as the *Indian Act*. There was therefore no legal reason to equate the Aboriginal common law interest in ancestral lands outside the *Indian Act* with the interest of Indians in reserve lands. *Quaere*, as well, whether, when referring to the *Star Chrome Co.* case, Dickson J. realised that he was adopting also Duff J.'s "personal and usufructory" concept of Aboriginal title, which the majority of the Court had rejected as analytically unhelpful (*i.e.*, wrong) only eleven years earlier in the *Calder* case?

In fact, there was good reason to assume that the Aboriginal interest in common law title lands should be a *greater* interest than the Indian interest in reserve lands, since the common law of land ownership applied, or ought to apply, equally to Aboriginal and non-Aboriginal Canadian citizens alike. Typically, the common law interest in land arising from possession was fee simple, which is a greater interest in land than the Aboriginal possessory interest in reserve lands under the *Indian Act*. But perhaps the greatest problem with Dickson J.'s reasoning on this point (other than that it was not supported by authority) was that, if the Aboriginal interest in ancestral lands that existed at common law was the same as the Indian interest in reserve lands under the *Indian Act*, then the common law interest would necessarily vary depending upon the current state of the *Indian Act*. This was so because the quality of the Indian interest in reserve lands was created and governed by that statute.

the Musqueam damages of $10,000,000.00.[340] The Federal Court of Appeal reversed the trial judge's decision, asserting that no legally enforceable trust obligation existed between the federal government and the Musqueam.[341] The obligation was found to be a "political" one.

The Supreme Court of Canada reinstated the finding of liability and the award of damages made by the trial judge. It preferred to do so, however, on the basis of a breach of fiduciary duty. What concerns us for the present are the statements about the nature and quality of Aboriginal title made by the Court in the process. Dickson J. first made reference to the *Calder* decision as authority for the propositions that Aboriginal title to land did not owe its sole origin to the *Royal Proclamation* of 1763, or to any express act of recognition by the state, but existed as a matter of the regular common law principles applicable to real property:

> In *Calder et al. v. A.-G. B.C.*, this court recognized aboriginal title as a legal right derived from the Indians' historic occupation of their tribal lands. With Judson and Hall JJ. writing the principal judgements, the court split three-three on the major issue of whether the Nishga aboriginal title to their ancient territory had been extinguished by general land enactments in British Columbia. The court also split on the issue of whether the *Royal Proclamation* of 1763 was applicable to Indian lands in that province. Judson and Hall JJ. were in agreement, however, that aboriginal title existed in Canada (at least where it has not been extinguished by appropriate legislative action) independently of the *Royal Proclamation* of 1763. Judson J. stated expressly that the Proclamation was not the "exclusive" source of Indian title. Hall J. said that "aboriginal title does not depend on treaty, executive order or legislative enactment [citations in the text omitted].[342]

Next, again in apparent accord with the common law principles articulated in *Calder*, Dickson J. found that the transition to British sovereignty had not extinguished Aboriginal title. Quoting with approval from Marshall C.J.'s judgment in *Johnson v. McIntosh*,[343] he reiterated that "[The Indians] were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their discretion."[344]

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[340] (1981), 10 E.T.R. 61 (F.C.T.D.), *per* Collier J.
[341] (1982), 13 E.T.R. 245 (F.C.A.), *per* Le Dain J.
[342] (1984), 13 D.L.R. (4th) 321 (S.C.C.) at p. 335.
[343] (1823), 8 Wheaton 543; 21 U.S. 240 (U.S.S.C.).
[344] *Guerin v. The Queen, supra*, note 235, at p. 386; Dickson J. also referred to *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (P.C.) for a more recent example of the same proposition.

Having thus laid the foundation for the application of normal common law principles of real property, Dickson J. declined to do so, preferring instead to "resolve" the question by the judicial creation, for Aboriginal peoples alone, of a new type of land tenure previously unknown to law:

> It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land[345] the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has none the less arisen because in neither case is the categorization quite accurate.
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> Indians have the legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable other than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. *The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading* [emphasis added].[346]

Dickson J.'s use of the inalienability criterion as a defining characteristic of the new "*sui generis*" Aboriginal title was completely at odds with the *Royal Proclamation* of 1763, the very instrument that

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[345] With respect, this formulation begs the question. The Aboriginal interest in reserve lands *is* unique, because it is a creature of statute, *i.e.*, the *Indian Act*, R.S.C. 1985, c. I-5. It is a right of "perpetual usufruct" not accompanied by the fee simple in the land itself: see *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), 130 D.L.R. (4th) 193 (S.C.C.), *per* McLachlin J. at pages 219 and 226. Aboriginal ownership of land *at common law*, in contrast, has nothing to do with the *Indian Act*, and is "unique" only because Dickson J. so asserts.

[346] *Guerin v. The Queen, supra* note 235 at p. 339; it is quite unclear why the inalienability criterion identified by Dickson J., being a creature of statute with applicability only to reserves established under the *Indian Act*, R.S.C. 1985, c.I-5 would apply to land owned by Aboriginal peoples at common law, quite outside the provisions of the statute. These two interests in land are legally distinct. The former is a unique

imposed this restriction in the first place. It must be recalled that the prohibition contained in the *Royal Proclamation* was to the purchase, not the sale, of Indian lands other than by the Crown. It was a legal disability imposed upon the commercial freedom of non-Aboriginal settlers in order to protect the Aboriginal population from potential sharp practices ("Great Frauds and Abuses")[347] by would-be purchasers. Since this legal disability was imposed upon would-be non-Aboriginal purchasers, and not on the Aboriginal population itself, the exclusive right of the Crown to purchase Indian lands (the so called "inalienability" characteristic) told one *nothing* about the quality of Indian title, *i.e.*, precisely what the Indians had to sell. It was therefore difficult to understand why Dickson J. considered the so-called inalienability criterion to be a defining characteristic of *common law* Aboriginal title, rather than a characteristic limited to the statutorily created Indian possessory interest in reserves. The general inalienability characteristic was simply a legal limitation upon the commercial freedom of the non-Aboriginal population. One could not reasonably argue that a legal disability placed on non-Aboriginal potential purchasers had anything to do with the asserted "*sui generis*" character of the ownership interest of Aboriginal peoples in their land.[348]

What should one make of Dickson J.'s new "*sui generis*" formulation? The common law principles articulated in the *Calder* decision were recited, but neither applied nor explicitly rejected. Legal principles drawn from "general property law", however, were then held not to apply to Aboriginal peoples as they do

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creature of statute with the fee simple vested in the Crown, while the latter exists independently of any state action and is owned by the Aboriginal peoples who hold a common law title by possession.

[347] "And Whereas Great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the Great Prejudice of Our Interests, and to the Great Dissatisfaction of the said Indians ... ." These are the very words used in the *Royal Proclamation* to justify the legal disability it placed upon white settlers. They tell one *nothing* about the character of the Indian interest in the land, except, by necessary implication, that the Indians had something that they owned, which they remained free to sell.

This observation was made long ago by the Supreme Court of the United States in *United States v. Paine Lumber Company*, 206 U.S. 467 (1907). Delivering the opinion of the Court, McKenna J. said at pp. 669 to 670 that "The restraint on alienation must not be exaggerated. *It does not of itself debase the right below a fee simple.* ... It is based upon the necessity of superintending the weakness of the Indians and protecting them from imposition" (*i.e.*, "Great Frauds and Abuses") [emphasis added].

[348] A hypothetical example drawn from contemporary circumstances may help to illustrate this point. Suppose that a Provincial Legislature enacted a statute requiring that all purchasers of residential properties do so only through provincially licensed real estate agents. There would be no doubt as to the legislature's constitutional competence to do so by virtue of its jurisdiction over "Property and Civil Rights within the Province" flowing from the *Constitution Act*, 1867, s. 92(13). In effect, "owner to owner" private sales of

to other Canadian citizens. No legal reason for this differential treatment was ever offered. Aboriginal property rights were "*sui generis*." It did not matter whether the Aboriginal property interest in question arose under a treaty, was in an Indian reserve (a creature of statute), or existed at common law independently of any statute.[349] The most plausible interpretation of the judicial assertion of the "*sui generis*" theory of Aboriginal title was that it was an attempt by the Court, in cases involving Aboriginal land claims, to avoid the full legal consequences of land ownership which arose in disputes involving non-Aboriginal peoples.

A less charitable interpretation could be that the so called "*sui generis*" rights of Aboriginal land ownership were essentially an empty basket, to be filled by the courts on a case-by-case basis as a matter of judicial convenience. The *sui generis* concept, while constituting a radical departure from the conscientious attempt to apply well understood common law principles of real property found applicable in *Calder*, has remained the judicially favoured approach to Aboriginal title to the present day.

For instance, in *Roberts v. Canada*,[350] the simple legal question was whether the Federal Court of Canada had jurisdiction to entertain an action for trespass by one Aboriginal band against another band occupying a reserve created under the *Indian Act*.[351] The Supreme Court of Canada once again insisted that the common law of real property was incorporated into the federal law governing Aboriginal title, but also persisted in its assertion that the Aboriginal interest in land was a *sui generis* right.[352] Wilson J. said:

> In *Calder v. Attorney-General of British Columbia*, this court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. As Dickson J. (as he then was) pointed out in *Guerin*, aboriginal title pre-dated colonization by the British and survived British claims of sovereignty. The Indians' right of occupation and possession continued as a "burden on the radical or final title of the Sovereign: *per* Viscount Haldane in *Amodu Tijani v. Southern Nigeria (Secretary)*. While, as was made clear in *Guerin*, s. 18(1) of the *Indian Act* did not create the unique relationship between the Crown and the Indians, it certainly

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houses would be prohibited. Nobody could reasonably argue that, because of this, the right of the owner in his or her house was impaired, or rendered "*sui generis*," still less a "personal and usufructuary" right.

[349] *Guerin v. The Queen*, *supra*, note 235, at p. 337.

[350] [1989] 2 C.N.L.R. 146 (S.C.C.).

[351] R.S.C. 1985, c. I-5.

[352] These two positions are obviously inconsistent.

> incorporated it into federal law by affirming that "reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart [citations in the text omitted].[353]

The assertion that common law principles of land ownership had been incorporated into federal common law did not, however, prevent the Court from resolving the case on the basis of the new "*sui generis*" theory of Aboriginal title, a concept alien to accepted common law principles of real property:

> The obligation of the Crown in this case results from the very nature of aboriginal title. The Court's most recent affirmation that the nature of the Indian interest in aboriginal lands is *sui generis* is found in *Canadian Pacific Ltd. v. Paul.*[354]
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> *The right to the use and occupancy of reserve lands flows from the sui generis nature of Indian title*[355] [emphasis added].

While this reasoning is possibly correct relative to the Aboriginal interest in Indian reserves, which are creatures of the *Indian Act.*[356] the Supreme Court of Canada has never offered any plausible legal explanation for its application to lands not under the Act. Common law Aboriginal title, by definition, existed independently of the *Indian Act*. Land areas in which Aboriginal title existed were not Indian reserves. After reading the Court's judgment in *Roberts*, one is left no closer to an understanding of what aspects of normal property ownership are, or are not, included in the new *sui generis* category of Aboriginal land title.

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[353] *Roberts v. Canada*, [1989] 2 C.N.L.R. 146 (S.C.C.) at p. 156; while *Roberts* dealt with a dispute relating to land set aside for reserves under the *Indian Act*, R.S.C. 1985, c.I-5, the court in *Guerin* stated (without justification in law) that the same principles applied to the common law interest of Aboriginal peoples in ancestral lands outside the statute.

[354] *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654.

[355] [1989] 2 C.N.L.R. at pp. 153 to 154; The correct position is surely that "the right to the use and occupancy of reserve lands" (*sic*) flows from the provisions of the *Indian Act*, R.S.C. 1985, c. I-5, and not from "the *sui generis* nature of Indian title."

[356] R.S.C., 1985, c.I-5.

There are other examples. In *R. v. Sparrow*,[357] a case involving fishing rights rather than land claims, Dickson C.J. and La Forest J., writing together, found occasion again to refer both to "the *sui generis* nature of Indian title"[358] and "the *sui generis* nature of aboriginal rights."[359] The judgment was of no assistance in ascertaining the legal content of "the *sui generis* nature of Indian title [*sic*];" however, it is relatively clear that by this stage any serious attempt to apply normal common law principles of real property to Aboriginal land claims had gone out of fashion. Undefined *sui generis* land rights had replaced recognized common law legal categories. This development should be seen as the emergence (or perpetuation in a different form) of a repugnant legal double standard.

Again, in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*,[360] another case involving a very serious breach of fiduciary duty by the Crown,[361] Gonthier J. had recourse to the "*sui generis*" theory of Aboriginal title, to trump common law principles which might otherwise have governed the case: "Since Indian title in reserves is *sui generis*, it would be most unfortunate if technical land transfer requirements embodied in the common law were to frustrate the intention of the parties ... ."[362] "[T]he *sui generis* nature of aboriginal title requires the courts to go beyond the usual restrictions imposed by common law in order to give effect to the true purpose of the dealings."[363]

In the same case McLachlin J. (concurring in the result, but on different grounds) said:

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[357] (1990), 70 D.L.R. (4th) 385 (S.C.C.).
[358] *Ibid.*, at p. 409.
[359] *Ibid.*, at p. 411.
[360] (1987), 14 F.T.R. 161 (F.C.T.D.); affirmed, *sub nom. Apsassin v. The Queen in Right of Canada* (1993), 100 D.L.R. (4th) 504 (F.C.A.); appeal allowed, (1995), 130 D.L.R. (4th) 193 (S.C.C.).
[361] In *Blueberry River*, the federal government, without authority, sold valuable mineral rights surrendered by the Band in trust for lease only. The Band was consequently deprived of the flow of revenue that would have accrued under the lease. At trial, Addy J. dismissed the action, but estimated that the Band had been deprived of approximately $300,000,000.00 in lost revenues: (1988), 14 F.T.R. 161 (F.C.T.D.); affirmed, (1993), 100 D.L.R. (4th) 504 (F.C.A.). The Band's appeal was allowed by the Supreme Court of Canada; its claim was for fraud and breach of fiduciary duty.
[362] *Ibid.*, at p. 199.
[363] *Ibid.*, at p. 200; as will be seen, the modern effect of the "*sui generis*" theory of Aboriginal title has been to restrict seriously the uses to which Aboriginal people can put the lands they "own," thereby diminishing their economic value and utility for commercial exploitation: see the analysis of "*sui generis* Aboriginal title" in *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 513 (S.C.C.), *infra*, and the consideration of its economic implications in Chapter Four.

> Indian title in reserves is *sui generis* in that it does not include the fee simple title but consists rather in a right of perpetual usufruct.
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> The difficulties of applying trust principles directly to the *sui generis* Indian interest in their reserves point to the fact that it is better to stay within the protective confines of the *Indian Act.*[364]

The problem is that Aboriginal peoples probably have very substantial rights to land entirely outside the *Indian Act*. Such decisions not only left unclear what, if anything, was intended by Dickson C.J. to be included within the *sui generis* interest in land available to Aboriginal peoples, but also openly invited the courts to depart from common law principles governing land ownership when the litigation involved Aboriginal peoples as claimants.

The trend has consistently continued. For instance, in *Cote v. The Queen,*[365] a case involving Aboriginal fishing rights in a situation where the evidence was insufficient to establish the existence of Aboriginal title. Lamer C.J. found occasion once again to refer to "an aboriginal *sui generis* interest in land,"[366] without finding it necessary to clarify what bundle of ownership (or even usufructuary) rights this "*sui generis* interest in land" would have comprised if Aboriginal title had been proved.

The Present Position: Filling the *Sui Generis* Basket

In 1996 and 1997 the Supreme Court of Canada issued two important decisions: *Van der Peet v. The Queen,*[367] and *Delgamuukw v. British Columbia.*[368] Carefully examined, it is evident that these decisions took very different views of the nature and content of Aboriginal title in Canadian law. Yet both decisions offered the latest indication of what the mysterious *sui generis* category of Aboriginal land rights, first

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[364] (1995), 130 D.L.R. (4th) at pages 219 and 226.
[365] (1996), 138 D.L.R. (4th) 385 (S.C.C.).
[366] *Ibid.*, at pp. 402 to 403.
[367] (1996), 137 D.L.R. (4th) 289.
[368] (1997), 153 D.L.R. (4th) 193.

articulated in *Guerin v. The Queen*,[369] might contain. The perplexing aspect is that the decisions in *Van der Peet* and *Delgamuukw* were, *prima facie*, inconsistent. *Van der Peet*, while not abandoning the assertion that Aboriginal title was a "*sui generis*" interest in land, spoke of Aboriginal land ownership in a manner as close to conformity with the "normal" common law principles of real property as had been seen since the Supreme Court's prior attempt to deal with the issue in *Calder*. In *Delgamuukw*, in contrast, the Court expressly attempted to fill the *sui generis* category in a manner alien to accepted common law principles. This latter development has been to the detriment of the Aboriginal "owners" of common law title lands.

Van der Peet did not involve Aboriginal land title *per se*. The legal issue was whether regulations forbidding the sale of fish caught under an Indian Food Fishing Licence were constitutionally valid under s. 35(1) of the *Constitution Act*, 1982.[370] Lamer C.J., however, seized the opportunity to opine on the nature of Aboriginal title. His analysis was more consistent with the Court's common law approach in *Calder* than it was with the *sui generis* theory proclaimed by Dickson J. in *Guerin* or, indeed, with Lamer C.J.'s own "authoritative" statement of the content of "*sui generis*" Aboriginal title, which he articulated the following year in *Delgamuukw*. In *Van der Peet*, Lamer C.J. began his analysis with a statement of the origins of Aboriginal title comparable to that of Judson J. in *Calder*, only now reinforced by the constitutional entrenchment of Aboriginal rights by s. 35(1) of the *Constitution Act*, 1982.

> Subsequent to s. 35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this court in *Sparrow* ...
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> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: 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. It is this fact, and this fact above all others, which separates aboriginal peoples from other minority groups in Canadian society, and which mandates their special legal, and now constitutional, status.[371]

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[369] *Supra* note 235.
[370] *Constitution Act*, 1982, s.35(1); enacted by the *Canada Act 1982* (U.K.), c. 11, Schedule B.
[371] (1996), 137 D.L.R. (4th) at p. 303; compare this with Judson J.'s statement twenty-four years earlier in *Calder*, [1973] S.C.R. at p. 328; see, *supra* note 287, and the referenced passage from the judgment of

Next,[372] Lamer C.J. proceeded to cite *Calder* and, indeed, most of the common law authorities cited in *Calder*, in a way which might have led one to conclude that the "*sui generis*" quality of Aboriginal title was not *sui generis* after all, but was governed by the well understood and generally applicable common law principles of real property. He recited with approval Marshall C.J.'s statement that "They [the Indians] were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion."[373] Further, and in accordance with authorities such as *Campbell v. Hall*[374] and *Oyekan v. Adele*[375], he said: "It is only the fallacy of equating sovereignty with beneficial ownership that gives rise to the notion that native title is extinguished by the acquisition of sovereignty."[376] *Ex facie*, this analysis was quite consistent with the common law analysis applied in *Calder*.

Since *Van der Peet* dealt with Aboriginal fishing rights rather than Aboriginal land title, Lamer C.J.'s analysis of the Aboriginal title question went no further than this. *Van der Peet*, however, would have seemed to presage a solution for the legal problem of Aboriginal title in terms of recognised common law principles, whether or not cloaked in the mysterious language of "*sui generis*" rights. In this light, therefore, it was difficult to conclude that the ultimate "solution" adopted the following year in *Delgamuukw* was anything other than a radical departure from common law principles, invented as a matter of judicial convenience.

Delgamuukw was the first decision of the Supreme Court of Canada to address the existence, nature and quality of common law Aboriginal title to land since its decision in *Calder*, twenty-four years earlier. It

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Judson J. in *Calder*. In all but Lamer C.J.'s reference to constitutional entrenchment, their formulations are virtually identical.

[372] (1996), 137 D.L.R. (4th) at pp. 304 to 308.

[373] *Johnson v. M'Intosh* (1823), 8 Wheaton 543; 21 U.S. 240, quoted with approval by Lamer C.J. at (1996), 137 D.L.R. (4th) at p. 30. If, as this suggested, Aboriginal peoples are free to use the land they own at common law "according to their own discretion" (*sic*), then the restrictions on Aboriginal land use articulated by Lamer C.J. the following year in *Delgamuukw* are inexplicable, unless he intended to repudiate most of his remarks on the subject in *Van der Peet*, which he did not explicitly do.

[374] *Supra* note 72.

[375] *Ibid.*

[376] (1996), 137 D.L.R. (4th) at p. 308.

should be regarded simply as the latest expression of an unadmitted legal double standard in the treatment of Aboriginal and non-Aboriginal interests in land.

In *Delgamuukw*, Chiefs representing fifty-eight Gitskan and Wet'suet'en Houses brought an action on behalf of their respective peoples for a declaration that they owned the traditional lands that they had inhabited from time immemorial. The territory in question consisted of more than 22,000 square miles of land in and around the watersheds of the Bulkley and Skeena Rivers in north central British Columbia.[377] The lands had continuously been inhabited by the Gitskan and Wet'suet'en peoples for more than three thousand years.[378] The land had never been ceded to or purchased by the Crown, by treaty or otherwise. The plaintiffs' claim was dismissed by the British Columbia Supreme Court[379] and the British Columbia Court of Appeal.[380] Leave to appeal to the Supreme Court of Canada was sought and granted.

Ironically, as in the earlier case of *Calder*, the Supreme Court of Canada considered itself unable to rule on the merits of the plaintiffs' claim, and remitted the case back to the British Columbia Supreme Court for a new trial.[381] Lamer C.J., however, did seize the opportunity to opine "authoritatively" on the contents of Aboriginal title in Canadian law, in a case in which this, together with the issue of the reception of "traditional" (*i.e.*, oral) evidence to prove ownership,[382] was the principal legal issue. His Reasons for Judgment showed that Aboriginal title *must* now be regarded as a "*sui generis*" interest in land, in the sense that, as formulated, it constituted a form of land tenure unknown to Canadian law prior to 1997. (Interestingly, it is also a form of land tenure which is probably alien to most if not all systems of Aboriginal land tenure in the pre-contact period.)

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[377] Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992), 17 Queen's Law Journal 350 at p. 352.
[378] *The Supreme Court of Canada Decision on Aboriginal Title: Delgamuukw*, commentary by Stan Persky (Vancouver: Greystone Books, 1998), at p.1.
[379] (1991), 79 D.L.R. (4th) 185.
[380] (1993), 104 D.L.R. (4th) 470.
[381] Lamer C.J. decided that the plaintiffs' claims ought not to have been consolidated on appeal without amendments to the pleadings reflecting the conversion of multiple individual claims into two collective claims and considered that, as a result, the Crown had been prejudiced: (1996), 153 D.L.R. (4th) at p. 271. As of the present date (mid-2001) the new trial has yet to commence.
[382] Given the body of authority in favour of the admissibility and probative value of this type of evidence *quantum valeat*, it is not clear why this issue should have arisen at all. See "Questions of Proof" in Chapter Two, *supra*.

Lamer C.J. began his analysis with the (correct) proposition that "The content of common law Aboriginal title ... has not been authoritatively determined by this Court."[383] Next, in justification of his proposed departure from any concept of land tenure previously known to law, he stated: "[A]lthough the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly *sui generis*, and demand a unique approach ... ."[384] Finally, at page 241 of his Reasons for Judgment, continuity with the common law was lost. Lamer C.J. wrote:

> The starting point of the Canadian jurisprudence on aboriginal title is the Privy Council's decision in *St. Catherine's Milling and Lumber Co. v. The Queen*, which described aboriginal title as a "personal and usufructuary right. The subsequent jurisprudence has attempted to grapple with this definition,[385] and has in the process demonstrated that the Privy Council's choice of terminology is not particularly helpful to explain the various dimensions of aboriginal title. *What the Privy Council sought to capture is that aboriginal title is a sui generis interest in land.*[386] Aboriginal title has been described as *sui generis* in order to distinguish it from "normal" property interests, such as fee simple. However, as I will now develop, it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or the rules of property found in aboriginal legal systems ... [emphasis added].
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> The idea that aboriginal title is *sui generis* is the unifying principle underlying the various dimensions of that title. One dimension is its *inalienability*. Land held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties [emphasis in the original text].
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> A further dimension of aboriginal title is the fact that it is held *communally* (emphasis in the original text). Aboriginal title cannot be

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[383] *Delgamuukw v. British Columbia*, *supra* note 368 at p. 227.
[384] *Ibid.* at p. 230; again, the two propositions are obviously inconsistent.
[385] Actually, as already seen, Lord Watson *expressly declined* to rule on the nature of Aboriginal ("Indian") title; with respect, the Chief Justice started from a false premise. The Judicial Committee of the Privy Council did not state any "definition" of Indian title which should have bound Canadian courts.
[386] On any reading of Lord Watson's judgment in the *St. Catherine's Milling* case, this is an *extremely* implausible proposition. The *only* legal question asked and answered by the Privy Council in the *St. Catherine's Milling* case was whether land, once disencumbered of Indian title, belonged to the Province in which it was situated, or to the Dominion. The nature of the Aboriginal ("Indian") interest in the land prior to its surrender was not decided. Lord Watson expressly declined to do so when asked by counsel.

> held by individual aboriginal persons: it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which distinguishes it from *normal property interests* [emphasis added].[387]

Already, Lamer C.J. had fashioned a property interest which truly was "*sui generis*," in the sense that, prior to his decision, such an interest in land was unknown to law. The new property interest was without precedent or authority, the result of judicial "creativity." It was by no means clear why the Aboriginal title which existed at common law, should be qualified by the inalienability characteristic.[388] The general inalienability of *Indian Act* lands flowed from the statute[389] and applied only to Indian reserves constituted under that Act. If Aboriginal title to land existed at common law, that land did not become an Indian reserve within the meaning of the Act, nor did Lamer C.J. suggest anywhere in his Reasons for Judgment that it would.[390]

The communal aspect of the *sui generis* Aboriginal title described by Lamer C.J. equally had no basis in Canadian law prior to 1997, and was unsupported by authority. What was clear from the decision, however, was that "normal" rules of real property[391] did not apply to Aboriginal peoples' lands as they do

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[387] (1997), 153 D.L.R. (4th) at pp. 241 to 242.

[388] As distinct from the Aboriginal possessory interest in reserve lands, created under the provisions of the *Indian Act*, R.S.C. 1985, c. I-5, which truly did consist of a statutorily created, inalienable and perpetual usufruct: see, *supra* note 345, relative to the *Blueberry River* case.

[389] *Indian Act*, R.S.C. 1985, c. I-5.

[390] In any event, even if one were to concede the improbable proposition that common law Aboriginal title lands were subject to the inalienability characteristic because Indian reserves created under the *Indian Act*, R.S.C. I-5 were subject to this restriction, it was a definite challenge to Lamer C.J.'s reasoning in this connection that, less than four years after his judgment in *Delgamuukw*, serious proposals are imminent before Parliament which would significantly amend the *Indian Act* so as to render reserve lands, and the chattels located thereon, *exigible* in satisfaction of the claims of creditors, *i.e.*, *alienable*: see, *Winnipeg Free Press*, Monday, 8 January 2001, "*Reserves face reforms: Massive changes to Indian Act would increase accountability.*" If Lamer C.J.'s "reasoning by analogy" from the characteristics of Indian reserve lands held by the Crown under the *Indian Act*, to the characteristics of tribal lands owned by Aboriginal peoples pursuant to common law Aboriginal title, offered a legitimate path of reasoning, the "inalienability" of lands held pursuant to common law Aboriginal title was a frail characteristic, capable of variation by Parliament's unilateral amendments to the *Indian Act*, a statute which did not govern, and did not purport to govern, such lands.

[391] (1997) 153 D.L.R. (4th) at p. 242: they are not "normal property interests" (*sic*). It could be argued that the surrender provision of the *Royal Proclamation of 1763* are premised on Aboriginal title having a communal quality, but the lands in question in *Delgamuukw* were not *Proclamation* lands. For an argument and authorities for the proposition that Aboriginal rights in general are "communal" see generally K. McNeil, "The Post-Delgamuukw Nature and Content of Aboriginal Title," in K. McNeil, ed., *Emerging*

to the property interests of non-Aboriginal Canadian citizens. In effect, the Court announced that two types of property interests now existed in Canadian law, depending upon the racial origin of the claimant to title: "Aboriginal title" was available to Aboriginal peoples, while "normal property interests" were available to other Canadians.

Finally, Lamer C.J. imposed a further set of non-specific and open ended restrictions upon the quality of common law Aboriginal title, again without recourse to authority:

> Although the courts have been less than forthcoming, I have arrived at the conclusion that the content of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and, second, that those protected uses must not be irreconcilable with the nature of the group's attachment to the land.[392]

Thus in addition to the *indicia* of inalienability and communal ownership, there was a third qualification: unascertainable restrictions on use. Lamer C.J. described this new characteristic in the following terms:

> 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. That relationship should not be prevented from continuing into the future. As a result, uses of the lands which would threaten that future relationship are, by their very nature, excluded from aboriginal title.
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> Accordingly, in my view, lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place.
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> *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.* 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 way as to

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Justice? Essays on Indigenoud rights in Canada and Australia (Saskatoon: University of Saskatchewan Native Law Centre, 2001), and specifically footnote 102 therein.

[392] *Ibid.*, at p. 243.

> 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) [emphasis added].
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> It is for this reason that lands held by virtue of aboriginal title may not be alienated.[393]

Potentially the greatest problem is that the restrictions as to the permissible uses of lands held pursuant to Lamer C.J.'s version of "*sui generis*" Aboriginal title are open-ended and fundamentally unascertainable, or at least not capable of ascertainment in advance of judicial pronouncement. Lamer C.J.'s attempts to "reason by analogy" from statutes which govern Indian reserves,[394] and do not purport to define the limits to the permissible range of uses of lands held by common law title, do not assist in determining the permissible limits. Lamer C.J. was clear at least that the range of permissible uses of lands held pursuant to Aboriginal title is not limited to those uses to which Aboriginal peoples put the lands in the period prior to European contact. He asserted:

> [A] source of support for the conclusion that the uses to which lands held under aboriginal title can be put are not restricted to those grounded in practices, customs and traditions integral to distinctive aboriginal cultures can be found in *Guerin*, where Dickson J. stated ...

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[393] *Ibid.*, at p. 247; the characteristic of inalienability asserted here in respect of common law Aboriginal title lands is a judicial invention. Inalienability, as has been seen, was never a qualification of the Aboriginal interest in land but, in contrast, a legal disability placed upon the commercial freedom of *non-Aboriginal* purchasers by the *Royal Proclamation* of 1763; *i.e.*, they could not buy Indian lands. Moreover, lands held pursuant to *common law* Aboriginal title were not Indian reserves created under the provisions of the *Indian Act*, R.S.C. 1985, c. I-5., which were, by the operation of the statute, inalienable other than by surrender to the Crown. Consequently, there was simply no legal reason to suppose that the constraints on alienability imposed by the *Indian Act* on the Aboriginal possessory interest in reserve lands should apply to lands owned by Aboriginal peoples at common law.

The newly fashioned restrictions on alienability and use of common law Aboriginal title lands may, however, have serious implications. Since lands held pursuant to common law Aboriginal title are not reserves under the *Indian Act*, R.S.C. 1985, c. I-5., the surrender provisions of the Act have no application to such lands. They may therefore be perpetually indivisible, unsaleable and unpledgeable as collateral security for funds borrowed for purposes of economic development, because no statutory mechanism exists for their surrender in trust for such purposes, in contrast to the situation with respect to reserve lands where the *Indian Act* provides such a mechanism. If lands held by Aboriginal peoples at common law are truly communal and inalienable, as Lamer C.J. suggested, then their economic utility and commercial value to their Aboriginal "owners" may be largely sterilised.

[394] *Indian Act*, R.S.C. 1985, c.I-5; *Indian Oil and Gas Act*, R.S.C. 1985, c. I-7, as amended, 1999, c. 31, s.137.

> that the same legal principles governed the aboriginal interest in reserve lands and lands held pursuant to aboriginal title... .[395]
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> The nature of the Indian interest in reserve land is very broad, and can be found in s.18 of the *Indian Act*, which I reproduce in full:
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> > 18(1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which the lands in a reserve are used is for the use and benefit of the band.
> >
> > 18(2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, *for any other purpose for the general welfare of the band*, and may take any lands in a reserve required for those purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to that Indian, in such amount as may be agreed between the Minister and the Indian, or, failing agreement, as may be determined in such manner as the Minister shall direct [emphasis is that of Lamer C.J.].
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> The principal provision is s.18(1), which states that reserve lands are "held for the benefit" of the bands which occupy them; those uses and benefits, on the face of the *Indian Act*, do not appear to be restricted to practices, customs and traditions integral to distinctive aboriginal cultures ... .[396]

It is difficult to understand how Lamer C.J. could rely upon the statutory provisions he cited as an analogy to support a broad range of permissible uses for common law Aboriginal title lands, by Aboriginals, for purposes which they themselves (as "owners") would determine. It is impossible to read the provisions of ss. 18(1) and 18(2) of the *Indian Act* without observing that, while a broad range of land based activities *may* be carried out on reserve lands, these uses expressly require authorisation in advance, either by the Governor in Council or by the responsible Minister: "[T]he Governor in Council *may determine* whether

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[395] As has been seen, this is a highly dubious proposition, for which no convincing (or, indeed, any) legally plausible explanation has ever been offered by the Court. It emerged pristine in *Guerin*, *per* Dickson J. See *supra* note 339.

any purpose for which lands in a reserve *are used or are to be used* is for the use and benefit of the band" [emphasis added]; "The Minister *may authorize* the use of lands in a reserve ... for any ... purpose for the general welfare of the band"[397] [emphasis added]. Even if one accepted the analogy from statutorily permissible uses to be a valid path of reasoning, the analogy must be carried through to its conclusions.[398] Lamer C.J.'s reasoning leads to the conclusion that, whatever the scope of the permissible uses of lands held under common law Aboriginal title, the Governor in Council or the responsible Minister may be in a position to decide whether, even within the range of permissible uses, any particular activity will be permitted. There would also even appear to be the possibility of land expropriation, with compensation to be determined "in such manner as the Minister may direct."[399] Surely this is at odds with accepted legal conceptions of the way in which the use of lands owned by non-Aboriginal Canadian citizens may permissibly be restricted.

Lamer C.J.'s reasoning by analogy from the *Indian Oil and Gas Act*[400] was no more convincing.

> [Another] source for the proposition that the content of Aboriginal title is not restricted to practices, customs, and traditions which are distinctive to aboriginal cultures is the *Indian Oil and Gas Act*. The overall purpose of the statute is to provide for the exploration of oil and gas on reserve lands through their surrender to the Crown. The statute presumes that the aboriginal interest in reserve land includes mineral rights ... . On the basis of *Guerin*, aboriginal title also encompasses mineral rights, and lands held pursuant to aboriginal title should be capable of exploitation in the same way,[401] which is certainly not a

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[396] (1997), 153 D.L.R. (4th) at pp. 244 to 245.
[397] *Indian Act*, R.S.C. 1985, c. I-5, ss. 18(1) and (2).
[398] It should be noted that La Forest J., in the minority on this point, rejected Lamer C.J.'s form of reasoning by analogy from statute: "[I]n defining the nature of "aboriginal title", one should generally not be concerned with statutory provisions and regulations dealing with reserve lands ... . [It should not be assumed] that specific statutory provisions governing reserve lands should automatically apply to tribal lands." As *per* La Forest J. at (1997), 153 D.L.R. (4th) at pp. 278 to 279. His position may well be legally preferable, but it is difficult to reconcile with Dickson J.'s assertion in *Guerin* that the two interests in land (common law Aboriginal title and the Aboriginal interest in reserve lands) are identical: see *supra* note 339.
[399] *Indian Act*, R.S.C. 1985, c. I-5, s. 18(2).
[400] R.S.C. 1985, c. I-7, as amended, 1999, c. 31, s.137.
[401] At this point, one is tempted to ask the question of just *how* "inalienable" Aboriginal common law title lands could "be capable of exploitation in the same way" (*sic*), in that, in contrast to reserve lands held by the Crown under the *Indian Act*, there exists no statutory mechanism for the surrender of common law title lands to the Crown in trust for development. Presumably, a new "Treaty of Cession" would be required in every case.

> traditional use of those lands. This conclusion is reinforced by s. 6(2) of the Act, which provides:
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> > 6(2) Nothing in this Act shall be deemed to abrogate the rights of Indian people or preclude them from negotiating for oil and gas benefits in those areas in which land claims have not been settled.
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> The areas referred to in s.6(2), at the very least, must encompass lands held pursuant to aboriginal title, since those lands by definition have not been surrendered under land claims agreements. The presumption underlying s. 6(2) is that aboriginal title permits the development of oil and gas reserves.[402]

Once again, assuming that the analogy from lands governed by federal statute to lands held pursuant to Aboriginal title was a legitimate path of reasoning, the analogy must be given full credit and its entire implications admitted. Lamer C.J. omitted any reference to s. 3 of the Act, which stipulated that:

> 3. The Governor in Council *may make regulations*
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> (a) respecting the granting of leases, permits and licences for the exploration for oil and gas in Indian lands, and the terms and conditions thereof;
> (b) respecting the disposition of any interest in Indian lands necessarily incidental to the exploitation of oil and gas in those lands, and the terms and conditions thereof;
> (c) providing for the seizure and forfeiture of any oil or gas taken in contravention of any regulation made under this section or any lease, licence or permit granted under such regulation;
> (d) prescribing the royalties on oil and gas obtained from Indian lands;
> (e) prescribing the fine not exceeding five thousand dollars that may be imposed on summary conviction of any regulation made under this section or failure to comply with any lease, permit or licence granted pursuant to any regulation under this section; and
> (f) generally for carrying out the purposes of this Act and for the exploitation of oil and gas in Indian lands [emphasis added].

If the analogy from the terms of the statute to the permissible uses of land held, pursuant to common law Aboriginal title outside the statute, is accepted as legitimate, one hand takes away what the other gives. The statute (or, more specifically, the analogy which Lamer C.J. sought to draw from it) stated that the exploration for and exploitation of oil and gas on common law Aboriginal title lands was a permissible use The same analogy from the same statute also indicates that this form of land use would not be controlled by

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[402] (1997), 153 D.L.R. (4th) at p. 245.

the Aboriginal common law "owners" of the land, but in contrast would be subject to the strict regulation and control of the responsible Minister.[403]

What, then, is one to make of the judgment in *Delgamuukw*? Is it a vindication of Aboriginal peoples' common law rights of real property, or simply a continuation of the courts' persistent unwillingness to treat Aboriginal property rights with the same legal respect that they accord to the equivalent claims for ownership of land, and the rights of use which flow from ownership, in the case of non-Aboriginal citizens? Logic drives one to the latter conclusion. If *Delgamuukw* did "authoritatively" state the content and quality of common law Aboriginal title, then that title truly has become a "*sui generis*" interest in land, if only because the "normal" legal rules governing the property rights of non-Aboriginal citizens are stated not to apply to it.[404] Aboriginal land title is not a "normal property interest."[405] Instead, it is an entirely novel property interest, created by the Court without precedent or authority. It is an interest in land inferior in quality and utility to what Aboriginal peoples would be entitled to by operation of the well established ("normal") principles of land ownership, and to what non-Aboriginal claimants are entitled to under similar circumstances.

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[403] On Lamer C.J.'s own reasoning as to the necessity of maintaining the connection of Aboriginal peoples with their lands, this proposed use and, indeed, any other use involving the extraction and exploitation of non-renewable resources, is problematic. Ultimately, the resource will be depleted, such that this "dimension" of the Aboriginal connection to the land will become exhausted, and therefore by definition *not* available to future generations of Aboriginal peoples. Recall Lamer C.J.'s assertions relative to the imperative of preserving the relationship with the land for future generations of Aboriginal peoples, stated by him at (1997), 153 D.L.R. (4th) at pp. 246 to 247: "That relationship should not be prevented from continuing into the future. *As a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title*" [emphasis added]. The courts have not considered this to be a valid reason for controlling the uses made by non-Aboriginal owners of their land. How Lamer C.J.'s assertion is to be reconciled with the exploitation of *any* non-renewable resource is unclear.

Lamer C.J.'s attempt to refine the "inherent limit" upon the permissible uses of common law Aboriginal title lands, by analogy to the doctrine of equitable waste, further muddies the water. At p. 248 of his Reasons for Judgment, he stated that while "traditional real property rules" did not apply to these lands, "[A] useful analogy can be drawn between the limit on Aboriginal title and the concept of equitable waste at common law. Under that doctrine, persons holding a life estate in real property cannot ... ruin the property." Upon the depletion of oil and gas reserves, or any other non-renewable resource situated on Aboriginal title lands, the land would have been "ruined" for future generations of Aboriginal people, for that purpose. Does not this lead one to the absurd conclusion that the exploitation of, *inter alia*, oil and gas reserves on Aboriginal title lands is a permissible use only if the reserves are never depleted?

[404] As *per* Lamer C.J., (1997), 153 D.L.R. (4th) at p. 242.

As Professor McNeil ironically pointed out in an article written before the Supreme Court of Canada's decision in *Delgamuukw* was released: "[W]here an adverse possessor *wrongfully* takes possession of someone else's land and remains there for the statutory limitation period, which in some Canadian provinces is only ten years ... [t]hat wrongdoer will have a fee simple estate acquired through possession. ... *Any legal system that would accord a greater interest in land to a wrongdoer, after just ten years of adverse possession, than it would to Aboriginal peoples who have rightfully occupied and used lands for hundreds, or even thousands of years, is not entitled to respect*"[406] [emphasis added]. But this is precisely the effect of the decision in *Delgamuukw*. The *sui generis* Aboriginal interest in land conferred by that decision is clearly far less than fee simple.

As a result of the judgment in *Delgamuukw*, Aboriginal land title is, for the present, subject to the various judicially crafted constraints of inalienability, communality and undefined restrictions as to its use. These are restrictions which it would not be imagined could apply to land owned by non-Aboriginal citizens. It is very likely that these restrictions will have commercial and economic implications, impairing the commercial and economic value of Aboriginal title lands to the Aboriginal peoples who "own" them. These implications are examined in Chapter Four.

Conclusions

This Chapter has traced the evolution of the concept of Aboriginal land title in Canadian law from the final assertion of British sovereignty to the Supreme Court's latest pronouncement on the subject in *Delgamuukw*. Perhaps the term "evolution" is inapposite in this context, in that the legal twists and turns have not followed any discernible or logical progression, or at least not any sort of progression readily explicable in legal terms.

We have seen the "personal and usufructuary" theory of Aboriginal title, mentioned in *obiter* in the Privy Council's decision in the *St. Catherine's Milling* case, elevated to the level of received doctrine, considered

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[405] *Supra* note 391.

determinative by the Canadian courts, despite its author, Lord Watson, having specifically declined to articulate any such doctrine.[407] Next, eighty-five years later in the *Calder* case the Supreme Court of Canada rejected the "personal and usufructuary" theory of Aboriginal title as analytically unhelpful. Arguably, this was the Court's single attempt to apply "normal" common law principles of real property to Aboriginal and non-Aboriginal citizens alike.

Then came the various judicial attempts to cut down and limit Aboriginal title to little more than a set of limited rights to perform specified activities on the land to which ownership was claimed. These attempts at definition did not produce results that corresponded to ownership of land in the common law sense at all. They implicitly excluded the possibility of remedies *in rem* to Aboriginal claimants: *Baker Lake* and *Bear Island* are cases in point. They confused, inadvertently or deliberately, ownership of land with its use.

We have even seen the resurrection of the "personal and usufructuary" theory of Aboriginal title by the Ontario High Court in *Bear Island* and Ontario Court of Appeal in *Isaac v. Davey*, notwithstanding what was clearly said about the analytical inutility of that approach only one year earlier by the Supreme Court of Canada in *Calder*.

Next came the era of "*sui generis*" Aboriginal title with the Supreme Court of Canada's decision in *Guerin*[408] and the cases which followed it, with varying conceptions of what the new *sui generis* category might contain. Finally, in *Delgamuukw*, Lamer C.J. attempted to "solve" the problem by creating a truly novel property interest, previously unknown to law (English or Aboriginal), hemmed in by various open-ended and unascertainable restrictions, and justified on the highly improbable basis that this is what Lord Watson *really* meant to say in the *St. Catherine's Milling* case in the first place.[409] We are further told that

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[406] K. McNeil, *supra* note 228 at p. 138.
[407] *Province of Ontario v. Dominion of Canada*, [1909] S.C.R. 1.
[408] Which was based on the faulty premise that the inalienability of Aboriginal lands other than to the Crown constituted a qualification on Aboriginal title which somehow rendered it *sui generis*, rather than the recognition that inalienability was a legal disability placed on the commercial freedom of non-Aboriginal purchasers wishing to buy land belonging to Indians, intended to protect Indians from the "Great Frauds and Abuses" perpetrated by white settlers.
[409] As *per* Lamer C.J., in *Delgamuukw v. British Columbia*, at (1997), 153 D.L.R. (4th) at p. 242.

when Aboriginal people own land at common law they do not, in contrast with other Canadian citizens, possess a "normal property interest (sic)."[410]

The best that can be said of this trip into legal history is that it has been one of twists and turns in avoidance of the established road map for common law principles of land ownership. No Canadian court of which I am aware has ever, in respect of non-Aboriginal Canadian citizens, found ownership of land at common law to exist, but then sought to avoid the consequences of that ownership by novel legal rules (inalienability, communality, restricted use) asserted without authority or reason. It would appear that the one thread which has bound the cases together, from *St. Catherine's Milling* to *Delgamuukw*, has been the consistent unwillingness of Canadian courts to apply the same set of legal rules to property claims made by Aboriginal peoples as they have consistently applied in the case of all other Canadian citizens. In this sense Canada's parliaments and courts have continually sought legal instruments that will separate Aboriginal status in land from the rest of Canada.

[410] See *supra*, note 391.

Chapter Four

Implications and Conclusions

Sui Generis Second Class Citizens

Chapter Three analysed the tortuous path of legal reasoning which has brought us to the latest, and presumably most authoritative, judicial exposition of Aboriginal land title in Canada. What is most remarkable is that the process has proceeded in spite of, rather than in accordance with, accepted principles of real property law and, indeed, the principle of *stare decisis* which Canadian courts profess to apply.

Ever since the Supreme Court of Canada's decision in *Guerin*, two types of property interests have been recognised by the Canadian courts: "normal" property interests, enjoyed by the vast majority of the Canadian population, and a lesser, "*sui generis*" property interest, available to Aboriginal peoples. The argument of this thesis has been that this distinction is without legal foundation and is, indeed, discriminatory, and that this conclusion is sustainable without any reliance on instruments such as the *Canadian Charter of Rights and Freedoms*.[411] One of the oldest principles of the common law is that it applies equally to all subjects in all parts of the realm.[412] From the analysis of the preceding Chapters it appears that Canadian courts have never respected this proposition in matters involving Aboriginal claims to ownership of their ancestral lands.

The very origin of the *sui generis* concept is shrouded in mystery. It may have originated in a student note commenting on an American Indian land claim case published some months before the decision in *Guerin*

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[411] *Constitution Act, 1982*, enacted by the *Canada Act (U.K.)*, 1982, c. 11, Schedule B.

[412] As *per* Lord Mansfield's fourth proposition in *Campbell v. Hall supra* note 72, that "the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there."

was released.[413] This was not acknowledged by Canada's Supreme Court in *Guerin*, but it appears to have been the first use of the expression "*sui generis*" to characterise the trust-like relationship between governments and Indian land.

I have argued that there is no reason why a legal distinction between the land interests available to Aboriginal peoples and the more valuable land interests available to other Canadian citizens should be tolerated, particularly when the effect of the "*sui generis*" formulation of Aboriginal title has been to restrict, rather than enlarge, the interest in land available to Aboriginal peoples in their ancestral territories. In this Chapter, I shall briefly examine some implications of Aboriginal title in its latest, "*sui generis*" judicial creation, and then suggest how Aboriginal land claims might have been resolved, to Aboriginal peoples' greater advantage, using the conventional common law legal principles analysed in Chapter Two.

It is appropriate, however, to acknowledge that the position I have adopted is at odds with much academic commentary on the *sui generis* doctrine and its effects. Some scholarship has proceeded from the assumption that it has been the common law which has eroded Aboriginal interests in land, and hence concluded that the *sui generis* concept, unknown to Canadian law prior to 1984, is a welcome and salutary development, as in the work of Professors Borrows, Rotman and Slattery. In an article published a few months prior to the Supreme Court's decision in *Delgamuukw*, Borrows and Rotman had the following to say about the supposed effects of the common law on Aboriginal land interests and about its replacement with the new "*sui generis*" theory:

> Aboriginal rights have always been regarded as different from other common law rights. They do not take their source or meaning from the philosophies that underlie the western canon of law. Although equal in importance and significance to other rights, Aboriginal rights are viewed differently because they are held only by Aboriginal members of Canadian society. This approach to interpreting Aboriginal rights is appropriate because, in many respects, Aboriginal peoples are unique within the wider Canadian population. Before their characterization as *sui generis*, previous common law doctrines often penalized the Aboriginal difference. Now, the *sui generis* appellation potentially turns negative characterizations of Aboriginal difference into positive points of protection. Its very existence recognizes that Aboriginal

[413] Kimberly T. Ellwanger, "Money Damages for Breach of the Federal-Indian Trust Relationship After *Mitchell II* – United *States v. Mitchell*, 103 S. Ct. 2961 (1983)" (1984) 59 Washington L. R. 675 at p. 687.

> rights stem from alternative sources of law, that reflect the unique historical presence of Aboriginal peoples in North America.
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> Courts must not interpret Aboriginal rights using conventional common law doctrines alone because of the continued existence of prior Aboriginal legal regimes. The selective application of conventional common law categories devalues Aboriginal similarities and differences and makes Aboriginal-derived law seem incompatible, or inferior, to other sources.[414]

Relative to the subject matter of this study – Aboriginal title – these comments are difficult to support. Indeed, it is difficult to accept the assertion that "common law doctrines often penalized the Aboriginal difference" when, as the analysis of previous Chapters has sought to demonstrate, Canadian courts have strenuously resisted applying "common law doctrines" in adjudicating Aboriginal entitlements to land. As has been seen, the English *cum* Imperial common law, if conscientiously applied, preserves Aboriginal systems of land tenure according to pre-existing Aboriginal legal regimes, provided these can be ascertained by the courts.[415] Only Parliament has jurisdiction to legislate relative to land held pursuant to unceded Aboriginal title and, indeed, in the face of s. 35(1) of the *Constitution Act, 1982*, it is by no means clear that even Parliament could legislate to extinguish Aboriginal title to unceded lands. Since 1982, Aboriginal rights, which must be taken to include land rights, have enjoyed a constitutionally entrenched status.

Equally, in cases in which pre-existing systems of Aboriginal land tenure are now no longer discoverable, due to the passage of time or the decimation and dislocation of populations, it would seem that the "common law doctrines" of possession, and the presumption of ownership that flows therefrom, should, if

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[414] John Borrows and Leonard I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997), 36 Alta L. R. 9 at pp. 11 to 12.
[415] See discussion of Imperial constitutional common law in Chapter Two.

applied, confer upon Aboriginal peoples a higher and more valuable estate in land[416] than the *sui generis* land interest created for them by the Supreme Court of Canada in *Guerin* and *Delgamuukw*.[417]

If Borrows and Rotman are complaining about the persistent non-recognition of Aboriginal land entitlements in Canada, or the justifiable perception by Canadian Aboriginal peoples of second class treatment, they are correct; however, as the analysis of previous Chapters has sought to demonstrate, the problem has not been "the corrosive effects of the common law"[418] but, in contrast, the systematic unwillingness of Canadian courts and governments to apply the common law in an even handed manner to the claims of Aboriginal and non-Aboriginal peoples alike. Indeed, even Borrows and Rotman, strong advocates of the *sui generis* theory of Aboriginal rights, concede that "the use of *sui gen*eris principles in the analysis of Aboriginal rights may hamper those groups who wish to use common law principles to support their rights."[419]

Other scholars have suggested that the *sui generis* theory of Aboriginal rights in general, and of Aboriginal land title in particular, is the logical outcome of the meeting of two vastly dissimilar legal cultures – Aboriginal and European – and hence that the development of Canadian law as it relates to Aboriginal peoples is a form of "inter-societal" law which both borrows from and supercedes each legal culture. Professor Slattery adopted such a position when he wrote:

> [T]he law of aboriginal title operates as an overarching body of law, bridging the gap between Aboriginal land systems on the one hand and English (or French) land systems on the other; each operates within its own sphere of influence. The status of each system and their interrelations are regulated by this higher level of law, which owes its origins to the interactions of British and First Nations over a long period of time, and draws on the legal conceptions and interests of both sides.

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[416] In the sense of an estate in land that is generally alienable if Aboriginal owners so wish, and that is not subject to the restrictions of communality and limited use unless Aboriginal owners decide for themselves that they wish such restrictions to exist.
[417] See discussion of common law concepts of possession and the presumption of ownership arising therefrom in Chapter Two.
[418] Borrows and Rotman, *supra* note 414, at p. 27.
[419] *Ibid.*, at p. 44.

> This fundamental body of law is neither English nor Aboriginal in origin: it is a form or intersocietal law that has evolved from long-standing practices linking the various communities.[420]

At a theoretical level, one might ask where the jurisdiction to pronounce a new system of "inter-societal" legal rules comes from, given the express adoption of English (not British or Aboriginal) law by all Canadian provinces except Quebec. One must concede, however, as a practical matter that courts pronounce upon the limits of their own jurisdiction in their decisions, which are authoritative as long as they are followed. Moreover, there has actually been some stated approval of Slattery's theory in recent Supreme Court of Canada decisions.[421]

More fundamentally, however, the suppressed premise underlying Slattery's legal hypothesis appears to be that *sui generis* Aboriginal rights, by taking equal account of the perspectives of Aboriginal and non-Aboriginal legal cultures, will produce results more respectful of Aboriginal entitlements than the common law alone. The difficulty is that, if the *sui generis* form of Aboriginal title created by the Court in *Delgamuukw* is to be regarded as an expression of "inter-societal" law, Aboriginal title has now come to constitute something less than non-Aboriginal litigants would be entitled to receive under similar circumstances by the application of "normal property law." If a goal of Slattery's postulated "higher level of law" is to place Aboriginal and non-Aboriginal entitlements to land on a more equal footing, then the decision in *Delgamuukw* either does not accomplish this or it is not a true example of "inter-societal" law.

The purpose of the discussion above is to acknowledge that other academic perspectives relative to Aboriginal rights in general, and to Aboriginal title specifically, are present. The central arguments of this thesis therefore run contrary to some received academic wisdom, by suggesting that the consistent historical failure to respect Aboriginal entitlements to land results neither from any "corrosive effects" of the common law nor from any failure by the courts to develop properly a "higher level of law," which

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[420] Brian Slattery, "The Legal Basis of Aboriginal Title" in Frank Cassidy, ed., ***Aboriginal Title in British Columbia: Delgamuukw v. the Queen*** (Lantzville: Oolichan Books, 1992) 113 at pp. 120 to 121.

recognises Aboriginal entitlements more fairly; but, in contrast, that it results from the persistent failure of intransigent governments and courts to apply evenhandedly the very common law principles of real property by which they purport to be bound.

The Present Position

Given the regular twists and turns taken by Canadian courts over the past century in their exposition of Aboriginal title and its content, it is difficult to regard the latest articulation of Aboriginal title in *Delgamuukw* as authoritative. Indeed, since the substantive issue of the Gitskan and Wet'suet'en land claims remains in 2001 undecided by the Supreme Court of Canada, but rather remitted for determination at a new trial, which may or may not ever take place, it would be legally permissible to characterise the Supreme Court's opinions in *Delgamuukw* as to the nature, content and limitations of Aboriginal title as *obiter dicta*, as much as Lord Watson's musings on the same subject in the *St. Catherine's Milling* case 109 years earlier. For the present, however, we have no alternative but to assume that the form of "*sui generis*" Aboriginal title described by the Court in *Delgamuukw*, with all its ambiguities and limitations, whether stated *in obiter* or otherwise, will be regarded by Canadian courts as authoritative, at least in the short run. What, then, are the implications?

Perhaps the greatest irony of the vision of Aboriginal title expressed in *Delgamuukw* is that there was no evidence that it corresponded in any realistic sense to the ways in which *any* Canadian Aboriginal peoples held land in the pre-contact period according to their own systems and laws of land tenure. The Court made no inquiry whatsoever into the nature of original Gitskan or Wet'suet'en land tenure or, indeed, into the pre-contact forms of land tenure of *any* Canadian Aboriginal people. At the same time it set out a definition of Aboriginal title which, apparently, is intended to apply equally in all parts of Canada and to all Canadian Aboriginal peoples, irrespective of their pre-existing systems of land tenure. To the extent that pre-existing systems of Aboriginal land tenure varied from one Aboriginal group to another in the pre-

[421] Lamer C.J. cited with approval the passage from Slattery quoted above in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at p. 547, even though this was not necessary in the context of his decision, which pertained to commercial fishing rights and not Aboriginal land title.

contact period, the crafting of a "one size fits all" definition of Aboriginal title is difficult to justify logically. It is also contrary to previous expressions of the Supreme Court as to how Aboriginal title and its contents should be ascertained.

In *Kruger and Manuel v. The Queen*,[422] for instance, Dickson J. opined that when the content of Aboriginal title was ultimately determined, a global analysis was inappropriate:

> Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, *it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis*[423] [emphasis added].

It is difficult to see how the Supreme Court's decision in *Delgamuukw* is consistent with this admonition. The Court did not consider *any* evidence bearing on the pre-existing forms of land tenure of the Gitskan and Wet'suet'en claimants or, indeed, of Aboriginal peoples in any other part of Canada. It did expound *rules* as to how *evidence* of pre-existing Aboriginal forms of land tenure should have been approached by the trial judge; but, paradoxically, it also proclaimed a universal form and content for Aboriginal title that is evidently intended to apply irrespective of what such evidence might reveal.

The Aboriginal title constructed by Lamer C.J. in *Delgamuukw* has the triple qualifications of inalienability,[424] compulsory communality,[425] and unascertainable restrictions on use.[426] It is remarkable that, in a judgment in which the reader is repeatedly admonished that "the Aboriginal perspective" must be taken into account[427] in defining the content of Aboriginal title, *no* evidence of actual Aboriginal forms of land tenure was considered. Ironically, a form of land tenure was posited which is probably alien to the way in which any Canadian Aboriginal group ever held land.

As Professor Flanagan has noted in this connection:

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[422] (1977), 75 D.L.R. (3d) 434 (S.C.C.).
[423] *Ibid.*, at p. 437.
[424] (1997), 153 D.L.R. (4th) 193 (S.C.C.) at p. 241.
[425] *Ibid.*, at p. 242.
[426] *Ibid.*, at p. 245.

> [T]he only persuasive reason to treat aboriginal law as *sui generis* is that its sources include pre-existing systems of aboriginal law. If it can be established that these systems were unlike anything known at common law, it may be reasonable to distinguish aboriginal title from common law interests, and fashion aboriginal title in a manner consistent with these pre-existing systems. However, the Supreme Court in *Delgamuukw* made little effort to describe or explore the significance of these pre-existing systems of aboriginal law.[428] As a result, the Court's conclusions regarding the *sui generis* nature of aboriginal title and the extraordinary limits the Court thereby placed on this title remain open to question.
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> If aboriginal title were not in fact *sui generis*, traditional common law property principles consistently applied would arguably have provided the claimants in *Delgamuukw* with a considerably broader interest in aboriginal lands than the Court ultimately granted. This raises the question of whether "piercing the veil"[429] in this case is an elaborate device to *restrict* the scope of aboriginal title, rather than a culturally sensitive approach that recognizes that "formalistic" and "alien" principles of property law should not be applied to aboriginal title. ... The decision asserts a very broad judicial power to control and restrict the use and development of aboriginal lands, a power to interfere with real property rights that is otherwise unknown at common law [emphasis in the original].[430]

And, further on the same point:

> Lamer C.J.C. did not attempt to articulate what the pre-existing systems of aboriginal law might have been. He did not explore the content of any interest in the land that aboriginal peoples might have acquired under these pre-existing systems. There does not appear to have been any effort to establish what laws and customs were in place that entitled aboriginals to use and occupy their lands. What uses of the land did the pre-existing system of aboriginal law permit? Could these interests be alienated? Were certain uses of the land prohibited under aboriginal law?[431]

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[427] As *per* Lamer C.J., for instance, *Ibid.*, at p. 255.

[428] Less charitably but perhaps more accurately, it could be said that the Court made *no* effort to undertake any such analysis, in that it declined to examine the evidence adduced relative to pre-existing Gitskan and Wet'suet'en laws of land tenure, and remitted the matter back for a new trial at which findings of fact in this regard would presumably have to be made.

[429] An analogy drawn by Lamer C.J. from corporate law to the equitable discretion of a court to disregard the separate legal personality of a corporate body in order to achieve a just result.

[430] William F. Flanagan, "Piercing the Veil of Real Property Law: *Delgamuukw v. British Columbia*" (1998), 24 Queen's L. J. 279 at pp. 284 to 285. In other words, these extraordinary restrictions do not apply to the "normal" property interests available to non-Aboriginal Canadians.

[431] *Ibid.*, at pp. 306 to 307.

As indicated in Chapter One, the forms of Aboriginal land tenure which existed prior to European contact (or, as *Delgamuukw* would have it, at the time of the assertion of British sovereignty[432]) were as varied as the cultures of Canada's Aboriginal peoples and the lands they inhabited. It has not been the goal of this study to examine any of these land tenure systems in detail but, in contrast, to explore the proper present legal consequences of their pre-existence. *Prima facie*, it appears that certain Aboriginal communities had highly sophisticated concepts of land tenure in many ways analogous to common law private property concepts. Indeed, among the very Aboriginal peoples (the Gitskan and Wet'suet'en) who were the claimants in *Delgamuukw*, ownership of resources appears to have run a spectrum from personal private control, control by small family groups, ownership by Houses, and communal usufructuary ownership, depending upon the nature of the resource in question. Ownership of family hunting grounds among the eastern Algonkian peoples evidently came very close to private ownership of land.[433] There is no historical or anthropological evidence that the cultivated fields of the agricultural Hurons or Iroquois were the communal property of a village, or even of a band.[434] The system of Micmaw land management described by Henderson[435] constituted yet a different model. But the *Delgamuukw* decision imposes a common form of Aboriginal tenure for all Canadian Aboriginal peoples irrespective of their pre-existing laws of land tenure.

There was, equally, no evidence that Aboriginal peoples, according to their own laws, generally regarded land as inalienable. Indeed, there is evidence to the contrary. If Aboriginal peoples universally regarded land as inalienable, then it is difficult to understand how treaties with the Crown involving land cessions could have been made by them. Even in the pre-contact period, it appears that treaties of peace could be concluded between Aboriginal Nations which involved the transfer or cession of land.[436] In his observations published in 1643, Roger Williams noted the tendency of some Indians "to make bargain and

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[432] As *per* Lamer C.J., (1997), 153 D.L.R. (4th) at p. 253, as to the date of assertion of British sovereignty being the date at which occupation must have been a fact for proof of *present* Aboriginal title.
[433] Frank G. Speck, "The Family Hunting Band as the Basis of Algonkian Social Organization" (1915), 17 *American Anthropologist*, at p. 289, and Chapter One, in general.
[434] Bruce G. Trigger, *The Huron Farmers of the North* (Stanford: Holt, Rinehart and Wilson, 1969).
[435] James Sakej Youngblood Henderson, "Micmaw Land Tenure in Atlantic Canada" (1995), 18 Dalhousie L. J. 196.
[436] *Ibid.*, at p. 130, relative to the treaty of peace between the Mikmaw and the Mohawk peoples involving a transfer of territory.

sale amongst themselves for a small piece, or quantity of [g]round."[437] Unless the inalienability criterion was thought to flow from the provisions of the *Royal Proclamation* of 1763,[438] which apparently has no application to some parts of Canada,[439] it is an artifact of the *Delgamuukw* decision which is inexplicable in legal terms. It is perhaps explicable in *political* terms as a continuation of the treatment of Aboriginal peoples as infantile populations which require the perpetual custodianship of the national government lest they be tempted to bargain away their traditional lands for a pittance.[440] It is questionable whether this degree of paternalism is acceptable in a Canadian legal system which has come increasingly to affirm the equality of citizens and cultures.

All this flies in the face of Lamer C.J.'s assertion in *Delgamuukw* that "In my opinion, ... the common law should develop to recognize aboriginal rights (and title, when necessary) as they were recognized by either *de facto* practice or by the aboriginal system of governance."[441] If this admonition were to be followed conscientiously by the courts, the content of Aboriginal title would necessarily be quite different in different parts of the country, depending upon the content of whatever pre-existing Aboriginal rules of land tenure were operative at the time of the assertion of British sovereignty.

In no way, therefore, can the content of Aboriginal title stipulated in *Delgamuukw* be said to take into account "the Aboriginal perspective." There is no single such perspective to be taken into account. Instead, the Court's decision in *Delgamuukw*, contrary to its own admonition, posits one singular form of Aboriginal tenure, which takes no account whatsoever of the differences between the pre-sovereignty systems of governance of Canada's diverse Aboriginal peoples, including their varied and distinctive systems of land tenure. But it is from the pre-existence of such Aboriginal legal systems and rules of land tenure that the "*sui generis*" character of present day Aboriginal title is said to flow.[442]

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[437] Roger Williams, *A Key Into the Language of America* (London: Gregory Dexter, 1643), reprinted in 1973 (Detroit: Wayne State University Press, 1973), at p. 167.
[438] R.S.C. 1985, Appendix II, No. 1.
[439] In particular to British Columbia, which was the part of Canada under consideration in *Delgamuukw*.
[440] In this connection it is worth noting that other equally distinctive cultures, for instance, the agrarian Mennonites of Manitoba and Ontario, have managed to maintain unique and ongoing relationships with land held in fee simple without any such "protection" or separate legal status.
[441] (1997), 153 D.L.R. (4th) at p. 260.
[442] This is, in fact, the position taken by Borrows and Rotman, *supra* note 414 at p. 12.

There can be little doubt, however, that Aboriginal title as defined in *Delgamuukw* has economic consequences for the "owners" of Aboriginal title land. It is a property interest debased below the economic value of fee simple, for a number of reasons. As long as Aboriginal title land is inalienable, it remains "dead capital" incapable of serving as collateral security for loans to facilitate the land's development. Any significant economic development on Aboriginal title lands will require large scale capital infusions from outside institutions A prudent investor will be unlikely to make substantial advances without the benefit of collateral security in the form of a charge on the land being developed. This cannot happen in the case of inalienable lands.

It is no solution to this problem that Lamer C.J. suggests that Aboriginal title lands can be surrendered for developmental purposes.[443] Unlike the situation in respect of reserve lands constituted under the *Indian Act*,[444] there exists at present no statutory or constitutional mechanism for such a surrender to take place without first extinguishing the Aboriginal interest in the land in question. Indeed, upon surrender the land would revert to the province in which it is situated as a *plenum dominium* in the Crown in Right of the Province.[445] It would appear, therefore, that Aboriginal title land may be sold (to the Crown only) but not developed by the Aboriginal people who own it, other than in marginal ways which do not require significant capital infusions from outside sources.

A further impediment to the development of Aboriginal title lands for valuable economic purposes is that the "inherent limit"[446] to the use of such lands posited by Lamer C.J., is not ascertainable in advance. In a market economy, uncertainty as to the scope and limits of property rights is generally the enemy of investment and economic development. Again, as Professor Flanagan has observed:

> With one hand the Court giveth and with the other the Court taketh away.

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[443] (1997), 153 D.L.R. (4th) at p. 248.
[444] R.S.C. 1985, c. I-5.
[445] This, in fact, was the only legal issue actually decided in the *St. Catherine's Milling* case, [1888] A.C. 26 (P.C.) at p. 55.
[446] (1997), 153 D.L.R. (4th) at pp. 246 to 249.

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> The limitations on aboriginal title imposed by the Court in *Delgamuukw* will no doubt be the source of considerable frustration and litigation in the future. The court casts a large cloud on aboriginal title and imposes vague restrictions on the right to use and develop aboriginal lands. This will limit the commercial value of aboriginal lands and restrict the degree to which aboriginal communities and other investors might be willing to invest in the development and exploitation or these lands. ...[447]
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> What happens if an investor, in cooperation with the holders of aboriginal title, has invested in development of the land for logging purposes, later determined to be irreconcilable with aboriginal title? Is the investment simply lost? Can the investor recover damages from the holders of the aboriginal title or the federal Crown? These unresolved questions mean that it is unlikely that prudent investors, including the holders of aboriginal title, will invest in the development of lands subject to such vague restrictions. In effect, the cloud cast over aboriginal title by the Court significantly reduces the commercial value of aboriginal lands.[448]

Lamer C.J.'s analogy to equitable waste[449] is not helpful. The extraction of non-renewable resources, which is apparently permitted,[450] is inherently problematic in that, by definition, these resources will eventually be exhausted, thereby "severing" the connection of the Aboriginal owners with the land in respect of that resource for all time. More importantly, the "inherent limit" on development has been expressly linked to traditional uses of the land which gave rise to the "special bond" from which Aboriginal title is said to arise in the first place. Under modern conditions, these activities may have an increasingly limited economic significance:

> *[L]ands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to the aboriginal title in the first place* [emphasis added].
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[447] Flanagan, *supra* note 430, at pp. 312 to 313.
[448] *Ibid.*, at p. 316.
[449] *Delgamuukw*, *supra* note 368, at p. 248.
[450] At least as to the extraction of oil and natural gas on Aboriginal title lands; see *ibid.*, at p. 245.

> 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. 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 way 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) [emphasis added].[451]

It would appear that the activity which establishes the "special bond" with the land must be a practice carried out on the land by Aboriginal peoples during the pre-contact period, or at latest, at the time of the assertion of British sovereignty; future uses which are not compatible with that "special bond" are not permitted, however preferable they may seem to Aboriginal peoples under modern conditions. It is possible, for instance, that sustainable timber farming, emphasising the cultivation of particularly valuable species of trees, may not be compatible with the use of Aboriginal title land for hunting beaver or deer. The diversion of streams and rivers for the generation of hydroelectric power may well be incompatible with the continued use of the stream or river for subsistence salmon fishing. The development of a marina may render a site unsuitable for harvesting clams and mussels.[452]

The "inherent limit" upon Aboriginal uses of Aboriginal title lands, by definition, disentitles Aboriginal owners from making, for themselves, important decisions as to the most appropriate and beneficial uses of their land under modern conditions. Aboriginal peoples have been turned into *sui generis* second class citizens in their ownership of land. The "inherent limit" constitutes a court imposed freezing of Aboriginal priorities relative to their lands, governed by their presumed attitudes towards the land in previous centuries. The assumption underlying the "inherent limit" must be that, while non-Aboriginal cultural

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[451] As per Lamer C.J. in *Ibid.*, at p. 247.

[452] Ironically, the Tsawout people of Vancouver Island obtained an injunction restraining the development of a marina at Saanichton Bay precisely on the ground that the proposed location had traditionally been used by them to harvest food: *Saanichton Marina Ltd. v. Claxton* (1987), 43 D.L.R. (4th) 481 (B.S.S.C.); affirmed in part (1989), 57 D.L.R. (4th) 161 (B.C.C.A.). Suppose the positions of the parties were subsequently reversed, with the Tsawout people now wishing to develop the marina on Aboriginal title land. Under the "inherent limit" pronounced in *Delgamuukw*, this would arguably be a prohibited use, in that it would sever the "special bond" with the site (*i.e.*, harvesting food) from which the Aboriginal title originally derived.

attitudes towards the appropriate uses of land may change and evolve over time. Aboriginal attitudes may not. There is no legal or other reason why such a proposition should be accepted.

In what sense, then, can the decision in *Delgamuukw* be regarded as a victory for Aboriginal peoples? Both sides of the Supreme Court of Canada in *Calder*[453] agreed that Aboriginal title to land arises out of possession at common law. Judson J. and Hall J. differed only as to whether, in that particular case, the claimants' Aboriginal title had been extinguished. The *Delgamuukw* decision therefore adds nothing new in this respect. The only new elements that the decision in *Delgamuukw* does add, it would seem, are compulsory communality and restrictions on alienability and use, predicated on supposed perpetual cultural differences which Aboriginal peoples may or may not wish to preserve, given the new opportunities which recognition of their land title might present.

An unexpressed double standard has arisen whenever Aboriginal peoples have sought to recover land *qua* Aboriginals. The Supreme Court of Canada's decision in *Delgamuukw* is simply the most recent expression of this double standard. What might have been the outcomes of Aboriginal land claims litigation had the *sui generis* theory of Aboriginal title not come into vogue after 1984? Presumably, land claims could have been pleaded in accordance with the common legal principles which the courts apply in cases of disputes over land not involving Aboriginal peoples. Arguably, nothing now prevents land claims from being asserted in this form, even in the aftermath of *Delgamuukw*, provided the claimants characterise themselves as stakeholders whose Aboriginality is only incidental to the claims advanced. For Aboriginal claimants, there might be significant advantages to such a strategy.

The Application of a Consistent Set of Principles

Suppose an Aboriginal group were to assert a land claim in terms of the generally accepted rules of Imperial constitutional common law, or, alternatively the provincially adopted rules of the common law of real property, analysed in Chapter Two, rather than accepting the special *sui generis* restrictions on

[453] [1973] S.C.R. 313.

Aboriginal title which the Canadian courts have crafted for them. Suppose, in other words, that an Aboriginal group asserted its claim on the footing that its members are litigation parties who happen to be Aboriginal, rather than on the basis of their Aboriginality *simpliciter*. They would then be claiming the advantages of a "normal" property interest, irrespective of their Aboriginality. A case pleaded in such terms would force a court to confront squarely the repugnant double standards which the judiciary has set up relative to the land rights of one particular group within Canadian society.

One way of considering the possible outcomes is by conducting a mental experiment as to how *Delgamuukw* might have been decided on the basis of the principles of land law which apply to all other Canadians.

By way of conclusion to this thesis, let us undertake this hypothetical legal experiment.

(1) The Plaintiffs' Prescriptive Rights Against the Crown

Suppose the plaintiffs (the Gitskan and Wet'suet'en peoples) adduced evidence proving that they occupied the land claimed when the Crown asserted sovereignty over the territory which now comprises British Columbia by the Treaty of Oregon in 1846. At this point, the lands would have become "Crown lands," in the sense that, at common law, the Crown would have obtained a radical or allodial title to which no beneficial interest would necessarily attach. Suppose the plaintiffs proved, further, that they continued to occupy the claimed lands after 1846, that this occupation was known by the Crown, and that the Crown was aware that the plaintiffs claimed that they owned the land.[454] Acts of occupation upon which the plaintiffs might rely as evidence of possession might have included fishing, hunting, felling trees, gathering

[454] The objection taken in *Regina v. McCormick* (1859), U.C.Q.B. 131 would therefore have no application.

vegetation, building houses, and movement over the land and throughout its navigable waters. Such activities traditionally are legally sufficient to amount to possession at English common law.[455]

It is a matter of public record that no Information of Intrusion was ever filed by the Crown. By virtue of the *English Law Ordinance*,[456] the English statute 9 Geo. III, c. 16 [*Nullum Tempus Act*] became the law of British Columbia, and was still in effect in that jurisdiction in 1906.

On the application of conventional legal principles the conclusion would have been that, as of 1906, the Crown's beneficial interest (if any) in the land claimed by the plaintiffs was extinguished and a new statutory title in fee simple vested in the Gitskan and Wet'suet'en peoples as of that date.[457] Subsequent amendments to British Columbia legislation limiting or precluding the acquisition of new prescriptive rights as against the Crown could have no effect upon these rights, which had already ripened into full ownership of land by the passage of time.

Most significantly, the plaintiffs would have acquired a "normal" rather than a limited, "*sui generis*" interest in land.

(2) The Plaintiffs' Common Law Right of Possession

At common law, prescriptive statutes and limitation periods aside, all ownership of property flows from possession. Possession amounts to full ownership unless otherwise accounted for by the existence of a prior, better title in another, or demonstration that the interest of the person in possession constitutes some lesser estate in land. "Possession, however short, is evidence of seisin in fee."[458] "The law gives credit to

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[455] See the discussion of acts of occupation sufficient to constitute common law possession in Chapter Two.
[456] S.B.C. 1857, c. 7.
[457] *I.e.*, upon the determination of the statutorily prescribed sixty year period following the assertion of Crown sovereignty by the conclusion of the Treaty of Oregon.
[458] *Lightwood on Possession of Land* (London: Stevens and Sons, Limited, 1894), at p. 121.

possession unless explained."[459] Possession for hundreds, or even thousands of years, *a fortiori*, constitutes the strongest possible evidence of seisin in fee.

Suppose the plaintiffs could show by evidence that they were in possession of the claimed lands as of 1846. Upon the reception of the English law of property and civil rights in British Columbia, the plaintiffs' possession would have been "unexplained" in the legal sense. There was no possibility that they held subject to a prior superior interest in the land, as prior to British sovereignty no power of record existed capable of asserting or creating any such interest. Equally, and for the same reason, it could not have been shown that their possession of the land amounted to some lesser estate than the presumptive full ownership in fee simple.

As demonstrated in Chapter Two, the solution of the common law in cases of legally unexplained possession is the presumption of a fictitious Crown grant of the land to the persons found in possession, or alternatively the presumption that unencumbered title has vested in the them by the running of the relevant periods of prescription, either against the Crown or the Crown's grantee.[460]

In either case, in the event of a challenge to the plaintiffs' title, a court applying "ordinary" legal principles[461] should have found unencumbered ownership to be in the Gitskan and the Wet'suet'en as of 1846, by virtue of their otherwise "unexplained" possession. Whether this finding was achieved by means of a fictitious Crown grant to legitimate the "unexplained" possession or by the presumption that all relevant limitation periods had expired so as to bar any adverse claims would not matter.

Once again, the plaintiffs would have acquired the benefit of a "normal" rather than a "*sui generis*" interest in the land.

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[459] As *per* Mellor J. in *Asher v. Whitlock* (1865) L.R. 1 Q.B. 1 at p. 6.
[460] As *per* Kitto J. in *Allen v. Roughley* (1955), 94 C.L.R. 98 (H.C.) at p. 138.
[461] As opposed to the "special" principles which the judiciary has crafted when land claims are advanced by Aboriginal peoples *qua* Aboriginals.

(3) The Plaintiffs' Original Tenure Survived the Transfer to British Sovereignty

Suppose, finally, the plaintiffs proved that, at the time the British asserted sovereignty, the Gitskan and Wet'suet'en peoples had laws and systems of land tenure. Anthropological evidence and traditional evidence from oral history might have been adduced to show whether land and resources were owned privately, by groups of individuals, by Houses, or as a community usufruct, depending upon the nature of the resource; whether the Houses recognised internal territorial boundaries *inter se*; and whether there existed an organised system (*e.g.*, the potlatch) for the periodic verification and validation of boundaries and entitlements. It appeared that the plaintiffs' laws of land tenure were recorded orally: the Gitskan *adaawk* and the Wet'suet'en *kungax*. These would have been admissible as evidence. There does not exist, nor has there ever existed, any common law impediment to the proof of customary boundaries and systems of land tenure by "traditional" (*i.e.*, oral) evidence.[462]

By the application of regular common law principles, the court could have found that, upon the transition to British sovereignty, the laws and systems of land tenure of the plaintiffs persisted *proprio vigore* unless and until extinguished by legislation clear and plain in its intent to do so.[463] As a matter of constitutional law, the British Columbia provincial legislature lacked the competence to pass such legislation[464] and, as a matter of public record, none was ever passed by the federal Parliament.

Since the British Columbia legislature could not legislate to extinguish the plaintiffs' pre-existing system of land tenure, *a fortiori*, neither could provincial Crown grants made within the claimed territory have this effect. At their highest, any such purported grants would take effect subject to the plaintiffs' pre-existing land tenure.[465] Moreover, since the Crown must prove its own title in the same manner as the subject, it would not, without evidence as to how the Crown came to acquire a beneficial interest in the claimed lands,

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[462] See, *Kobina Angu v. Cudjoe Attah*, *supra* note 126; *Stool of Abinabina v. Chief Kojo Enyamadu*, *supra* note 128; and the authorities referred to *supra* note 131.
[463] *Campbell v. Hall*, *supra* note 72; *Freeman v. Fairlie* (1828), *supra* note 72; *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313, as *per both* Judson *and* Hall JJ.
[464] As *per* Lamer C.J. in *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) at pp. 267 to 273.

have been legally available to the court to conclude that the Crown had any beneficial interest in the land capable of forming the subject matter of a grant.[466] Any purported Crown fee simple grant within the plaintiffs' traditional territories should therefore have been found to be a nullity: *nemo dat quod non habet*. Alternatively, purported Crown grants in fee simple might have taken effect subject to the limitations imposed by the plaintiffs' pre-existing system of land tenure, which might have given an absolute priority to the plaintiffs' occupation and uses.[467] The Crown's purported grantees might or might not have had a remedy in damages as against the Crown for the defective grants.

In the result and, once again by the application of regular common law principles, the court might have found that the Gitskan and Wet'suet'en peoples never lost their original title to their traditional lands, and that their inherent Aboriginal systems of land tenure and territorial boundaries persisted unaltered. In this case, the plaintiffs would have established a truly "*sui generis*" interest in the claimed land, but it would be *sui generis* in the real sense that it actually took account of an "Aboriginal perspective," and not the artificial and limited property interest conceived by the Supreme Court of Canada in *Guerin* and *Delgamuukw*.

The Problem with "Aboriginal Title"

This thesis has sought to demonstrate that Aboriginal peoples have generally been unsuccessful in asserting proprietary claims to their ancestral lands because of an ever-present but unexpressed double standard in the application of common law principles by Canadian governments and courts. The unexpressed assumption[468] revealed in Canadian judicial decisions has been that two types of land ownership exist in Canada: "regular title" and "aboriginal title." It has not been considered conceivable that these two forms

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[465] *Oyekan v. Adele*, *supra* note 66.
[466] *Bristow v. Cormican*, [1878] 3 A.C. 641 (H.L.); *Amodu Tijanii v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (P.C.).
[467] As was the case in *Oyekan v. Adele*, *supra* note 66.
[468] The assumption has now been given formal sanction: Aboriginal title is not a "normal property interest," as *per* Lamer C.J. in *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) at p. 242.

of land tenure could have the same incidents, be subject to proof in the same way, or be capable of the same variety of valuable uses.

The presumed abnormality[469] of Aboriginal property interests has not inured to the benefit of Aboriginal peoples in their quest for vindication of their proper legal entitlements to ancestral lands. The classification of their title as *sui generis* is simply the latest linguistic expression of the historical double standard. It has not strengthened their claims but, in contrast, has placed extraordinary restrictions upon their title which would never be considered to be applicable to the "normal" property interests available to other Canadians. It has reinforced the unspoken assumption that Aboriginal peoples have not the full rights of Canadian citizenship and the full and equal benefits of Canadian law.

It is high time that this thinly veiled double standard was purged from Canadian legal and judicial discourse. To achieve this would require abandonment of the now popular *sui generis* theory of Aboriginal land title, with all the restrictions and limitations that accompany it or, alternatively, recognition of truly *sui generis* land rights actually based on surviving and ascertainable systems of original Aboriginal land tenure. This course of pleading remains available for future land claims litigation.

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[469] *Ibid.*

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