

# PROVING A CONSTITUTIONAL RIGHT TO THE LAND FOR ABORIGINAL PEOPLES OF CANADA

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In *Delgamuukw v. British Columbia*,<sup>1</sup> the Supreme Court of Canada realized a standard Canadian legal analysis with its recurrent doctrinal categories and distinctions was not appropriate for understanding the constitutional rights of Aboriginal peoples. The Court affirmed a *sui generis* constitutional analysis that respects Aboriginal perspectives on law and land. An appropriate analysis could not cling to the predetermined British system of rules, categories and rights to analyze aboriginal rights. The Court refused to mediate Aboriginal rights through colonized juridical precedents and the politics of privilege. Its articulation of *sui generis* analysis is maturing. The overriding purpose of this new constitutional analysis of aboriginal and treaty rights is a commitment to

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1 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*] with the judgment of Chief Justice Lamer (and Cory, McLachlin, and Major JJ.), Justice La Forest (and L'Heureux-DubÉ) concurring opinion with Justice McLachlin in substantial agreement, from a judgment of the British Columbia Court of Appeal (1993), 30 B.C.A.C. 1, 49 W.A.C. 1, 104 D.L.R. (4th) 470, [1993] 5 W.W.R. 97, [1993] 5 C.N.L.R. 1, [1993] B.C.J. No. 1395 (QL), [hereinafter Court of Appeal] varying an order of McEachern C.J., [1991] 3 W.W.R. 97, [1991] 5 C.N.L.R. xiii, (1991), 79 D.L.R. (4th) 185 [hereinafter Trial Court].

shaping a post-colonial order in Canada by guaranteeing the effective enjoyment of these rights and a just recognition of ancient property rights.

Under the guidelines established by a unified Supreme Court of Canada in *Delgamuukw*, this chapter identifies various evidential standards of constitutional right to the land. These standards are constitutional or public, being distinct from British common law and private standards of proof. The constitutional or public standards arise from British sovereign assertion of political jurisdiction over foreign Aboriginal lands that in turn frame the legal consequences of such an assertion. The time when the British sovereign asserted political jurisdiction over Aboriginal lands is critical to the Court's analysis. In their view, the date of sovereign assertion combined with either Aboriginal perspective or factual presence to the land creates a connection or relationship with the land which, when invoked provides for protection by British law.

While in certain factual situation, the connection must be "exclusive" in a *sui generis* analysis. Regardless of the inability to prove a connection at the time of sovereignty or later Aboriginal displacement, the Court stated Aboriginal peoples could prove a right to the land by demonstrating present occupation and showing a substantial maintenance of the connection. These constitutional standards of proof appear to be an independent test based on historical and legal contexts. A case by case approach will full articulate the relationship between the standards. The overarching purpose and unity of these standards

are to protect the Aboriginal peoples constitutional right to their land since the assertion of British sovereignty.

Proving an Aboriginal connection with the land involves transcultural interpretation that utilizes both comparative law and cross-cultural methodologies. Transcultural constitutional interpretation will determine both what is to be proved and the means to prove an Aboriginal connection with the land. Such interpretation modifies the existing rules of both evidence and procedural law. It involves describing the relations among Aboriginal peoples and to their surrounding ecology, an account of their livelihood, their community regulation among their members, and their relations with other peoples. These relationships or connections, thought of as a “quality”, define the meaning of Aboriginal humanity or human nature as well as constitutional rights.

#### **I. ABORIGINAL PEOPLES CONSTITUTIONAL RIGHT TO THE LAND**

To set the context for proving an Aboriginal right to the land, it is required to consider the constitutional nature of the right, since neither a constitutional right to the land nor private “ownership” exist in the British law as received in Canada. In the common law, the reasoning of British communities, the British sovereign is the lord paramount of the land tenure system in Britain, but the land is shared with various peoples and entities. No absolute ownership exists. A “landowner” has a private “estate” in land held of the sovereign; others may

have partial “bundles of rights” or interests of one kind or another in the same land. The key to proof of “title” has always been proof of possession, which provides protection against intruders or wrongdoers. Possession is not a brute state of fact but rather a legal description or qualification of fact. In English common law, title to land is relative; it is a better right based on prior possession to use of a set of abstract legal powers or faculties on a place.

In interpreting and applying the constitutional guarantee of existing Aboriginal rights by s. 35(1) of the *Constitution Act, 1982*,<sup>2</sup> the Supreme Court of Canada established that since the British sovereign asserted jurisdiction over their lands, Aboriginal peoples have had a constitutional and legal right to their lands.<sup>3</sup> The *sui generis* rights existing in 1982 were recognized and affirmed in their “full form” as part of the constitution of Canada and its supreme law by ss. 35(1) and 52(1).<sup>4</sup> Section 35(1) neither created these Aboriginal rights, nor constituted the source of Aboriginal rights to their lands.<sup>5</sup> These Aboriginal rights reside in or are derive from Aboriginal knowledge, heritage, laws, and the physical fact of occupation before the assertion of British sovereignty. Aboriginal claimants do not have to demonstrate their rights by reference to Crown grants

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2 April 17, 1982, Part II, Schedule B, *Canada Act, 1982*, c. 11 (U.K.).

3 The Gitksan or Wet'suwet'en hereditary chiefs, both individually and on behalf of their "Houses" claimed separate portions of 58,000 square kilometers of territory in northwestern British Columbia. Their claim was originally for "ownership" of the territory and "jurisdiction" over it, which they translated before the Supreme Court into a claim for Aboriginal title over the land in question and self-government.

4 *Delgamuukw*, *supra* note 1 at para. 133; s. 52(1) *Constitution Act, 1982*, *supra* note 2.

or derivative titles; their constitutional rights are neither derived nor delegated from the British sovereign or law.<sup>6</sup>

The Aboriginal legal orders and factual occupations were both protected by the British prerogative law of treaties, instructions, and proclamations that formed the “imperial constitutional law” of the colonies. Aboriginal law operated before the introduction of alien British common law;<sup>7</sup> its continuity was respected by common law principles of colonization and property.<sup>8</sup> The British sovereign’s assertion of jurisdiction thus affirmatively operated to vest Aboriginal law and rights in the land in British law.

Section 35(1) did not codify the prior cases involving Aboriginal title that had come before the Supreme Court of Canada and Judicial Committee of the Privy Council. No definitive statement on the content of Aboriginal title or rights in the land existed in 1982 from either final court of appeal.<sup>9</sup> Chief Justice Lamer

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5 *Delgamuukw*, *supra* note 1 at paras. 114 and 133-34.

6 *Ibid.* at paras. 133, 189, 192 and 200 per LaForest, J. Also see *R v. Sparrow* [1990] 1 S.C.R. 1075 at 1103 [hereinafter *Sparrow*].

7 B. Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727 at 737-38 and “Aboriginal Sovereignty and Imperial Claims” (1991) 29 Osgoode Hall L. J. at 681-703; Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 110-16, 181-83.

8 *Delgamuukw*, *supra* note 1 at para. 114. Kent McNeil, *Common Law Aboriginal Title supra* note 7 at p. 7. In *Guerin v. The Queen*, [1984] 2 S.C.R. 335 [hereinafter *Guerin*] Justice Dickson described Aboriginal title, at p. 376, as a “legal right derived from the Indians’ historic occupation and possession of their tribal lands” and held Aboriginal title was “an interest in land” which encompassed “a legal right to occupy and possess certain lands” (at p. 382). In *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 [hereinafter *Paul*] the Court went even further and stated that Aboriginal title was “more than the right to enjoyment and occupancy” (at p. 688). In *Delgamuukw*, Chief Justice Lamer took the reference to “more” as emphasis of the broad notion of use and possession.

9 *Delgamuukw*, *supra* note 1 at para. 116.

stated that all of these judicial descriptions were unhelpful in grasping the *sui generis* nature of Aboriginal right to the land. Moreover, these descriptions were contaminated with colonial English perspectives about land in the common law. The existing opinion or “the legal” recognition of the colonizers did not bind the Court’s interpretation, as stated in *Côté*:

[s]ection 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive Aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal recognition and approval of European colonizers.<sup>10</sup>

The Court held the constitutionalization of existing Aboriginal rights to the land itself by s. 35(1)<sup>11</sup> affords constitutional protection to the historic land tenure.<sup>12</sup> It clarified that Aboriginal right to the land is classified as a category of Aboriginal rights by s. 35(1); it is “simply one manifestation of a broader-based conception of aboriginal rights”.<sup>13</sup> Section 35(1) recognizes and affirms every degree of connection or relationship of Aboriginal nations and peoples with the land;<sup>14</sup> nevertheless, Aboriginal right to the land itself has been held to be distinct from other manifestations of constitutional Aboriginal rights.<sup>15</sup> The

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10 *R. v. Côté*, [1996] 3 S.C.R. 139 at para. 52.

11 Justice La Forest’s concurring opinion relied on a highly contextual definition of “the Aboriginal right of occupancy”, *Delgamuukw*, *supra* note 1 at para. 191.

12 *Delgamuukw*, *supra* note 1 at para. 126.

13 *Ibid.* at para. 137.

14 *Ibid.* at para. 141.

15 *Ibid.* at para. 137-38. Compare *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*] test for integral Aboriginal activities related to a distinctive culture as constitutional

Court used the term “Aboriginal title” to signify the traditional collective right of Aboriginal peoples to land for their livelihood and to confer a broad constitutional right to use the land for a variety of modern economic activities.<sup>16</sup> *Sui generis* real property rights constitute more than a common right to enjoyment and occupancy,<sup>17</sup> and do not require their activities protected as integral to their traditional practices, customs, and traditions at the time of first European contact.<sup>18</sup>

The Court has summarized the content of Aboriginal title in the form of two propositions: first, it encompasses the right to exclusive use and occupation of the land for a variety of purposes; and second, these uses must be conciliated with the group's connection with that land and other parts of the constitution of Canada. The Court characterized these purposes as “parasitic” on or derivative of the *sui generis* land tenure system.<sup>19</sup> These interconnected *sui generis* rights are more enduring and extensive than the independent, but related, rights to engage

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Aboriginal rights to the discussion of Aboriginal perspectives and law in creating Aboriginal title at para. 33, 74; *R. v. Adams*, [1996] 3 S.C.R. 101 at para. 26 [hereinafter *Adams*] and *Côté*, *supra* note 10 at para. 38.

16 Although “tenure” in English land law is associated with a feudal or royal law explanation of how land is held by a lord and ultimately from a Crown, I feel that “Aboriginal tenure” is a better and clearer term, since it captures the nature of the *sui generis* property order of the Aboriginal peoples, see *infra* note 108 which explains the existence of a treaty reconciled the Aboriginal order with the prerogative order in foreign affairs.

17 *Delgamuukw*, *supra* note 1 at paras. 119, relying on *Paul*, *supra* note 8 at 678.

18 *Ibid.*, *Delgamuukw* at paras. 122 and 140.

19 *Ibid.*, *Delgamuukw* at paras. 111 and 140; At paras. 191-192, Justice La Forest’s concurring opinion characterized the necessary difference between Aboriginal title and rights as “a

in specific traditional activities at specific sites, which the Court characterized as “Aboriginal rights”. The interconnected rights to use the land, the Court said, must be reconcilable with the nature of the relationship or connection between the Aboriginal peoples and the land.<sup>20</sup> The Court stated the constitutional protection provided by s. 35(1) does not exhaust the content of Aboriginal title or rights since Aboriginal peoples can develop beyond their ancient relationship with the land.<sup>21</sup>

The Court conceptualized the constitutionalization of right to the land as a *sui generis* title,<sup>22</sup> which is the unifying principle underlying its various dimensions and characteristics.<sup>23</sup> Its unique constitutional dimensions are: its source, its communality, and its exclusive alienability to the Crown. The Court conceptualized Aboriginal tenure and title as a distinct proprietary order

distinction between: (1) the recognition of a general right to occupy and possess ancestral lands; and (2) the recognition of a discrete right to engage in an Aboriginal activity in a particular area”.

20 *Ibid.* at para. 111.

21 *Ibid.* at para. 136.

22 Personally, I prefer the Germanic concept of “*aufhebung*” to the Latin *sui generis* for Aboriginal title. Hegel used this concept to signal its organic spiraling nature (like the opening of a fern or sea shell and the human ear) where nothing is lost or destroyed but rather transformed and preserved. Hegel conceptualized *aufhebung* as the emergence of an order of meaning undreamt of previously, representing a holistic way of thinking but also the dynamic of change at work both in nature and in the unfolding of events, as when the legal mind self-consciously narrates and interprets the history of its own stages of understanding Aboriginal thought on the road to justice. But European labeling has already created enough problems for Aboriginal categories, and Aboriginal language should define the tenure or title.

23 *Ibid.*, *Delgamuukw* note 1 at para. 113. *Mabo v. Queensland (No. 2)* (1992) 175 C.L.R. 1 (H.C. AST.) at 89 [hereinafter *Mabo*], *Wik Peoples v. Queensland: Thayorre People v. Queensland* [1996] 187 C.L.R. 1, 215 (H.C. AST.) [hereinafter *Wik*]; *Fejo v. Northern Territory*, [1998] 156 A.L.R. 721 (HC Australia), at par. 53 (Gleeson CJ) and para. 108 (J. Kirby). See, J Borrows and L.I. Rotman, “The



existing in the constitution of Canada derived from Aboriginal knowledge, heritage, law and factual possession of certain lands.<sup>24</sup> Through Aboriginal law, the right to the land is held communally by all members of the Aboriginal nation and as such, the entire community makes decisions with respect to it. Under Aboriginal legal orders, title is not held by a sovereign or individual person, which therefore distinguishes it from British and civil law property order or interests.<sup>25</sup> At the time the sovereign asserted authority over Aboriginal land tenure, the British law established lands cannot be transferred, sold, or surrendered to anyone other than the Crown and, as a result, are inalienable to third parties.<sup>26</sup>

The Court used the concept of *sui generis* to distinguish Aboriginal law from the derivative proprietary interests of British common law, such as fee simple, and French civil law.<sup>27</sup> The application of "traditional real property

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Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36 Alta. L. Rev. (No. 1) 9-45.

24 This reversed the trial judge who held that Aboriginal "interests in the land arise out of occupation or use of specific land for aboriginal purposes for an indefinite or long, long time before the assertion of sovereignty", and who also held that Aboriginal interests are communal, consisting of subsistence activities and not proprietary.

25 *Delgamuukw*, *supra* note 1 at para. 114.

26 *Ibid.* at para. 113. This was a reflection of Aboriginal law and its land tenure principles.

27 *Ibid.* See, *Mabo supra* note 23 where the High Court of Australia held that even if British common law has no equivalent or analogous legal right or interest as existed in Aboriginal law, these Aboriginal rights were recognized by the common law, at 58 and 70. Brennan J., Deane J., and Gaudron J., who acknowledged that "pre-existing native interests with respect to land [...] were not confined to interests which were analogous to common law concepts of estates in land or proprietary rights" at 85. They held the correct judicial analysis demands "the traditional interests of the native inhabitants are to be respected" even though those interests are of a "kind unknown to English law". As for proof of Native title in Australia, see generally G. McIntyre,

rules" to elucidate the *sui generis* content of Aboriginal title is not appropriate.<sup>28</sup>

The Court clarified that the *sui generis* proprietary order of Aboriginal peoples can compete on an equal footing with other proprietary orders and interests.<sup>29</sup>

The difference of Aboriginal rights in the land must be given full constitutional respect by the courts as any reliance on differences would be equated with denial of equality of the law.

The challenge to the Canadian judiciary and other parties is to develop a *sui generis* and transcultural approach to Aboriginal rights to land and activity

"Proving Native Title," in R.H. Bartlett and G.D. Meyers, *Native Title Legislation in Australia* (Perth, Western Australia: Centre for Commercial and Resources Law, 1994) at 156 [hereinafter *Native Title Legislation*]; and G. Neate, "Proof of Native Title", in B. Horrigan and S. Young, ed.'s., *Commercial Implications of Native Title* (Sydney: Federation Press, 1997) at 240-319.

<sup>28</sup> *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657, at para. 14. The Supreme Court referred to the need to "pierce the veil" of common law real property law and its technical land transfer requirements in adjudicating Aboriginal land rights disputes and interpretation of Band surrenders at para. 17. The relied on *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 at para. 7; *Delgamuukw* (B.C.C.A.) at paras. 53-57, 130-131, 263, 293 per Macfarlane J.A.; at paras.394- 397 per Wallace J.A.; at para. 597; at paras. 665, 718; and 916 per Lambert J.A.; at paras. 1139-1143 per Hutcheon J.A.; *Sparrow*, *supra* note 6 at 1112; *Paul*, *supra* note 8 at 678. See also *Te Runanganui o Te Ika Whenua Inc. Society v. Attorney-General* [1994] 2 N.Z.L.R. 20 (N.Z.C.A.) and *Mabo*, *supra* note 23 at 89 per Deane and Gaudron JJ. stated "the preferable approach" to determining the content of common law native title is "to recognize the inappropriateness of forcing native title to conform to traditional common law concepts and to accept it as *sui generis* or unique".

<sup>29</sup> *Delgamuukw*, *supra* note 1 at para. 113 citing *Paul*, *supra* note 8 at p. 677. In *Delgamuukw*, *supra* note 1 at para. 190, Justice La Forest stated the *sui generis* interest cannot be equated with fee simple ownership; nor can it be described with reference to traditional property law concepts. See also the High Court of Australia judgment in *Mabo v. Queensland (No. 1)* (1988) 166 C.L.R. 186, where the Court stated that since the enactment of the *Racial Discrimination Act* (1975) (Cth-AST.) the legislative destruction of, or injury to, Aboriginal property rights in ways which would not apply to non-Indigenous rights is capable of constituting discrimination on the grounds of race. A similar argument can be made under the equality right in section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, See also, article 5(a) of *International Convention on Elimination of All Forms of*

issues, rather than relying on British traditions. The Court reasoning in *Van der Peet* and *Delgamuukw* suggests the latent difficulties of applying a *sui generis* analysis based on Aboriginal knowledge, heritage, and legal thought. The academic commentators and the Court chose to rely upon, consciously or unconsciously, was existing Anglo-Canadian legal categories in the guise of intersocietal law and ultimately losing sight of Aboriginal perspectives and law.<sup>30</sup> The intersocietal law analysis states Aboriginal title does not stem from Aboriginal law, British law or French law, but is a legal bridge between each legal system.<sup>31</sup> The Court awkwardly suggested that the rules of real property found in Aboriginal legal systems can not completely explain Aboriginal title, its dimensions or its characteristics, they must be understood by reference to both common law and Aboriginal perspectives.<sup>32</sup> This is a cross-eyed perspective. This approach is also inconsistent with the Court's decision that Aboriginal law and prior presence comprise the source of Aboriginal rights.<sup>33</sup> Aboriginal legal system must be complete described in Aboriginal thought and language; it is not an invention of the British common law. After the assertion of British sovereign,

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*Racial Discrimination*, 10-27 Sess. 1974-1982, 660 U.N.T.S. 195 providing the right to equal treatment before the tribunals and all other organizations administering justice.

30 *Ibid.*, *Delgamuukw* at para 112. *Van der Peet*, *supra* note 15 at paras. 20, 34, and 42.

31 *Ibid.*, *Delgamuukw* at para. 112. See, Brian Slattery, "The Legal Basis of Aboriginal Title", in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, G.B.: Oolichan Books, 1992), at pp. 120-21.

32 *Ibid.*, *Delgamuukw* at para. 112.

33 *Ibid.*, *Delgamuukw* at para. 114

the role of prerogative law and the common law is to respect the Aboriginal laws or perspectives.

One way of evaluating the judicial approach to *sui generis* rights is to evaluate how it respects Aboriginal knowledge, heritage, language and its legal order. In the British Columbia Court of Appeal, Justice Lambert observed the relevant considerations flow from using “an Aboriginal point of view as a reference point rather than a view of rights based on western [Eurocentric] legal theory,” as “the appropriate approach.”<sup>34</sup> In *Mabo*, Justice Toohey highlighted the content of Aboriginal rights protected by British common law as that which already exists. He emphasized that if the courts found that only those existing rights, which were the same as or which approximated those under English law, could comprise legal rights, such an approach would defeat the purpose of recognition and protection of *sui generis* rights.

## II. PROVING AN ABORIGINAL RIGHT TO THE LAND

The proof of a constitutional Aboriginal right to the land reflects the Court conceptualization of the source and content of *sui generis* Aboriginal title,<sup>35</sup> and its rejection of the different theories to justify extinguishment of these historic

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<sup>34</sup> *Delgamuukw*, *supra* note 1 (Court of Appeal) at para. 684. See also paras. 381-424 per Wallace J.A.; at 276-281” paras. 663-684; at para. 718 per Lambert J.A..

<sup>35</sup> *Ibid.* at para. 140.

rights to the land.<sup>36</sup> The Court recognized that the general principle of constitutional interpretation and the common law provide for a recognized Aboriginal title and right as they were recognized by either the Aboriginal system of governance or by *de facto* practice.<sup>37</sup> These principles allow sufficient flexibility to deal with this highly complex and rapidly evolving area of constitutional law.

The Court's guidelines for an Aboriginal claimant to establish proof of an Aboriginal right in the land is composed of the follow alternative criteria:

- (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.<sup>38</sup>

The Court stated that proof of an Aboriginal right to the land must mirror the content of the Aboriginal right or rights vested when the British sovereign asserted political jurisdiction over the territory.<sup>39</sup>

Aboriginal title arises from the relationships or connections of Aboriginal nations and peoples with a territory.<sup>40</sup> This constitutional right is not the sum of a set of certain activities or a bundle of rights within the territory or Aboriginal

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36 *Ibid.* at paras. 114, 126 and 173-183; *Delgamuukw*, B.C.C.A. at 490. Hutcheon, J.A. for the minority opinion in the Court of Appeal agreed that there had not been blanket extinguishment of Aboriginal tenure at 764.

37 *Ibid.* at para. 159.

38 *Ibid.* at para. 143.

39 *Ibid.* at para. 155.

40 *Ibid.* at para. 137.

rights. It is different from specific activities on specific sites that are viewed by the Court as integral to their distinctive Aboriginal cultures (the *Van der Peet* “Aboriginal rights”).<sup>41</sup> This chapter is concerned with the civil proof in Aboriginal peoples asking for a judicial declaration of title. The burden of evidence changes depending on who initiates the action.<sup>42</sup> In most civil cases seeking declaration of title, Aboriginal peoples as plaintiffs will bear the onus of proving their connections to the land at the time the British sovereign asserted jurisdiction over the territory. Since the common law courts have discovered that property law is a “bundle” of complex legal relations between humans<sup>43</sup> (rather than relations between a person and land or things), civil litigation is surrounded by unimagined indeterminacy. Property in the common law has become a dynamic and conflicted concept. Any quest for doctrinal precision in the common law property (and economic rights) has failed; thus, the legacy is one of contradiction and ambiguity, often replaced by clarifying statutes. Judges are reluctant to issue declaration of title because it is virtually impossible to be

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41 *Ibid.* at paras. 111 and 137; Justice La Forest agreed with the majority’s characterization of Aboriginal title as the right to use the land for a variety of activities, but appears to qualify them by relating them to the Aboriginal society’s traditional habits and mode of life at paras. 191 and 194.

42 Kent McNeil, “The Onus of Proof on Aboriginal Title” (May, 1999) [unpublished] at 24-37.

43 See W. N. Hohfeld, “Some Fundamental Legal Concepts as Applied to Judicial Reasoning” (1913) 23 Yale L. J. 16.

certain that no one else (especially unrepresented third parties) has a valid or overlapping claim to the disputed land.<sup>44</sup>

Where Aboriginal people can demonstrate "their connection with the piece of land" at the time of assertion of British sovereignty, the Court held a claim to Aboriginal title is constitutionally established and affirms a vested *sui generis* right to the land itself, or "ownership" or tenure.<sup>45</sup> This relationship can be proved by either exclusive connection with Aboriginal perspectives and laws creating a land tenure system or physical (factual) occupation or by both methods.<sup>46</sup> These concepts contain each other; a complete understanding of Aboriginal connections can begin with either foundation. Each perspective is like looking into a mirror that reflects into another mirror, creating the same image back innumerable times. The Aboriginal perspective is an intellectual manifestation of the Aboriginal perspective; occupation is a factual

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44 *Delgamuukw*, *supra* note 1 at para. 185.

45 *Ibid.* at para. 140; see *supra* note 22. Toohey J. in *Mabo*, *supra* note 23 at 178-79 pointed out the use of the word "title" in the Aboriginal context is "artificial and capable of misleading" where the Aboriginal rights being claimed do not correspond to the concept of ownership as understood by the land law of England "developed since feudal times" and by the later land law of Australia. He saw that although title "is a convenient expression" which "fits more comfortably into the legal system of the colonizing power", what is involved in Aboriginal law is "a special collective right vested in an Aboriginal group by virtue of its long residence and communal use of land or its resources". Since "the specific nature of such a title can be understood by reference to the traditional system of rules" it is not particularly fruitful to inquire as to whether title is "proprietary" or "personal" or whether such "inquiries into the nature of traditional title are essentially irrelevant" *ibid.* at 187.

46 *Ibid.*, *Delgamuukw* at paras. 146-7. In *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 [hereinafter *Baker Lake*] Mahoney J. held that to prove Aboriginal title, the claimants needed both to demonstrate their "physical presence on the land they

manifestation. If proving these connections to the land is difficult, Aboriginal connections can be constructed from present occupation that establishes continuity with the land.<sup>47</sup>

In past declaratory actions, Eurocentric knowledge characterized evidence submitted by Aboriginal peoples as oral or traditional evidence. Oral evidence included Aboriginal legends, mythology, religion, moral obligations, spiritual obligations, personal assertion of descent, cultural artifacts and explanations of their significance, customs and traditions of family ownership. As well, land acquisition, succession, divestiture, title or interest in family lands, and boundaries to family lands were viewed as oral evidence. The Court has established the admissibility, utility and reliability of such oral evidence in determining Aboriginal peoples constitutional rights to their land, and extended the nature of this evidence.

#### **A. THE BRITISH SOVEREIGN'S ASSERTION OF POLITICAL JURISDICTION**

In *Delgamuukw*, the Court established the guideline that the relevant time of vesting the Aboriginal connection with the land is when the imperial sovereign asserted "sovereignty" over the foreign Aboriginal territory. Sovereignty is a difficult concept to translate or define and is notoriously problematic since the Court did not clarify the nature or content of the assertion

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occupied" (at p. 561) and the existence "among [that group of [...]] a recognition of the claimed rights [...] by the regime that prevailed before" (at p. 559).



of sovereignty. However, in the prior case of *Quebec Secession Reference* it acknowledged British “sovereignty” is a political fact for which no purely legal authority can be constituted.”<sup>48</sup> The burden of proving such political fact or facts involved with asserting British sovereignty over an Aboriginal territory appears to be the Crown’s burden, since the assertion operates without the knowledge or consent of the Aboriginal nations and peoples.

In the territory comprising modern day British Columbia, the date of assertion of sovereignty in British Columbia coincides with a negotiated treaty in public international law namely, the Oregon Boundary Treaty of 1846.<sup>49</sup> This was not a unilateral assertion by the Crown. The 1846 treaty reconciled European and the United States claims to Aboriginal lands without any consent

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47 *Ibid.*, *Delgamuukw* at paras. 143, and 152-154.

48 *Re Reference by the Governor General in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada*, [1998] 2 S.C.R. 217, at para. 142 [hereinafter *Quebec Secession Reference*], citing H.W.R. Wade, “The Basis of Legal Sovereignty” [1955] Cambridge L.J. 172 at 196.

49 *Delgamuukw*, *supra* note 1 at para. 145. Treaty Between Her Majesty And The United States Of America, For The Settlement Of The Oregon Boundary (Oregon Boundary Treaty, 1846), TS 120. This is McEachern C.J.’s conclusion at trial, (at 233-34) and the parties did not dispute this issue on appeal. The Court suggests is that any European treaty has some problematic elements since they are European reconciliation of political rights regulated by public international law, *Van der Peet*, *supra* note 15 at paras 36-37 (discovery convention), and controlled by international rules of treaty construction, *The Vienna Convention on the Law of Treaties*, 23 May 1969, UN Doc. A/CONF39/27 at 289, 1155 I.N.T.S. 331, reprinted in 8 I.L.M. 976 (1969). These rules create a presumption against interpreting any treaty terms as effecting an abandonment of sovereignty or rights of the treaty parties, much less non-involved third parties like the Aboriginal nations. See *Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels*, Advisory Opinion (1931), P.C.I.J. Ser. A/B, No. 43 at 142 [hereinafter *Polish War Vessels*]; *The Case of the S.S. "Lotus"* (1927), P.C.I.J. Ser. A, No. 9 at 18; *Case of the S.S. "Wimbledon"* (1923), P.C.I.J. Ser. A, No. 1 at 24-25; and *Polish Postal Service in Danzig*, Advisory Opinion, (1925), P.C.I.J. Ser. B, No. 11 at 39. Moreover, both the

or participation of Aboriginal nations. Against all competing European sovereigns, the 1846 Treaty created the exclusive entitlement of the British sovereign to deal with the Aboriginal nations of the territory. In British law this assertion vested the Aboriginal nations law and rights to the land.

The Court gave several legal reasons for choosing the 1846 Treaty. The Court stated that it was more certain than the date of first discovery and contact,<sup>50</sup> rejecting the standards of the trial judge in *Delgamuukw*.<sup>51</sup> The Court underlined judicial difficulties of determining the precise moment that each Aboriginal people had first contact with European colonizers,<sup>52</sup> or the reception of the British common law.<sup>53</sup>

Aboriginal law, public international law, and British common law's guiding principle declare a change in "sovereignty" over a particular territory

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Aboriginal perspective and common law decisions rejected the authority of European conventions or treaties as interfering with Aboriginal rights.

50 The historical period for the Trial Court in *Delgamuukw* was the time of contact. The judge determined contact occurred in the territory with the 1822 establishment of a trading fort near the Aboriginal land but outside their territory (*Delgamuukw*, *supra* note 1, Trial Court at 25). In *Mabo*, *supra* note 23, the High Court of Australia held the British sovereign claimed sovereignty when the Governor of Queensland, in exercise of powers conferred by prerogative letters patent, proclaimed the formal annexation of the Murray islands, at 19-21, 25 per Brennan J., at 133-114 per Deane and Gaudron JJ., at 12-121 per Dawson J., at 179-180 per Toohey J.

51 *Delgamuukw*, *supra* note 1 (Trial Court) at 81.

52 See *Johnson v. M'Intosh* (1823) 8 Wheaton 543, 21 U.S. 240 (USSC); *Baker Lake*, *supra* note 46 but no authority was cited for the test. In *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 the Supreme Court of Canada referred to occupation "for centuries" and "from time immemorial" but did not rely on a critical date of discovery.

53 *Mabo*, *supra* note 23 at 22-26 per Brennan J.

can not affect or extinguish the existing rights in the land of the inhabitants.<sup>54</sup> *Sui generis* Aboriginal rights have never needed official recognition by the European sovereign.<sup>55</sup> Public international law and prerogative law holds no land exists without a lord (*nulle terre sans seigneur*), thus these laws recognize and protect the pre-existing Aboriginal peoples legal and physical connections with the claimed land.<sup>56</sup>

Since the assertion of sovereignty is not the same as state succession, the Aboriginal right to the land is not derived from a colonizing sovereign's assertion or governing colony's authority or vantage point. Rather, the distant sovereign assertion is only a claim of protective jurisdiction over the Aboriginal lands and rights. The Court has held common law recognition by the colonizers, judicial decisions or prerogative acts of the existence of Aboriginal rights to the

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54 *Delgamuukw*, *supra* note 1 at para. 145, *Mabo supra* note 23 Brennan J. at 48, Deane and Gaudron J.J. at 66-68, and Toohey J. at 146-147; *Guerin supra* note 8 at 378; *Adeyinka Oyekan v. Musendiku Adele*, [1957] W.L.R. 876 at 788; D.P. O'Connell, *International Law*, 2<sup>nd</sup> ed. (London: Stevens, 1970) at 377.

55 Francisco de Vitoria,, *De Indis et De ivre belli relectiones*, ed. by E. Nys, trans. J.P. Bate (New York, Oceana: London, Wildy, 1964); H. Grotius, *Mare libervm: sive, De ivre qvod Batavis competit ad indicana commercia dissertatio* (Lugdun: Batauorvm: Ex officina Ludovici Elzevirij, 1609); C.V. Bijnkershoeck, *De dominio maris dissertatia*, trans. R.V.D. Magoffin intro. J. Brown Scott (New York: Oxford Univ. Press, 1964). See generally, J.Y. Henderson, *The Mikmaw Concordat* (Halifax: Fernwood Press, 1977) at 37- 72.

56 This is often called the doctrine of acquired rights in public international law or the doctrine of continuity in British law. In imperial common law, the doctrine of continuity provides that Aboriginal rights, possessions, customary laws, practices and usages continued after the assertion of British sovereignty. The Aboriginal rights were recognized by and incorporated as legal rights within British law as well as the common law.

land are not necessary for the recognition and affirmation of that Aboriginal right.<sup>57</sup>

As long as the distant British sovereign's law protect and vest Aboriginal rights against all others, the assertion of political jurisdiction requires no conciliation with the protected Aboriginal orders. Prerogative law operates through imperial charters, letter patents, commission, instructions, and proclamations to vest Aboriginal nations, tribes, and peoples' relations to their lands and affirms Aboriginal law, thus preventing any taking of their land. An explicit manifestation of the operation of prerogative law in North America is the *Royal Proclamation, 1763*.<sup>58</sup> Under its terms, massive territories or countries connected with Aboriginal nations or tribes (which were often bigger than Great Britain itself) were reserved as "Hunting Grounds" and "for the use of the said Indians". Lands reserved for the Indians were much broader than their villages, settlements or physical occupation, but extended to their understanding of their land. Under prerogative laws, Aboriginal peoples had the right to possess the

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57 *Delgamuukw*, *supra* note 1 at para. 114.

58 R.S.C., 1985, App. II, No. 1 [hereinafter *Royal Proclamation of 1763*]. Although the Proclamation is not the source of "Aboriginal title" in this country, it bears witness to the British imperial law toward Aboriginal peoples as based on respect for their right to occupy their ancestral lands; compare characterization of British courts in *R v. Secretary of State*, [1981] 4 C.N.L.R. 86 to Supreme Court of Canada in *Sparrow*, *supra* note 6, at p. 1103, see *Delgamuukw*, *supra* note 1 at para. 200 per La Forest, J. The legal rights deriving from the 1763 Proclamation are specifically guaranteed to Aboriginal peoples in s. 25 of the *Charter*, *supra* note 29, against all individuals: "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been

lands reserved for them and "not be molested or disturbed in the Possession" of such territory.<sup>59</sup>

In prerogative law, the imperial constitutional law of colonization, the sovereign's assertion of political authority creates an exclusive prerogative right to purchase the vested Aboriginal right. The Court has interpreted this as creating an imperial constitutional fiduciary duty toward the Aboriginal rights.<sup>60</sup> Imperial fiduciary responsibilities to protect and safeguard pre-existing law and rights of the Aboriginal peoples created the political lordship of the sovereign in British law. These responsibilities were clarified and strengthened by the sovereign's supplemental prerogative legal requirements, in particular the 1763 Proclamation established the exclusive right of prerogative purchase of Aboriginal lands through a public and consensual sale by the Aboriginal nations or tribes.<sup>61</sup> Hence, the time of the Crown's assertion of sovereignty and its prerogative laws establishes a negative limitation or prohibition of the activities of colonizers, immigrants, and governments.

In *Delgamuukw*, the Court conceptualized that the sovereign assertion of political authority protected the existing Aboriginal *sui generis* rights and

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recognized by the Royal Proclamation of October 7, 1763; and (b) any right or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claim settlements."

59 *Delgamuukw*, *supra* note 1 at para. 200.

60 *Delgamuukw*, *supra* note 1 at paras. 166-169, 174, 176, 178; *Sparrow*, *supra* note 6 at 1108, 1114; *Guerin*, *supra* note 8. See generally L. I. Rotman, *Parallel Paths: fiduciary doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996).

61 See, *Royal Proclamation of 1763*, *supra* note 58.

connection with the land by both the imperial constitutional law and later in the reception of the common law.<sup>62</sup> The Court established the guideline that if Aboriginal people were “present in some form” on the land when the sovereign asserted political jurisdiction, their pre-existing right to the land in Aboriginal law “crystallized” as a *sui generis* Aboriginal title in public international law and British law.<sup>63</sup> In *Roberts v. Canada*, the Dickson Court unanimously held that “aboriginal title pre-dated colonization by the British and survived British claims of sovereignty”<sup>64</sup>. Justice L’Heureux-Dubé in *Van der Peet*, dissenting on other grounds, said directly: “it is fair to say that prior to the first contact with the Europeans, the Native people of North America were independent nations, occupying and controlling their own territories, with a distinctive culture and their own practices, traditions and customs.”<sup>65</sup> Justice Macfarlane for the British Columbia Court of Appeal confirmed that the rights and privileges conferred by Aboriginal law and factual occupation were unaffected by the Crown’s acquisition of sovereignty.<sup>66</sup>

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62 *Delgamuukw*, *supra* note 1 at para. 145.

63 *Ibid.* See generally the continuity of this principle in international law, C. Wolff, *Law of Nations* [1750], (Oxford: Clarendon Press, 1934) at 144-145; E.C.S. Wade and G.G. Phillips, *Constitutional and Administrative Law*, 9th ed. by A.W. Bradley (London: Longman, 1977) at 7; and I. Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990) at 32-35.

64 *Roberts v. Canada*, [1989] 1 S.C.R. 322, at 340; *Guerin* *supra* note 8 at 378.

65 *Ibid.*, *Delgamuukw* at paras. 106; *Calder*, *supra* note 52 at 328, Hall J.; *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1053 [hereinafter *Sioui*], Lamer J. as he then was.

66 *Delgamuukw*, *supra* note 1 (Court of Appeal) at para. 46, citing Brennan J., *Mabo*, *supra* note 23 at 51. MacFarlane declared that Aboriginal peoples had an “unextinguished non-exclusive aboriginal rights which have received the protection of common law, and which now receive

In *Delgamuukw*, the Court's guidelines rejected the notion that the British sovereign's assertions of political jurisdiction implied an "ownership" of Aboriginal land or affects the Aboriginal connection or rights to the land itself.<sup>67</sup> In public international law, the British sovereign may assert political jurisdiction over Aboriginal lands in a foreign continent and create an abstract future or ultimate expectation interest. However, this asserted interest is not sufficient to extinguish the original tenure over the allodial lands held by Aboriginal nations or peoples. In British and colonial law, the sovereign's unilateral assertions of a paramount lordship or underlying or radical title protects and vests the pre-existing *sui generis* Aboriginal rights in land and the Aboriginal constitutional order. British courts have never acknowledged the Crown had prerogative power to abrogate or derogate property or other legal rights.<sup>68</sup>

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protection as existing aboriginal rights under s. 35(1) of the *Constitution Act, 1982*." He characterized these non-exclusive rights as "other than a right of ownership or property rights...[and] may be described as *sui generis* rights in land. [...] Their characteristics may vary depending upon the particular context in which the rights are said to exist, and having regard to specific fact situations," at para. 263. See also Justice Wallace: "an enforceable [Aboriginal] right, as against European settlers, came only with the protection which was extended to aboriginal rights by the adjusted common law," at paras. 381-84, 400.

<sup>67</sup> *Ibid.*, *Delgamuukw* at para. 145, *Mabo*, *supra* note 23 at 33-38.

<sup>68</sup> See Sir W. Blackstone, *Commentaries on the Law of England* 21<sup>st</sup> ed. (London: Sweet, Maxwell, Stevens & Norton 1844) vol. 1 at 141-145; *Halsbury's Law of England*, 3<sup>rd</sup> ed., vol. 12 (London: Butterworth & Co.) at para. 828. See also how these principles limit imperial act of state within a dominion, *Walker v. Baird*, [1892] A.C. 491 (P.C.); *Eshughbayi Eleko v. Officer Administering the Government of Nigeria*, [1931] A.C. 662 (H. L.); *Butte's Gas v. Hammer*, [1975] Q.B. 557 at 573 (C.A.).

In British law, the sovereign's future interest of paramount lordship does not vest any title to the sovereign in the protected Aboriginal lands,<sup>69</sup> since the paramount lordship only applies to common law estates. British courts have held the lordship does not apply to *allodial* tenure or title in the United Kingdom, since that land is "held" independent of the sovereign.<sup>70</sup> A *sui generis* Aboriginal title is an allodial tenure of Aboriginal nations and peoples distinct from the English or British common law.<sup>71</sup>

Both the assertion of political jurisdiction and prerogative treaties or laws protecting Aboriginal rights in the land. They operate to limit the common law in foreign jurisdictions and colonies.<sup>72</sup> The reception of the British common law in a colonial settlement also protects the pre-existing rights under Aboriginal land tenure or law, "even though those interests are of a kind unknown to

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69 The imperial sovereign cannot, on the strength of its fictitious original title, require a person who is in possession of land to prove his right by producing a royal grant, for in most cases no grant exists. It must prove its present title just like anyone else, McNeil, *Common Law Aboriginal Title*, *supra* note 7 at 84-85 Also see, the common law plea of "just terii" in G.C. Cheshire, *The Modern Law of Real Property*, 8<sup>th</sup> ed. (London: Butterworth, 1958) at p. 107-108.

70 *Lord Advocate v. Balfour*, [1907] S.C. 1360 (Scot. C.S.); *Smith v. Lerwick Harbor Trustees* (1903) 5 S.C. (5<sup>th</sup>) 680 (Scots. C.S.).

71 See generally, J.Y. Henderson, "Mikmaw Tenure in Atlantic Canada" (1995) 18 Dalhousie L.J. 196.

72 *Ibid.* British law was introduced into British colonies either by imperial legislation or by the silent operation of common law principle (as the so-called "birthright" of settlers) only insofar as it was applicable to "local conditions". The reception of these laws was limited by the vesting of Aboriginal rights at the time of the sovereign assertion of jurisdiction. See generally, J.A. Chitty, *A Treatise on the Law of the prerogatives of the crown and the relative duties and rights of the subject* (London: Joseph Butterworth, 1820) [hereinafter *Treatise*]; *Campbell v. Hall*, (1774) 1 Cowp. 204 at 208 affirmed in *Secretary of State*, *supra* note 58 at 128-129 per Lord Denning, M.R.



English law".<sup>73</sup> Typically, the reception of the British common law occurs later than the assertion of sovereign over a foreign territory. In the British common law of colonization, it is only after the sovereign classifies a colony as "settled" or permits a general assembly does a colony receive the protection of the common law.<sup>74</sup> The reception of the common laws is limited by "local conditions", including the protected Aboriginal order and its rights under imperial prerogative law.<sup>75</sup>

In *Van der Peet*, Justice McLachlin, dissenting on other grounds, argued the "golden thread" of British legal history was "the recognition by the common law of the ancestral laws and customs the Aboriginal peoples who occupied the land prior to European settlement."<sup>76</sup> No power of expropriation of any vested interest exists in British common law,<sup>77</sup> much less any authority to acquire foreign lands. In foreign territories, the prerogative law operates independently from the imperial Parliament and its imperial statutes that delegated authority to colonial governments. In *Delgamuukw*, the Court established the guideline that some common law courts recognition of Aboriginal right in the land affirms its legal force, but the decisions do not incorporate their common law test or

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73 *Mabo*, *supra* note 23 citing *Adeyinka Oyekan*, *supra* note 54, and *Amodu Tijani v Secretary, South Nigeria [1921] 2 AC 399*.

74 *Ibid.*, *Mabo* at 27-44.

75 *Blackstone*, *supra* note 68 at 106-107. See *Mabo*, *supra* note 23.

76 *Van der Peet*, *supra* note 15 at para. 263.

77 *Blackstone*, *supra* note 68 at 139.

reasoning into the nature or scope of the protected rights to the land.<sup>78</sup>

In the past, the settled colonies and colonial governments have attempted to avoid imperial laws by claiming that Aboriginal presence on the land does not mean the land is occupied. They alleged that Aboriginal peoples are the wrong kind of humans and that lands occupied by them were legally empty (*terra nullius*) and public international law creates an original “title” to the lands itself in the discovering sovereign.<sup>79</sup> The final courts of appeal in Australia, Canada and the International Court of Justice have comprehensively rejected this assertion as perpetuating historical injustice and racial discrimination.<sup>80</sup>

Legally vested Aboriginal rights to the land at the time of British sovereign assertion of political jurisdiction is presumed to continue in British and Canadian law.<sup>81</sup> This principle is similar to the effect of the blueprint of English common law, the *Magna Carta*. Under the *Magna Carta*, the barons’ lands,

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78 *Ibid.* at 136.

79 See, McNeil, *Common Law Aboriginal Title*, *supra* note 7 at 133-36.

80 This idea was rejected by the Court in *Côté*, *supra* note 10 at para. 53 as perpetuating an historical injustice suffered by Aboriginal peoples at the hands of colonizers. The High Court of Australia in *Mabo*, *supra* note 23, following *Western Sahara*, Advisory Opinion, [1975] I.C.J. Rep. 12, rejected and condemned this defense of *terra nullius* as an unjust fiction that discriminated on prejudicial and false assumptions. It was inconsistent with the British common law principles of possession, public international law and Human Right covenants, at 20-22; Deane and Gaudron called it part of a legacy of “unutterable shame” at the centre of Australia’s national mythology at 79. The High Court held in *Mabo* that legislative or private action that have a substantial impact on Aboriginal rights in land are subjected to legal and political objections based on substantive non compliance with the *Racial Discrimination Act 1975*, *supra* note 29, the correlative *International Convention on Elimination of All forms of Racial Discrimination*, *supra* note 29 and related compensation issues.

81 *Amodu Tijani*, *supra* note 73 at 401 (P.C.) (original native title must be presumed to have continued to exist unless the contrary is established); *Calder*, *supra* note 52 at 401-402 per Hall, J.

castles, liberties, or rights were vested and could not be taken by the king without the lawful judgment of his equals,<sup>82</sup> and other derivative possessions in the common law.<sup>83</sup> After the assertion of sovereignty, a *sui generis* Aboriginal legal order and its perspectives toward the land are protected by imperial constitutional law from ordinary statutory or common law intrusions. Equal protection of Aboriginal rights under the imperial constitutional law requires that vested Aboriginal rights could not be extinguished without the consent of the rightholders and fair compensation.<sup>84</sup> British law provides that any displacement of vested property right requires clear and plain imperial intent and act.<sup>85</sup> In *Delgamuukw*, the Court established the constitutional principles of s. 91(24) and s. 109 of the *Constitution Act, 1867*, that Aboriginal land not purchased by the sovereign is protected as reserve land for the Indians under the exclusive control of the federal government. This is a constitutional

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82 *Magna Carta*, 17 John (1215) c.29 (no freeman shall be disseised of his freehold but by the lawful judgement of his peer or by the law of the land) as interpreted by *Attorney-General v. De Keyser's Royal Hotel*, [1920] A.C. 508 (H.L.) at 569.

83 *Wik*, *supra* note 23, at 123-124, 126 per Toohey J, at 155 and 156 per Gaudron J., 168, 171, 185-86, 203 per Gummow J., 242-243, 247, 250-25 per Kirby J; *Mabo*, *supra* note 23 at 64 per Brennan and 194 per Toohey J.

84 *Campbell v. Hall*, (1774) 1 Cow. 204 at 208, affirmed by *R. v. Secretary of State*, *supra* note 58 at 91 (Eng. C.A.). Also see J. D. Chitty, *Treatise*, *supra* note 72 at 29 at 119,121,125, 132.; Sir Matthew Hale, *Prerogatives of the King*, ed. D.E.C. Yale (London: Selden Society, 1976) at 201, 227,240.

85 See *Burma Oil Co. v. Lord Advocate*, [1965] A.C. 75 at 102 (H.L.). The Court stated: "even at the zenith of the royal prerogative, no one thought that there was any general rule that the prerogative could be exercised, even in times of war or imminent danger, by taking property required for defense without making any payment for it." *Sparrow*, *supra* note 6 at 1099; *Delgamuukw*, *supra* note 1 at para. 180; (Court of Appeal) at 470, 523 per Macfarlane JA at 480 per Taggart JA, 595 per Wallace JA, 753 per Hutcheon JA, 633, 670 per Lambert, JA..

responsibility of the imperial sovereign as paramount lordship to the Aboriginal nations and tribes.<sup>86</sup> The federal Crown, as agent for the imperial sovereign, is required to show fidelity to the constitutional delegation and the Indians. This constitutional fidelity is particularly valid for the colony of British Columbia, which had not achieved responsible government,<sup>87</sup> when it was admitted to Canada in 1871 by an imperial order in council, the British Columbia Terms of Union.<sup>88</sup> Term 13 of the Union created an express constitutional trust in the federal government of all lands to be reserved for the use and benefit of the Indians in British Columbia, including Aboriginal rights to the land under the protection of the British sovereign assertion of jurisdiction in the Treaty of 1846. It stated the federal government shall assume “the charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit”. By accepting the trust responsibility, the federal government limited its legislative power by agreeing not to apply law or policy stricter than the pre-existing liberal policies. After the union, the federal government could request additional tracts of land in the province be placed in trust for the use and benefit of the Indians. Any disagreement on the quantity of such tracts of land was to be resolved by the imperial Secretary of State for the Colonies.

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86 s. 91(24) and s. 109 Constitution Act, 1867

87 P.W. Hogg, *Constitutional Law of Canada*, 3<sup>rd</sup> ed. (Toronto: Carswell, 1992) at 40.

88 1871 (U.K.), R.S.C. 1985, Appendix II, No. 10.

The British sovereign assertion of lordship over Aboriginal lands ended in 1982 with the devolution of power to Aboriginal peoples in Canada by s. 35(1) of the *Constitution Act, 1982*. Section 35(1) and 52(1) reinvigorated the *sui generis* tenure and rights to the Aboriginal people of Canada, including their constitutional right to the land and land protected by the fiduciary or trust obligations in prerogative or constitutional documents or in land ceded by treaties but never purchased. Thus, the explicit wording of s. 35(1) transformed the legacy of imperial protection and the sovereign's underlying title into a constitutional fiduciary duty controlling both federal and provincial power<sup>89</sup> and private rights under the Charter.<sup>90</sup>

#### **B. ABORIGINAL CONNECTION WITH THE LAND**

The requirement that the Aboriginal people prove a connection or relationship with the land rests uncomfortably given the Court's affirmation of constitutional and legal protection of rights to the land at the time of British sovereign assertion of political jurisdiction over Aboriginal territory. It masks the failure of the rule of law to protect Aboriginal lands from the unlawful acts of the colonialists and their pretensions.

The Court's guidelines requiring that Aboriginal people show a connection with the land implies that something has gone wrong with British rule of law.

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89 *Sparrow*, *supra* note 6 at 1109.

90 *Charter*, *supra* note 29.

Any assertion of political jurisdiction of the sovereign over a foreign territory is followed by British law taking positive actions to protect Aboriginal law and lands. No Aboriginal lands should have been dispossessed and they would not need to show a connection after the assertion of sovereignty. However, showing a connection with the land illustrates that somehow other people have taken or limited the use of Aboriginal territory protected and vested in British imperial constitutional law, British and Canadian common law, and federal statutory law. British law asserts that in civil, criminal or regulatory actions, the burden of proving a connection on the Aboriginal claimants ought to rest with the imperial Crown or its designated agents.<sup>91</sup> In order to understand this enigmatic requirement of Aboriginal connection to the land to prove rights to the land, the failure of the existing constitutional and legal regime must be critically interrogated at the same time.

The sovereign assertion of political jurisdiction over a foreign territory inhabited by Aboriginal nations and peoples should have the onus of submitting prior knowledge about Aboriginal law and presence in the land. If the sovereign has little or no knowledge of Aboriginal law or presence, it cannot rely on information obtained after its assertion to the Aboriginal peoples' detriment.<sup>92</sup>

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91 See Kent McNeil, "The Onus of Proof on Aboriginal Title" *supra* note 42 at 3-24.

92 In public international law, part of this context is called the rule of intertemporal law which creates a presumption against reading any treaty text according to standards developed after the treaty. See *Case Concerning Right of Passage over Indian Territory (Merits)*, (*Portugal v. India*), [1960] I.C.J. Rep. 6. The Supreme Court of Canada has required the terms of prerogative

The rules of international treaty interpretation create a presumption against reading any treaty text according to standards developed after the treaty.

Given the operation of British law which protects and vests Aboriginal right to the land when the sovereign asserted jurisdiction, in a declaratory action the Court held Aboriginal people are not required to prove their connection to the land as distinctive or an integral part of their society. Instead, they have to show some lesser connection with the land in question, which has not been clarified by the Court. Aboriginal claimants must prove a connection with the land before or at the time or from that time when the sovereign asserts political authority over the land.<sup>93</sup> However, the Court held they are not required to prove “conclusive evidence” of connection with the land,<sup>94</sup> or to show

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treaties to be construed in light of the law and facts existing when the treaty was signed; *Sioui*, *supra* note 65 at 1043-45; *Simon v. R.*, [1985] 2 S.C.R. 387 at 401 and 410 [hereinafter *Simon*], and *Nowegijick v. R.*, [1983] 1 S.C.R. 29 [hereinafter *Nowegijick*].

93 In *Delgamuukw*, *supra* note 1, Chief Justice Lamer’s use of different language confuses the issue of when occupation must be proved. Presumably, the time is when the Crown asserts political sovereignty, yet some doubt is built into his different conceptualizations. In his introduction of *Delgamuukw*, *supra* note 1 he states that “the land must have been occupied *prior to* sovereignty” at para. 143 (emphasis added) which infers at some time during its immemorial use; but he also points to a certain Aboriginal claimants must be connected with the land, in para. 144 he asserts “[i]n order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question *at the time at which* the Crown asserted sovereignty over the land subject to the title” (emphasis added) and in para.145 “I conclude that aboriginals must establish occupation of the land *from the date* of the assertion of sovereignty in order to sustain a claim for aboriginal title” at para. 153.

94 *Ibid.* at para. 198.

immemorial occupation and possession of the land<sup>95</sup> or prove the ultimate origins of their connections or show unbroken physical presence of the land.<sup>96</sup>

*1. Connections through Aboriginal perspectives on the land.*

Aboriginal perspectives can prove Aboriginal connections with the land.<sup>97</sup> Aboriginal perspectives of the land are derived from Aboriginal knowledge and heritage. These perspectives contextually show the nature of an Aboriginal people's attachment to the land, their uses, their practices, customs, and legal traditions. They show how an Aboriginal people resolved certain recurring problems with the land, other peoples, and how they gained their own livelihood by deliberate collective action. They are an appeal to Aboriginal judgments, tacit and explicit, and reflective assent about how to live with the land and other people that defines their picture of humanity-who they are and who they ought to be-and their experiences.

Aboriginal knowledge refers to the integrated body of knowledge developed through relationships with an ecosystem that covers all aspects of life. It is dynamic and cumulative, representing generations of experiences, careful empirical observation, and various experiments. It is stored in heritage

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95 *Ibid.* Justice La Forest shared Chief Justice Lamer's rejection of immemorial use but was reluctant to define more precisely the "right [of Aboriginal peoples] to live on their lands as their forefathers had lived"; see *Calder supra* note 52 at 328.

96 *Ibid.* at para. 153.

97 Aboriginal perspectives have always been inherent in the common law precedent that held only Aboriginal people who exhibited sufficient characteristics of an "organized society" were capable of holding and exercising Aboriginal rights, see *Calder supra* note 52 at 302 per Judson J.



by Aboriginal language, memories and ceremonies; learned and expressed in the oral and symbolic traditions of the peoples. Shared and transmitted orally and ceremonially, the collective wisdom of the people informs the law. These multi-layered relationships, which Tewa Pueblo educator Gregory Cajete describes as the “strands of connectedness”<sup>98</sup> are the basis for maintaining legal, social, economic, and diplomatic relationships -through sharing-with other peoples.

Aboriginal heritage is so intimately based on Aboriginal knowledge that often the terms are interchangeable. Many national and international definitions of Aboriginal or Indigenous knowledge or heritage stress the principle of its totality or holism and diverse modes. The *Report of the Royal Commission on Aboriginal Peoples* views Aboriginal knowledge:

as a cumulative body of knowledge and beliefs, handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and their environment.<sup>99</sup>

The UN Special Rapporteur, Dr.-Mrs. Daes, with the assistance of many Indigenous organizations and peoples, has presented the best operational definition of Indigenous knowledge and heritage. In her report on the protection

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98 G. Cajete, *Science: A Native American perspective* (doctoral dissertation, 1986) [unpublished] at 17.

99 Canada, *Final Report of the Royal Commission on Aboriginal Peoples*, vol. 4 (Ottawa: Minister of Supply and Services, 1995) at 454 [hereinafter RCAP]. See also, Inuit Circumpolar Conference, *A Report of Findings: The Participation of Indigenous Peoples and the Application of their Environmental and Ecological Knowledge in the Arctic Environmental Protection Strategy*, vol. 1 (Ottawa: Indian and North Affairs, Canada, 1993) at 27-37.

of the heritage of Indigenous people, she pointed out that Indigenous knowledge and heritage comprise “a complete knowledge system with its own concepts of epistemology, philosophy, and scientific and logical validity”<sup>100</sup> The Rapporteur further concluded that diverse elements of any Indigenous knowledge system “can only be fully learned or understood by means of the pedagogy traditionally employed by these peoples themselves, including apprenticeship, ceremonies and practices.”<sup>101</sup> Moreover, the Rapporteur stressed the role of land or ecology as the Indigenous knowledge system’s “central and indispensable classroom” in which the heritage of each Indigenous peoples has traditionally been taught.<sup>102</sup> She codified these insights in the *Principles And Guidelines For The Protection Of The Heritage Of Indigenous Peoples* (1995) that merged the concepts of Indigenous knowledge and heritage into a definition of heritage.<sup>103</sup>

Similar to other cultural visions about law, an Aboriginal perspective or tradition contains a vision about the nature, role, and organization of law; and how world view, heritage, knowledge, languages, values are and should be

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100 Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, United Nations Economic and Social Council, *Preliminary Report of the Special Rapporteur, Protection of the Heritage of Indigenous People*, UN ESC, UN Doc. E/CN.4/Sub.2/1994/31 (1994) at para. 8.

101 *Ibid.*

102 *Ibid.* at para. 9.

103 *United Nations Guidelines for the Protection of the Heritage of Indigenous Peoples*, G.A.Res.95-12808 (E), UN GAOR, 40th Sess., UN Doc. E/CN.4/Sub. 2/1995/3, (1995) at paras. 12-13 at 6.

found, taught, applied, and perfected.<sup>104</sup> As Professor Robert Cover wrote in “*Nomos and Narrative*”:

A legal tradition ... includes not only a corpus juris, but also a language and a mythos-narratives in which the corpus juris is located by those whose wills act upon it. These myths establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves—a lexicon of normative action—that may be combined into meaningful patterns culled from meaningful patterns of the past.<sup>105</sup>

From an Aboriginal perspective, cultural values inhere to Aboriginal legal order; in some cultures these traditions and ceremonies are indistinguishable from a legal system. Legal systems are comprehensible only through their customs and rules; consequently, to understand them a judge has to know the sources and language of a legal tradition, as well as the tradition’s relationship to its vision or purposes.<sup>106</sup> A comprehensive vision of a legal system is concerned with the traditions that create its internal logic and interrelated

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104 J.H. Merryman, *The civil law tradition: an introduction to the legal system of Western Europe and Latin America* (Stanford, Calif.: Stanford University Press, 1985) at 969; Harold Berman, *Law and revolution: the formation of the Western legal tradition* (Cambridge, Mass.: Harvard University Press, 1983); J.C. Smith and D.N. Wiesstub, *The Western idea of law* (Scarborough, Ont.: Butterworths, 1983); M.A. Glendon, M.W. Gordon, C. Osakwe, *Comparative legal traditions: text, materials, and cases on the civil law, common law, and socialist law traditions with special reference to French, West German, English, and Soviet law* (St. Paul, Minn.: West Pub. Co., 1985). Most Eurocentric writing takes an anthropological context and approach to studying Aboriginal (“primitive” or traditional) law. E.A. Hoebel and K.N. Llewellyn, *The Cheyenne way, conflict and case law in primitive jurisprudence* (Norman, University of Oklahoma Press, 1941); J.H. Barton, J.L. Gibbs, V.H. Li, J.H. Merryman, *Law in radically different cultures* (St. Paul, Minn.: West Pub. Co., 1983).

105 R. M. Cover, “*Nomos and Narrative*” (1983) 97 Harv. L. Rev. 4 at 9.

106 J.H. Merryman, “Letter to Editor” (1987) 35 Am. J. Comp. L. 438-441.

concepts surrounding the rules-such as legal extension and penetration that define the boundaries of the system with the structures, actors, and processes that describe how it functions.<sup>107</sup>

These Aboriginal perspectives and their visions of law, order, and diplomacy create an international order in America before the assertion of British sovereignty. Aboriginal law incorporates customary standards, rules, canons of behavior, and understandings of the world. Non-Aboriginal scholars have examined the Aboriginal worldview and its legal order in terms of an ideational order of reality,<sup>108</sup> or cognitive orientation, or ethno-metaphysic, and primitive law.<sup>109</sup>

Similar to the British sovereign's paramount lordship over common law estates, Aboriginal connections to a territory are a matter of Aboriginal perspectives and law. An Aboriginal right to the land can arise as an operation of Aboriginal law as well as the functional element of any occupation.<sup>110</sup> The

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107 J.H. Merryman and D. Clark, *Comparative Law: Western European and Latin American legal systems cases and materials* (Indianapolis: Bobbs-Merrill, 1978).

108 W.H. Goodenough, *Cooperation in Change; an anthropological approach to community development* (New York: Russell Sage Foundation, 1963) at 7.

109 A. I. Hallowell, *Culture and Experience* (New York: Schocken Books, 1955) and "Ojibwa Ontology, Behavior and World View" in *Primitive Views of the World* ed. S. Diamond (New York: Columbia University Press, 1960), reissued in S. Diamond, *Culture in history: Essays in Honour of Paul Radin* (New York: Columbia Univ. Press, 1969) at 49-82.

110 *Delgamuukw*, *supra* note 1 at para. 146. The appellant Gitksan nation argued that Aboriginal title may be established, at least in part, by reference to Aboriginal law; the respondent British Columbia asserted that in order to establish Aboriginal title, the occupation must be the physical occupation of the land in question.

Court explicitly emphasized the Aboriginal perspective includes, but is not limited to, their systems of law:<sup>111</sup>

the aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples [...]. As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.<sup>112</sup>

The High Court of Australia in *Mabo* held the nature and content of Aboriginal rights to their land are determined by the nature of the traditional law and customs of the indigenous inhabitants, and can be "equivalent to full ownership".<sup>113</sup> In *Mabo*, Justice Brennan asserted that "Native title has its origin in and is given its content by the traditional laws acknowledged by and the

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111 *Ibid.* at para. 147 ("the source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy.")

112 *Ibid.* at para. 148. The reliance on Aboriginal perspective is consistent with s. 27 of the *Charter*, *supra* note 29, which provides: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." In *Van der Peet*, *supra* note 15, the Court held that the Aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of Aboriginal peoples, at para. 41. Justice La Forest may have had doubts about this test, *Delgamuukw*, *supra* note 1 at para. 191.

113 *Mabo supra* note 23, Brennan J. (with whom Mason, C.J. and McHugh, J agreed) CLR at 57, 58, and 70 described Aboriginal law as "traditional law and customs", Deane and Gaudron JJ. referred to them as the "local native system" at CLR at 87-88, 109-110 70-71, and Toohey J. described them as "traditional title" as distinguished from common law recognition of Aboriginal laws at 178, 188-192 or "possessory title" at 210-211. The federal legislation, *Native Title Act, 1993* (Cth) referred to Aboriginal laws as traditional law and customs at s. 223(1). Other Australian

traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of Native title must be ascertained as a matter of fact by reference to those laws and customs."<sup>114</sup> Under this test, Aboriginal perspective and law create many versions of land tenure, occupation and use, and their uses are not dependent upon foreign state law, proclamation, or sovereign recognition.

In the past, one of the most difficult judicial tasks was ascertaining Aboriginal perspectives or “traditional evidence”. Although Aboriginal perspectives may share many tendencies with the classic European theory of human nature, Aboriginal perspectives are distinct representations and theories of human nature. Aboriginal peoples do not view their humanity as separated from their ecology; thus, they do not have to face the terror of separation by constructing artificial organizations or human “culture”, which are the antitheses of nature. In the Aboriginal perspective or way of looking at the land, the ecology is the diverse and fluctuating universal standard of life; communal and human behaviors are the particular manifestations of their responses to the ecology.<sup>115</sup> Aboriginal perspectives on the land constitute a vision of the proper way of striving to live harmoniously within an environment, which are both a

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justices had labeled Aboriginal law as a “system of rules”, *Mason v. Tritton* (1994) 34 N.S.W.L.R. 572 at 598.

114 *Mabo, ibid.*

reality and an ideal. Aboriginal perspectives are both practical and empirical relationships that inform the connection with the land. Through experience Aboriginal peoples have constantly refined, transformed, and vindicated relationships with the land to solve recurring problems. Aboriginal perspectives continued to affirm the diversity of Aboriginal thought and the creativity of Aboriginal humanity in a fluctuating ecology. Aboriginal peoples' attempt to reconcile their experiences of being within an ecology created a complimentary order that revealed their humanity and shared kinship, sympathies, and altruism.

With the assertion of the imperial Crown and colonial laws, the existing Aboriginal perspectives of the land may change. This implies the continuing jurisdictional regime inherent in Aboriginal perspectives. Most of these perspectives are not static or frozen in time, as they adjust changing ecological circumstances and human activities. The Court<sup>116</sup> and the High Court of Australia in *Mabo*<sup>117</sup> recognized that changing Aboriginal perspectives of the land maintain a connection with the land, thus do not affect their underlying right to the land or the dynamic manifestations of these rights. These decisions imply not only the recognition of Aboriginal law but also validity of Aboriginal

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115 See, L. Little Bear analysis in Canada, *Royal Commission on Aboriginal Peoples, "Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment"* [hereinafter RCAP Treaty Making] (Ottawa: Canada Communications Group, 1995) at 10-11.

116 *Delgamuukw*, *supra* note 1 at paras. 123, 132, 159. *R v. Sparrow*, *supra* note 6 at 1094-9.

jurisdiction over the land that is necessary to change the law to adjust to changes.

Both Aboriginal orders and treaty orders are intimately related to Aboriginal perspectives, worldviews, and languages. These orders are expressed in the structure of their languages, often unwritten, and symbolic literacies. Aboriginal peoples are experts with respect to their own languages, perspectives, and laws that connect them to the land. If an Aboriginal connection with the land is required to be recognized in its own perceptions, then it would be expected that much of the best evidence will come from Aboriginal peoples hearts and minds as contained in their language.<sup>118</sup>

In most Aboriginal languages, the Aboriginal perspectives the land taught the Aboriginal people the language and knowledge of the land, and their language is the sounds of the land.<sup>119</sup> For example the sound or syllable for “our place in the land”, and “our language” and “our body” are the same.<sup>120</sup> Aboriginal languages should be considered as the *lex animata* or *lex loquens*, a living and speaking law.

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117 *Mabo*, *supra* note 23 at 61 and 70 per Brennan J, at 110 per Deane and Gaudron JJ., at 192 per Toohey, J.

118 See, *Ejai v. Commonwealth* (18 March 1994), S.C. of Western AST. No. 1744 of 1993, Owen J. [unreported].

119 See Marie Battiste, “Nikanikinu’tmaq̓n” in J.Y. Henderson, *The Mikmaw Concordat* *supra* note 55.

120 See Jeannett Armstrong, “Sharing Ones Skin: Okanagan Community” in J. Mander and E. Goldsmith, eds. *The Case against the global economy and for a turn toward the local* (San Francisco: Sierra Club 1996); See *RCAP Treaty Making*, *supra* note 115 at 33-34.



Aboriginal languages provide the court with a record of the distinct relationships and recurring problems they have struggled with in creating their lives. Languages are the architectural source of intelligible order, law, and freedom for those who inhabit them. Only in the context of Aboriginal language and ideas can Aboriginal law or “history” be studied. The sounds, style of communication, and discourse encode Aboriginal values and rules and frame understanding.

Aboriginal peoples asserting a connection to land through their knowledge and conceptualization on the land, which are manifested in their laws.<sup>121</sup> They need to show evidence of a cognitive or spiritual tradition that connects them to the land from which their land tenure system is derived. Such demonstrations illustrate land tenure systems that already exist in the languages and perspectives. The idea of describing an Aboriginal connection to the land “in itself”, independent of their Aboriginal perspective, is meaningless for that idea presupposes the possibility of escaping from Aboriginal thought by imposing British or intersocietal perspectives. Most Aboriginal perspectives are holistic constructs that define everything by its relations with everything else; thus, no clear distinction exists between their connections with the land and their perceptions of the land.

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121 *Delgamuukw*, *supra* note 1 at para. 157. For a deep understanding of Aboriginal law see J. Borrows, “With or Without You: First Nations Law (in Canada)” (1996) 41 McGill L.J. 629-665.

The Court recognized this interrelatedness and held if an Aboriginal nation or society had a legal regime, tradition, or laws in relation to land, those laws would be relevant to establishing the connection of lands which are the subject of a claim for Aboriginal title. These relevant laws might include, but are not limited to, a land tenure system or laws governing land use.<sup>122</sup> In this context, the constitutional right to the land is best viewed as an Aboriginal tenure and jurisdiction, rather than a paper title or a recording system.<sup>123</sup>

In determining the Aboriginal perspectives toward the land, a comparative law and transcultural analysis is appropriate, since “one culture cannot be judged by the norms of another and each must be seen in its own terms”.<sup>124</sup> The Dickson Court stated that in analyzing Aboriginal rights in s. 35(1) “It is [...] crucial to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake”.<sup>125</sup>

Once such evidence is presented to the courts, Canadian judges must overcome judicial bias toward *sui generis* land tenures to properly analyze or assess the description of Aboriginal tenures, particularly when they are based on

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122 *Ibid.* at para. 148.

123 Toohey J. in *Mabo*, *supra* notes 23 and 42 at 178-79.

124 Chief Judge E.T. Durie of the Maori Land Court of New Zealand and Chairman of the Waitangi Tribunal, address, “Justice” Biculturalism and the Politics of Law” address to University of Waikato, 2 April 1993, quoted by Judge A.G. McHugh in “The New Zealand Experience in Determination of Native or Customary Title” Effect of Title Grants and Need for a New Title System” address to Supreme Court and Federal Court Judges of Australia at their 1995 Conference at Adelaide.

125 *Sparrow*, *supra* note 6 at 1112.

cognitive and spiritual perspectives deriving from the land or sites on the land<sup>126</sup> or when they are facing conflicts of interpretation by non-Aboriginal and Aboriginal experts.<sup>127</sup> Chief Judge E.T. Durie of the Maori Land Court of New Zealand and Chairman of the Waitangi Tribunal has stated from his experience on the Land Court, the greater problem was not the uncertainty of the customary Aboriginal land tenure, but rather the ability of the monocultural British adjudicators to understand or interpret the Maori anecdotal and impressionistic evidence.<sup>128</sup> Justice Holland of the New Zealand High Court stated: "There may be a danger in interpreting what a European would describe as his or her ancestral land. What is required to be determined is the relationship of the Maori people and their cultures and traditions with their ancestral land."<sup>129</sup> Such *sui generis* analyses establish the proof of an Aboriginal legal connection; it is not necessary to translate Aboriginal tenure or regime into common law categories of land tenure. Aboriginal perspectives or laws about land tenure do not have to be the equivalent or analogous to the common law or civil law traditions.

Courts must recognize and affirm these *sui generis* constitutional rights;

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126 See, Australian Land Tribunal, Aboriginal Land Claims to Cape Melville National Park Flinders Group National Park, Clack Island National Park and Nearby Islands (Land Tribunal, Brisbane 1994) paras. 359-360.

127 See, K. Maddock, "Warlpiri Land Tenure: A Test Case in Legal Anthropology" (1981) 52(2) Oceania 99-100.

128 Paper to 25th I.B.A. Biennial Conference" Melbourne, 13 October 1994.

129 *Royal Forest and Bird Protection Society v. WA Habgood* (1987) 12 N.Z.T.P.A. 76 at 80.

they cannot pretend that Aboriginal society had no law or they had law but no ideas of jurisdiction over the allocated rights. Judges must recognize that when the British sovereign asserted authority over Aboriginal lands, British imperial constitutional law and common law recognized and protected Aboriginal perspectives, law, and jurisdictional practices as part of the rule of law. Later when the common law was received in the British settlements these perspectives were also affirmed. Since Aboriginal perspectives are a valid source of Aboriginal rights to the land itself, they also are the source of jurisdiction over all activities on the land. Any regulation of different use of the land is jurisdictional activity.

These *sui generis* Aboriginal perspectives are integral to the operation of constitutional supremacy and the Canadian rule of law. Aboriginal perspective can be respected as foreign law incorporated into imperial constitutional law and Canadian constitutional law, which may be established by judicial notice or by “very slender” evidence.<sup>130</sup> They can be presented by oral testimony, expert witness on Aboriginal perspectives and law, or evidenced to a court. They are compatible with the common law traditions where customs and practices create the rules as well as with the legal positivist convention that rules govern

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130 *Halsbury's Law of England*, *supra* note 68 at 427 and 428.

practices.<sup>131</sup> With such evidence of foreign law or *sui generis* land tenures, there is no need to show factual or exclusive occupation of all the land.

### *2. Connection by Factual Occupation*

A connection with the land at the time of the British sovereign assertions can be proved also by factual or physical occupation. If the *sui generis* Aboriginal perspective does not create the legal connection (which could be a rare situation), the operation of British law also protects the factual or physical occupation or possession under the sovereign's protection. Factual occupation or possession is an independent test from both Aboriginal perspectives and present physical occupation.

In this factual context, Aboriginal peoples may claim connection by being on the land without any perspective why they are there.<sup>132</sup> The core of this idea is the Aboriginal people as the Eurocentric concept of savage in a state of nature.<sup>133</sup> This degrading and existential factual connection is more common among immigrants than Aboriginal people.

To assert factual connection, the Court did not require a genealogy of the group or group membership dating back to the British sovereign's assertion. Factual occupation may be established in court by a variety of ways, ranging

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131 F. Shauer, "Rules and the Rule of Law" (1991) 14 Harvard J. of Law and Public Policy at 645-694.

132 *Delgamuukw*, *supra* note 1 at para. 149.

from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources.<sup>134</sup> In considering whether occupation is judicially sufficient to ground title is established: "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed".<sup>135</sup> Justice La Forest stated the central significance of land to Aboriginal peoples can be showed by uses of the land to pursue their traditional ways of life as well as their use of adjacent lands and even remote territories.<sup>136</sup> His adjacent or remote uses suggest the validation of Aboriginal nations' use of consensual agreements and law, i.e. Aboriginal perspective not factual presence.

In the colonial era, common law judges set the evidentiary standards for factual possession under the common law as unnecessarily high and privileged the British sovereign lordship over Aboriginal land and colonial legislative powers.<sup>137</sup> British common law presumes that every person who is in possession of the land has a valid common law title,<sup>138</sup> but inconsistently apply

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133 See, Thomas Hobbes, *Leviathan: or the Matter, Forme, and Power of a Commonwealth Ecclesiastical and Civil*, ed. C.B. Macpherson (Baltimore: Penguin Books, 1968) ch. 13 at 186.

134 *Ibid.* at para. 149 relying on K. McNeil, *Common Law Aboriginal Title*, *supra* note 7 at pp. 201-202.

135 *Ibid.* at 149 relying on B. Slattery, "Understanding Aboriginal Rights", *supra* note 7 at 758. This is the reflection of the idea of the Indian as a savage in a state of nature

136 *Ibid.* at para. 199. Chief Justice Lamer partially used this concept with reference to use of land as a hunting ground, at para. 128.

137 See, G. McIntyre, "Proving Native Title" in *Native Title Legislation* *supra* note 70 at 156.

138 See generally, McNeil *Common Law Aboriginal Title*, *supra* note 7.

this standard to Aboriginal possession.<sup>139</sup> In *Delgamuukw*, the Court applied this legal maxim to any land occupied by Aboriginal people as a constitutional principle. It stated even if factual possession was unrecognized by any sovereign act, that it was recognized and protected by British law:<sup>140</sup> “the fact of physical occupation is proof of possession at law, which in turn will ground title to the land.”<sup>141</sup> Once Aboriginal claimants show factual presence at the time the British sovereign asserted political jurisdiction, the constitutional existence of the rights in the land vest in the Aboriginal nation or peoples.

### *3. Sui Generis Exclusive connection*

At the assertion of sovereignty, the Court suggests that Aboriginal connection must also be proved exclusive.<sup>142</sup> The Court had trouble with the British legal definition of exclusive, and created a *sui generis* concept of “exclusive” which exist at the time the sovereign asserted political jurisdiction

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139 *Ibid.* at para. 73, 149. *Common Law Aboriginal Title*, *supra* note 7, Justice La Forest’s concurring opinion in *Delgamuukw*, *supra* note 1, paras. 189, 190, 194, would have the court focus on the occupation and use of the land as part of the Aboriginal society’s traditional way of life, looking at the way “the society used the land to live, namely to establish villages, to work, to get to work, to hunt, to travel to hunting grounds, to fish, to get to fishing pools, to conduct religious rites, etc.” at 194.

140 *Delgamuukw*, *supra* note 1 at para. 145.

141 *Ibid.* at para. 149. Also see paras. 147-148. This approach to the proof of occupancy at common law is also mandated in the context of s. 35(1) by *Van der Peet*, *supra* note 15.

142 *Ibid.* at para. 155. Justice La Forest confuses specificity with exclusive occupation and use of the land. He argues “exclusivity means that an Aboriginal people must show that a claimed territory is indeed its ancestral territory and not the territory of an unconnected Aboriginal society”, at para. 196. This brings genealogy and cognitive awareness into the concept of exclusivity which factual possession ignores.

over the territory.<sup>143</sup> The *sui generis* concept of exclusive connection includes joint title and shared exclusivity.<sup>144</sup> It also means the ability or potential to exclude others, both non-Aboriginal and members of other Aboriginal nations, from certain lands by consensual agreements, law or in rare situation by force.<sup>145</sup> The Court noted that exclusive occupation does not mean that other Aboriginal peoples could not be present, or could not claim use or occupation of the claimed lands. Under those circumstances, “the intention and capacity to retain exclusive control” would demonstrate exclusivity.<sup>146</sup> Thus, proving a *sui generis* exclusive connection with a territory or land is not the utopian standard of exclusive used in United States Land Claim Commissions or the common law.<sup>147</sup>

In Aboriginal title jurisprudence in Canada the “exclusive” standard is imported from the foreign legislative standard of the United States *Indian Land Claim Commission Act* that established the parameter of litigation against the United States in United States courts.<sup>148</sup> This foreign standard was

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143 *Ibid.* at para. 155.

144 *Ibid.* para. 158.

145 *Ibid.* at para. 185.

146 McNeil, *Common Law Aboriginal Title*, *supra* note 7, at p. 204.

147 This idea is derived in English thought from either Adam’s plight in the Garden of Eden or Daniel Defoe’s fictional tale of *The Life and Strange Surprising Adventures of Robinson Crusoe, of York, Mariner (Robinson Crusoe)* [1719] (London: G. Routledge, 1880)

148 The United States Congress enacted the *Indian Land Claim Commission Act*, Act of Aug. 13 1946 ch. 959, 60 Statu. 1949, codified as amended at 25 U.S.C. s. 70-70v-3, which created exclusive use as part of statutory claims involving treaties of cession, s. 2 (4)). In the absence of a treaties, or where treaties were contested, the Act forced the claimants to develop aboriginal tenure concepts



unreflectively incorporated in Canadian common law decisions,<sup>149</sup> but the Court's stress on a *sui generis* exclusive connection at the time of the sovereign's assertion has resolved many of the traditional common law problems.<sup>150</sup>

In the proof of an Aboriginal right to the land, the Court justified their need for an "exclusive" connection on a questionable, negative grounds of the need of a singular tenure holder. The Court said that without proof the exclusive connection by law and fact, any judicial result would be absurd because it would be possible for more than one Aboriginal nation to have Aboriginal title over the same piece of land, and therefore for all of them to attempt to assert the right to exclusive in the land. Yet, in its discussion of *sui generis* rights, the court affirmed the possibility for joint use and holding the land in association with other Aboriginal peoples. In most situations the proof of an exclusive connection with an ecology or environment will circle back and be

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and logical facts according to Anglo-American property traditions and law that emphasizes definitive boundaries and nearly exclusive right to resources within those bounds. It also made proof of exclusive use and occupancy dependent upon factual interpretation of historical and anthropological evidence that were admissible in court. The requirement of exclusiveness made it necessary to define a single claimant group and to argue the facts of Aboriginal subsistence. Under these statutory terms, many areas could not be shown to have been exclusively occupied by any one of the claimants, since they were often utilized by a given band or tribe in certain seasons or even periodically. A Commission determination of joint use legally meant that nobody would be compensated.

149 Without any reflection on its source, this standard was viewed as a common law test in *Baker Lake*, *supra* note 46 and in the British Columbia Court of Appeal in *Delgamuukw*, *supra* note 1.

150 *Delgamuukw*, *supra* note 1 at para. 156. See, McNeil, *Common Law Aboriginal Title*, *supra* note 7 at p. 204.

interrelated to the Aboriginal perspectives of the connection and its values placed on shared or joint use.

The feared absurdity is neither grounds in Aboriginal perspectives, nor in the multiple layers of derivative land rights, interests, uses, and adverse possession of the common law regime under the lordship of the sovereign,<sup>151</sup> or even in the sovereign assertion of jurisdiction over territory held under many Aboriginal land tenure systems. These legal regimes acknowledge many vested rights in the land within a shared political jurisdiction. In competing systems of law and jurisdictions, perhaps the real absurdity is the idea of an exclusive single owner of an entire island or a foreign continent.<sup>152</sup>

Under Aboriginal perspectives of shared jurisdiction over the land and travel to natural resources of the land, exclusive connection was not a problem. Few examples of being alone on the land exist in Aboriginal thought in Canada nor do strict limits to mobility or trading. Jurisdictional boundaries and sharing of resource were common among the Aboriginal nations, but exclusivity is not a significant element of Aboriginal perspectives or law. The national or community decision-making authority recognized by Aboriginal law and its

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151 See generally, M.L. Benson & M. Bowden, *Understanding Property: A Guide to Canada's Property Law* (Toronto: Carswell, 1997), especially "What is a Property Interest?" at 1-15.

152 Similar singularity arguments were rejected in the medieval jurisdictional struggles between Holy See as Lord of the Earth with temporal and territorial kings, J.N. Figgis, *The Divine Right of Kings* 2nd ed. (Cambridge: Cambridge University Press, 1922) at 55-70.

traditions<sup>153</sup> prior to the British sovereign assertion of lordship creates consensual relationship among Aboriginal responsibilities, uses, and occupations, which determine “rights” among all inhabitants.<sup>154</sup>

A consideration of the Aboriginal perspective on “exclusive” usually derives from interrelated Aboriginal knowledge, heritage and laws. These perspectives may show and validate shared or joint use by other Aboriginal peoples or by “association with others”.<sup>155</sup> These legal traditions do not undermine their control of the territory, but create a union between Aboriginal perspective and factual occupation.<sup>156</sup> The Court noted the presence of other Aboriginal peoples within the territory by permission might reinforce the

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153 *Ibid.* at para. 115.

154 *Ibid.*

155 The High Court of Australia decision in *Mabo supra* note 23 affirmed that international obligations arising from treaties and conventions to which Australia is a signatory, affect governmental action toward Aboriginal rights in the land. The Supreme Court of Canada affirmed in *Quebec Secession Reference supra* note 48 that the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state is part of the Constitution of Canada at paras. 32, 114, 125, 126 148; See also *Reference re Resolution to Amend the Constitution* [1982] 2 S.C.R. 793, at 874. These judicial conclusions about shared exclusivity are consistent with inalienable and inviolable rights of article 17 of the *Universal Declaration of Human Rights*, G.A. Res. 217 (III 1948), which provides: “1. Everyone has the right to own property alone as well as in association with others” and “2. No one shall be arbitrarily deprived of his property.” Article 5 (d)(v) of the *International Convention on Elimination of All Forms of Racial Discrimination* 1966, *supra* note 29 affirms the right to own property alone as well as in association with others. Article 1 of the Human Right Covenants, the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, and the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, assert that all peoples have the right of self-determination and may freely dispose of their natural wealth and resources.

156 The exclusivity matrix is integral to the legal history of “seisin” and title in British common law, but not Aboriginal law.

exclusive title of an Aboriginal nation and a shared way of life.<sup>157</sup> These examples are manifestations of judicial confusion of Aboriginal perspectives and exclusive factual connection. Many Aboriginal peoples living on the same land by confederation could establish a continuity of Aboriginal connection when the Crown asserted sovereignty over the lands,<sup>158</sup> which merely reaffirms the need for the imperial protection of these *sui generis* worldviews and legal systems.

An Aboriginal people asserting the claim to the land may have Aboriginal perspectives or agreements that are positive proof of exclusive connection. If ceremonies, traditions, and treaties validated other Aboriginal peoples' use, they would be a part of the Aboriginal perspective, rather than exclusive factual presence.<sup>159</sup>

In the context of factual occupation, without evidence of Aboriginal perspectives, proving the exclusive connection among many Aboriginal users may become problematic. This situation would be rare, since Aboriginal thought and heritage usually provides a perspective to their place in the ecology and their relations to the land. However, the Eurocentric fiction and stereotype of

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157 *Delgamuukw*, *supra* note 1 at para. 158. Justice La Forest recognizes the possibility that two or more Aboriginal peoples may have factually occupied the same territory and used the land communally as part of their traditional way of life and joint occupancy where two or more groups have accommodated each other at para. 196. This concept is fundamental to Aboriginal and Canadian federalism and even the British Empire or commonwealth. See also, *Van der Peet*, *supra* note 15 at para. 156, citing Professor McNeil, *Common Law Aboriginal Title*, *supra* note 7 at 204.

158 *Ibid.*, *Delgamuukw* at para. 197, relying on Brian Slattery, "Understanding Aboriginal Rights", *supra* note 7 at 759.

savages in a state of nature continually haunts the judicial imagination of the colonizers or dominators.

The Court stressed any use of the common law concept of exclusive rights to property must be sensitive to the existing realities of Aboriginal law and traditions at the time of asserted British jurisdiction.<sup>160</sup> This is a proper caution since the assertion of jurisdiction is a prerogative act, not a common law act. The common law is received only by a prerogative act of granting a legislative council to a British settlement, but the received common law can be repugnant to existing prerogative instructions and acts, or to Aboriginal rights and perspectives, or treaties protected by prerogative acts.

Additionally, the Court accentuated that British common law concepts of exclusivity must be used cautiously in conceptualizing a *sui generis* exclusive connection. This was wise caution, since British common law recognizes infinite layers of jurisdiction authority and uses over a piece of land, but placed a “premium” on the factual reality of occupation.<sup>161</sup> As the coherent, homogenous, expectations that underpinned the common law became entwined in different expectations and overriding interest in colonization experience, the traditional practical proof became impossible. The concept of exclusive possession or occupation as the right to control or exclude others proved in

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159 *Delgamuukw*, *supra* note 1 at para. 157.

160 *Ibid.* at para. 156.

common law litigation to be indeterminate and the concept has diminished by British legislation.<sup>162</sup> The common law courts have discovered that applying the concept that each rightholder enjoyed absolute discretion and rights transformed into unimagined indeterminacy in concrete application as the damage one rightholder could do to other rightholders was pervasive and unavoidable. No way existed to resolve the horizontal and vertical conflicts among property rightholders; thus the common law doctrine of *sic uteretur ut alienum non lædas* (use your own property in such a manner as not to injury that of another) transformed into doctrines of property relationships, “bundles of rights”, competitive injury, of *damnum absque iniuria* (loss, hurt or harm without legal injury or damage) and various statutory and policy compromises.

The application of complex common law concepts of exclusive use is of little help in translegal contexts where land is densely shrouded in intangible expectations of diverse cultures. The modern system of registration of title codification of conveyancing and interpretation techniques, and statutes evolved as a solution to these problems of proof, embedded words in fabric of understandings about the uses of written documents, and created new associations of techniques of proof and practices of real property law. The technology of title registration and a fixed index accommodates greater

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161 *Ibid.* at para. 156.

162 See, *Halsbury's*, *supra* note 68 at para. 344-74, on “The Property Legislation of 1925.”

complexity than the common law allowed. The role of a registered owner, however, is fictional in the sense that registration serves primarily as the key to either the grammar of interests in registered land or a reference point organizing the priorities and relationship with the recorded interest; it is not organized around the ideal of a good root title.

**C. PRESENT OCCUPATION MAY BE RELIED ON AS PROOF OF HISTORIC CONNECTION**

If Aboriginal peoples have difficulties in proving connection by Aboriginal perspective or factual occupation at the time of the sovereign's assertion,<sup>163</sup> the Court approved of an alternative way to prove their *sui generis* right to the land. Aboriginal peoples can show connection with the land by working backwards from present occupation to establish proof of their connection at the time of the Crown assertions of authority.<sup>164</sup> In structuring this test, the Court did not turn a blind eye to the evils of colonialism in denying the protection of British law to Aboriginal rights to the land.<sup>165</sup> It refused to sanctify the colonial order's disrespect for recognizing or protecting Aboriginal rights.

The present occupation standard is developed to immunize and belatedly protect Aboriginal rights in the land from the corrupting influence of colonial domination and the failure to apply the protections of British law to the

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163 *Ibid.* at paras.143-54.

164 Justice la Forest agreed with this proposition, *Delgamuukw*, *supra* note 1 at para. 198.

Aboriginal peoples. The Court noted a strong possibility that the precise nature of connection will have changed between the time of sovereignty and the present.<sup>166</sup> Under this test, the Court stated if the colonizers were unwilling to recognize Aboriginal nations' *sui generis* right to the land or protect those rights under law or if this attitude disrupted the Aboriginal connection with the land, Aboriginal peoples are not required to establish "an unbroken chain of continuity" between present occupation and connections at the sovereign's assertion. They have to prove some "continuity" between the present and their historic connection with a substantial maintenance of their connection with the land.<sup>167</sup>

The present occupation test distinguishes between unjustified use of legislative power and justified protection of Aboriginal rights in the land. The Court noted that European colonizers may have disrupted the legal and factual connection with the land and may have been unwilling to recognize Aboriginal rights to the land and thereby perpetuated historical injustices: "the very purposes of s. 35(1) by perpetuating the historical injustice suffered by Aboriginal peoples at the hands of colonizers who failed to respect" Aboriginal rights to land.<sup>168</sup> In these situations, the colonizer's acts were unlawful under

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165 *Sparrow, supra* note 28.

166 *Ibid.* at par. 154.

167 *Ibid.* at paras. 152 and 153. This is the test of the High Court of Australia in *Mabo, supra* note 23.

168 *Ibid.* at para. 153, also see *Côté, supra* note 10 at para. 53.



British law and should not be respected. The Court has not affirmed these acts as evidence of better title or extinguishment.<sup>169</sup> The Court declared that the province did not have constitutional authority to extinguish *sui generis* Aboriginal tenure, that it had never been extinguished in the past, and that Aboriginal tenure continues as a constitutionally protected tenure in British Columbia that must be respected by courts.<sup>170</sup> Thus, Aboriginal claimants may also explain their loss of connection by actions of the colonialists and colonial authority.

Similarly, Justice La Forest agreed that present occupation might establish the Aboriginal connection with the land at a “more relevant” date after the assertion of sovereignty. He would not deny the existence of “Aboriginal title” in that area merely because the relocation occurred after the sovereign assertion.<sup>171</sup> Additionally, Justice La Forest noted the Aboriginal peoples may have been moved or relocated to another area due to natural causes, such as the flooding of villages, or to clashes with European settlers. In these circumstances, Justice La Forest concurred that Aboriginal claimants would not deny the existence of “Aboriginal title” in that area merely because the relocation occurred after the

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169 *Ibid.*, *Sparrow* at 1110.

170 *Ibid.* at paras. 114, 126.

171 *Ibid.* at para. 197.

sovereign assertion of sovereignty; instead, its connections continued as before the sovereign's assertion of sovereignty.<sup>172</sup>

Since imperial and Canadian constitutional law recognizes the Aboriginal peoples exclusive connection with the land, the Court acknowledged a legal presumption of a protected *sui generis* tenure or title and rights to the land and resulting fiduciary duties.<sup>173</sup> Aboriginal peoples in present possession of some part of their traditional lands should not have to prove much legal or factual continuity. The Court has stated Aboriginal claimants can show a "substantial maintenance of" their connection with the land to sustain their constitutional rights in various contexts.<sup>174</sup> It is uncertain if the proof of substantial maintenance is Lamerian drift or part of the Court's flexibility given to Aboriginal claimants or an alternative stand to the *sui generis* exclusive test, that should be available if present occupation is relied on as proof of pre-sovereignty occupation. In the context of present occupation as proof of aboriginal occupancy, the Court stated: "In *Mabo, supra*, the High Court of Australia set down the requirement that there must be "substantial maintenance of the

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172 *Ibid.* at para. 197.

173 *Guerin, supra* note 8.

174 *Ibid.* at para. 151. In the context of proof of Aboriginal connection with the land at the time of British sovereign, the Court stated : "in the case of [Aboriginal] title, it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants." See also *Van der Peet, supra* note 15 at para. 26 and Lamer, C.J.C. division of permanence of occupation in *Adams, supra* note 15 at paras. 27-28. Justice La Forest stated the

connection" between the people and the land. In my view, this test should be equally applicable to proof of title in Canada".<sup>175</sup> In *Mabo*, however, the substantial maintenance connection was part of the Aboriginal perspective standard rather than factual possession. Justice Brennan asserted: "Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence".<sup>176</sup>

#### **D. ABORIGINAL RIGHTS TO DO CERTAIN ACTIVITIES**

Because constitutionalized Aboriginal title and rights are interconnected and vary with respect to their degree of relationship or connection with the land, some Aboriginal peoples may be unable to make out a right to the land itself. Nevertheless, the Court noted they might possess a constitutional right to do certain activities on the land if these particular activities are integral to their distinctive culture.<sup>177</sup> If the Aboriginal evidence establishes that Aboriginal peoples used particular lands for hunting without any controlling Aboriginal law, the claimants may lack the crucial element of exclusivity. Still, a judge could

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central significance of land to Aboriginal peoples can be showed by how they continue to occupy and use the land to pursue their traditional way of life at para. 199.

<sup>175</sup> *Ibid.* at para. 153.

<sup>176</sup> *Mabo*, *supra* note at 57, 58, and 70.

find a constitutional right to hunt in the area of a specific part of the shared or joint area. However, in Aboriginal law and perspectives this would be an exceptional situation. In most cases an Aboriginal perspective on the shared hunting grounds, law, treaty or agreement may resolve this issue of a shared, non-exclusive, site-specific rights.

### **III. PROVING *SUI GENERIS* CONSTITUTIONAL RIGHTS MODIFIES EXISTING RULES OF PROCEDURE AND EVIDENCE**

Proving the substantive constitutional rights of Aboriginal peoples to a territory consists of propositions of law and fact that must mirror the *sui generis* nature of Aboriginal tenure and rights. The Court held the *sui generis* nature of these rights requires substantial modifications of rules of procedure and evidence.<sup>177</sup> These rules inform the historical consciousness of the British and Canadian legal system that establishes the truth and relevancy of propositions or the validity of propositions of law or alleged fact. These rules of evidence (and perhaps procedure) cannot operate to exclude the *sui generis* knowledge, heritage, and laws of the Aboriginal peoples from showing a connection with the territory or to privilege evidence by experts who rely on Eurocentric theories, methodologies, and disciplines about Aboriginal peoples. Not only

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177 *Ibid.* at para. 159.

178 *Ibid.* at paras. 3, 73-108.

would this be discrimination in the application of constitutional rights based on nationality or race, but would also illustrate judicial bias.

As typically applied by courts, the existing rules of evidence have discriminated against the admissibility of Aboriginal knowledge, heritage, and histories, therefore showing bias in the judicial evaluation of the evidence. The courts cannot view Aboriginal perspectives as tangential to the determination of constitutional rights. Aboriginal perspectives are not out-of-court statements admitted for their factual truth and therefore conflicting with the general rule against the admissibility of hearsay. An Aboriginal perspective is legal evidence of a *sui generis* Aboriginal legal system, which seeks to establish the rules and operation of a foreign legal system. They have been transmitted across the generations of a particular Aboriginal nation to the present-day. Aboriginal perspectives, languages, and laws have their own rules of evidence, which are protected by British and Canadian constitutional law and must be respected in a fair and impartial hearing. These rules are not a factual proposition, but issue of constitutional equality and comity.

In determining constitutional *sui generis* rights of Aboriginal peoples, the Supreme Court of Canada has established special rules of evidence and procedures. The constitutional interpretative principles demand that equal weight be given to the perspective of Aboriginal nations and peoples. In *Kruger v. The Queen*, Justice Dickson recognized that "[c]laims to Aboriginal title are

woven with history, legend, politics and moral obligations".<sup>179</sup> In *Simon v. The Queen*, Chief Justice Dickson noted that given that most Aboriginal societies "did not keep written records", the failure to give a fair and equal weight to Aboriginal perspectives would "impose an impossible burden of proof" on Aboriginal peoples, and "render nugatory" any rights they have.<sup>180</sup>

The Court acknowledged the validity of Aboriginal traditions in the *Report of the Royal Commission on Aboriginal Peoples*:<sup>181</sup>

The Aboriginal tradition in the recording of history is neither linear nor steeped in the same notions of social progress and evolution [as in the non-Aboriginal tradition]. Nor is it usually human centred in the same way as in the western scientific tradition, for it does not assume that human beings are anything more than one-and not necessarily the most important-element of the natural order of the universe. Moreover, the Aboriginal historical tradition is an oral one, involving legends, stories and accounts handed down through the generations in oral form. It is less focused on establishing objective truth and assumes that the teller of the story is so much a part of the event being described that it would be arrogant to presume to classify or categorize the event exactly or for all time.

In the Aboriginal tradition the purpose of repeating oral accounts from the past is broader than the role of written history in western societies. It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority and prestige. [...]

Oral accounts of the past include a good deal of subjective experience. They are not simply a detached recounting of factual events

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179 [1978] 1 S.C.R. 104, at 109.

180 *Simon*, *supra* note 92 at p. 408, see also *Van der Peet*, *supra* note 15 at para. 62.

181 Canada, *Report of the Royal Commission on Aboriginal Peoples*, vol. 1 "Looking Forward, Looking Back" (Ottawa: Communication Group, 1996) at 33.

but, rather, are "facts enmeshed in the stories of a lifetime". They are also likely to be rooted in particular locations, making reference to particular families and communities. This contributes to a sense that there are many histories, each characterized in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people.<sup>182</sup>

To respect *sui generis* Aboriginal knowledge, heritage and perspectives as constitutional Aboriginal rights, the laws of evidence must be modified. Such modifications are consistent with the common law traditions of pleading and evidence. Throughout different eras the courts have sanctioned and ratified their rules of evidence based on the actual habits of societies and deductions drawn from an insight into human nature, motives, passions, interests and affections.<sup>183</sup> This is a long-standing practice in the interpretation of treaties between the Crown and Aboriginal nations.<sup>184</sup>

Learning, understanding, affirming and enhancing Aboriginal perspectives and their cognitive diversity in the Canadian legal system and displacing the colonial biases and racial prejudices are difficult and pressing issues for trial courts.<sup>185</sup> In Aboriginal claims to title and rights, reviewing courts must give due weight and equal footing to Aboriginal traditions and perspectives. Trial

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182 *Delgamuukw*, *supra* note 1 at para. 85. This description of Aboriginal traditions is constructed on a polarity or oppositional foundation. It is constructed on a comparison to Eurocentric "objectivity" or purposive analysis. It is not an example of equal footing required by the Court.

183 *Humfrey v. Dale* (1857) 7 El. & Bl. 266 per Lord Campbell.

184 *R. v. Badger*, [1996] 1 S.C.R. 771 [hereinafter *Badger*]; *Sioui*, *supra* note 65 at p. 1068; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 at 232; See, J.Y. Henderson, "Interpreting Sui Generis Treaties", (1997) 36 Alberta L. Rev. 46-96.

courts must place Aboriginal perspectives on an “equal footing” with the familiar types of written Eurocentric historical evidence. To accomplish this task, trial courts have to respect oral knowledge, heritage, and histories of Aboriginal nations, which are the only legacy of their “heritage”.<sup>186</sup> These legal traditions and world views play an integral interpretative role in reviewing judges’ approaches to applying the rules of evidence to claims of constitutional rights by Aboriginal peoples.

In light of the evidentiary difficulties inherent in adjudicating Aboriginal claims, reviewing judges must give a large, liberal and generous interpretation to constitutional traditions of the Aboriginal peoples.<sup>187</sup> Any evidentiary uncertainties, ambiguities, or doubts are required to be resolved in favor of the Aboriginal peoples.<sup>188</sup> They must interpret Aboriginal evidence within the constitutionally protected context of Aboriginal knowledge and heritage that the British sovereign intentionally vested and protected by British law when it asserted jurisdiction over the land. The Court has stated that judges should approach the rules of evidence, and interpret the evidence that exists, with a

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185 See generally, the problems in Eurocentric constitutional theory, J. Tully, *Strange multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995).

186 British common law structure of real property should not be imposed on *sui generis* Aboriginal perspectives on property, neither should Eurocentric categories be imposed on Aboriginal knowledge and heritage. Moreover, Eurocentric theories of histories have many unresolved methodological problems, see Henderson, “Interpreting Sui Generis Treaties” *supra* note 184 at 56-71.

187 *Sparrow*, *supra* note 6 at 1107-08;

188 *Ibid.*, *Badger*, *supra* note 184 at paras. 41, 52; *Nowegijick*, *supra* note 92 at 34.



consciousness of the constitutional nature of Aboriginal claims. The courts must not resist or undervalue the *sui generis* evidence presented to prove constitutional rights by Aboriginal claimants, which is often oral history and evidence, simply because that evidence does not conform precisely to the evidentiary standards of British legal traditions.<sup>189</sup>

Judicial respect of Aboriginal knowledge and heritage will not strain "the Canadian legal and constitutional structure".<sup>190</sup> No stain exists in interpreting Aboriginal perspectives or law since they were vested and protected at the time of the sovereign's assertion of jurisdiction in British law and affirmed in the Canadian constitution. Aboriginal rights are based on knowledge and heritage that have already been constitutionally protected in s. 35(1). Judicial respect for these sources of Aboriginal rights is a reassertion of the convergence theory of constitutional interpretation.<sup>191</sup>

Trial judges must assume that the British sovereign intended to protect fully Aboriginal perspectives and rights when it asserted jurisdiction over the Aboriginal lands and peoples.<sup>192</sup> Constitutional supremacy or consistency in s. 52(1) required of federal and provincial law must be consistent with

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189 *Van der Peet*, *supra* note 15 at para. 68.

190 *Ibid.* at para. 49.

191 *Quebec Secession Reference*, *supra* note 48 at para. 72; *Delgamuukw*, *supra* note 1 at para. 160; *Badger*, *supra*, note 184 at paras. 37, 43, 47, 72, 84; *Harvey v. New Brunswick (A.-G.)* [1996] 2 S.C.R. 876 at, 914; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 373.

192 *Delgamuukw*, *ibid.* at paras. 133, 144-151, 164-169.

constitutional allocation of powers and the existing Aboriginal and treaty rights of Aboriginal peoples to be of force and effect.<sup>193</sup> Exercise of legislative powers must be reconciled with the constitutional rights of Aboriginal peoples, since the constitutionalization of these rights operates as a limit on these powers.<sup>194</sup> If either federal or provincial laws are consistent with the respective powers and rights, yet infringe on the Aboriginal title or rights, the government must justify the infringements and pay compensation to the Aboriginal peoples.<sup>195</sup> Moreover, the Supreme Court requires a fair and judicial reconciliation between Aboriginal perspectives and the common law, giving each equal weight.<sup>196</sup>

If a trial court fails to appreciate the evidentiary difficulties inherent in adjudicating, Aboriginal claims when applying the rules of evidence and interpreting the evidence before it, the Court has stated appellate intervention is justified and necessary.

In *Delgamuukw*, the Supreme Court found the trial judge made a number of serious errors relating to his treatment of the oral histories of the appellants. Those oral histories were expressed in three different forms: (i) the sacred or official oral history of *adaawk* of the Gitksan, and the *kungax* of the Wet'suwet'en "repeated, performed and authenticated at important ceremonies' established

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193 *Sparrow*, *supra* note 6 at 1006, 1113. 1117-8; *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 312.

194 *Ibid.* at 1115, 1110; see also *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 at 455.

195 *Ibid.*, *Sparrow*

the Aboriginal law of land tenure; (ii) the territorial affidavits filed by the heads of the individual houses within each nation introduced for the purposes of establishing each House's ownership of its specific territory; and (iii) the personal and family testimony and recollections of members of the appellant nations' use of the land.

At trial, the *adaawk* and *kungax* were relied on as proof of Aboriginal title. The Gitksan relied on the *adaawk* as an internal component of and as proof of the existence of an Aboriginal legal system of land tenure that covered the whole territory claimed by that appellant. These oral traditions revealed the Gitksan's historical use and occupation of that territory. For the Wet'suwet'en, the *kungax* was offered as proof of the central significance of the claimed lands to their distinctive culture.<sup>197</sup> The trial judge recognized that such evidence was a form of hearsay in the British common law traditions, but he ruled both the *adaawk* and *kungax* were admissible on the basis of the recognized exception that declarations made by deceased persons could be given in evidence by witnesses as proof of public or general rights and out of necessity since there was no other way of proving the history of the respective nations.<sup>198</sup> However, Chief Justice Lamer noted the trial judge erred when he gave no independent weight at all to

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196 *Ibid.* at paras. 49 and 50.

197 *Delgamuukw*, *supra* note 1 at para 94.

198 *Ibid.* at para. 95, relying on M. N. Howard, Peter Crane & Daniel A. Hochberg, ed.'s, *Phipson on Evidence* (14th ed. 14th ed. London: Sweet & Maxwell, 1990) at p. 736.

these special oral histories<sup>199</sup> because he felt they did not accurately convey historical truth, were confined to the communities, and were insufficiently detailed.<sup>200</sup> Under the trial judge's reasons, the Court noted that the court privileged written documents over oral traditions, and if this were allowed it would consistently and systematically undervalue the sacred and official oral history of Aboriginal nations that inform their constitutional rights.

The Court held the trial judge also erred in his treatment of the territorial affidavits filed by the individual chiefs introduced for the purposes of establishing each House's ownership of its specific territory. The Court held the affidavits were important declarations illustrating the existence and nature of the Aboriginal land tenure system within each nation and were material to the proof of title.<sup>201</sup>

Distinct from the sacred and official oral history and territorial affidavits of the chiefs, the Court also held the trial judge erred when he discounted the personal and family testimony about land use, the "recollections of Aboriginal life" offered by various members of the appellant nations.<sup>202</sup> This evidence had been adduced by the appellants in order to establish the requisite degree of use and occupation to make out a claim to ownership and, for the same reason as

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199 *Ibid.* at para. 96.

200 *Ibid.* at para. 98.

201 *Ibid.* at para. 102.

202 *Ibid.* at para. 99.

the sacred oral histories, the Court held that such testimony is material to the proof of Aboriginal title and cannot be discounted by trial judges.

The trial judge's treatment of the various kinds of oral histories constituted particularly worrisome errors because oral histories were of critical importance to the appellants' case for Aboriginal title. They were introduced in an attempt to establish the Aboriginal law of land tenure, the continuity with Aboriginal law, and their factual occupation and use of the disputed territory. Had the trial judge assessed the oral histories correctly, his conclusions on these issues of factual occupation might have been very different. Thus, the Court ordered a new trial, at which the evidence may be reconsidered in light of the principles established in *Delgamuukw*.

### **III. CONCLUSION**

As the evidence is submitted and proven in trial courts and reviewed by appellate courts, Aboriginal perspectives and rights will be tested and clarified. *Delgamuukw* ends the oppressive colonial analysis of Aboriginal title, and replaces it with a postcolonial analysis of constitutional supremacy. The concepts that British or Canadian lawyers' use to make sense of the "substance" of property rights and to determining of counts as good title to an interest is not applicable to determine proof of a constitutional right of Aboriginal tenure or title to the land.

In the modern context, these common law concepts are parasitic upon practical senses of entitlement derived from British consciousness and traditions. These notions of entitlement are their modes of seeing and doing that inform practical rationalities that created the common law tradition. These rationalities establish the contexts for the production and reproduction of the practices or technologies of recording, documenting, or registering of real property interests adapted to the needs of a *élite* class of property-owners. These evidential signs created the problematic notion of “title” and presupposed a specific pattern of conveyancing based upon stable resources of local knowledge that established cultural or social expectations. These expectations did not work in foreign jurisdictions.

Because of protected Aboriginal rights to the land and treaty purchases or cession in British law, the modern systems of land registration of title in Canada evolved as a solution to the problem of proof that emerged when land use took a more complex and ambiguous form. These registration systems eroded the older common law expectations and created an independent source of land ownership that developed new modes of proof and practices. Title became a credential or qualification that authorized an administrative system to record a holder, without any prior lawful possession. This allowed the recorded holder to exercise certain facilities or powers to be tendered to a future buyer or asserted

against an intruder.<sup>203</sup> These paper titles are instruments of transfer with the purpose of acquiring wealth and status, a way of indexing colonial expectations.<sup>204</sup> These land registration systems are partial systems. They were fabricated by ignoring the protected Aboriginal lands and uses of the land and actively discriminate against Aboriginal and treaty rights. They are a perversion of prerogative and common law in the colonies, a triumph of economic interests over vested rights, that will be remedied under the guidelines.

In searching for proof of a constitutional right in the land of Aboriginal peoples, the judges are reaching into understanding of comparative perspectives and law that are specific to Aboriginal peoples worldview and to particular historical periods. They are not looking at recovering practical expectations of the common law and on the value of written documents and records. They are seeking proof of a normative condition constructed by Aboriginal worldviews or a state of fact at the time of sovereign assertion of political jurisdiction over a territory.

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203 See, Harris, *Property and Justice* (Oxford: Oxford University Press, 1996) at 39-40, 80-1.

204 See, *Paulett v. The Queen* [1977] 2 S.C.R. 628 where the Supreme Court held that the precise terms of the land title statutes applicable to the North West Territory did not allow for the registering of Aboriginal title caveats on upatented Crown land. The British Columbia Court of Appeals in *Delgamuukw* overturned a *lis pendens* declaration issued to the Aboriginal plaintiffs because it viewed the whole Land Title system was intended to protect transaction inland and specifically to ensure that title was marketable and Aboriginal title was inalienable except to the Crown, (1987) 16 B.C.L.R. (2<sup>nd</sup>) 145 (B.C.C.A). The Court of Appeals ignored the title system also serves to protect the interest through providing public notice. The Supreme Court of Canada refused leave to appeal, *Uukw v. B.C.* (1887) 12 B.C.L. R. (2<sup>d</sup>) xxxvi (S.C.C.) However, the Court guidelines will challenge this judgment that avoids placing restriction on the province's

The Court held that the rule of law in imperial constitutional regimes and later common law established and protected the Aboriginal perspective to the land and their uses of the land.<sup>205</sup> As had the British Columbia Court of Appeal, the Supreme Court rejected federal and provincial Crown arguments that before 1982 Aboriginal tenure was extinguished. It denied each of their five extinguishment theories: that the assertion of Crown sovereignty had extinguished Aboriginal tenure; that colonial land legislation before Confederation extinguished the Aboriginal peoples' relations to the land; that the creation of land grants by British Columbia to settlers extinguished Aboriginal tenure because the Aboriginal people were precluded from sustaining their relationship to the land; that the establishment of federal Indian reserves in British Columbia extinguished Aboriginal tenure because the Aboriginal peoples "abandoned" their territory; and that s. 88 of the *Indian Act* allowed provincial laws of general application to extinguish Aboriginal rights. Additionally, the Court made it clear that trespass would not undermine their original connection.<sup>206</sup> In short, the Court rejected the self-serving complicity between colonial government and legislation in avoiding Aboriginal rights to the land and attempting to fabricate a title out of nothing more than expectations.

The existing burden of proof is concerned with what points toward a

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management of public lands.

205 *Ibid.* at paras. 114, 126.



rightful Aboriginal land tenure: a cognitive or factual map rather than paper title. The cognitive and factual map is merely a mirror of Aboriginal language and worldviews that grasp the ecology they live in. Their perspectives never insist on crisp grammatical separation of uses but rather smoothly drifted with the ecological seasons and subtle articulation involved with sharing. The proof of Aboriginal land tenure depends upon an understanding of how these shared uses fit together, in the same way common law judges have to fit together mortgages related to fee simple or life estates, leases to mortgages, tangible to intangible property, and so on. The Aboriginal understanding of the whole to the part creates the constitutional rights.

To rebut a constitutional right in the land prior to 1982, the Courts have required proof of a clear and plain imperial or constitutional act of the British sovereign purchasing Aboriginal land and the payment of fair compensation. The Court was clear in *Delgamuukw* that the provincial Crown cannot rely on colonial grants or recording systems of the colonial legal system, if they are derived only from the fiction of an unperfected lordship over Aboriginal lands. They must show the sovereign's actual title to the land by purchase and compliance with the terms of purchase.

Under imperial constitutional law and the constitution of Canada, today, the unpurchased rights in the land are constitutional rights, and a constitutional

amendment is required before any Crown can purchase the vested Aboriginal rights to the land to validly give any grants to others.<sup>207</sup> Without a written purchase affirmed by a constitutional amendment, challengers of the protected and vested Aboriginal right in the land cannot establish a superior title. Without a written purchase and constitutional amendment, the sovereign cannot fraudulently give to its federal or provincial government in Canada what it never actually acquired (*nemo dat quod habet*) but only protected.

Canadian constitutional law accords equal protection to Aboriginal rights in the land against the loss of their constitutional right. The Court seeks a fair use of the land, a workable way of sharing the resources of this continent against stonewalling governments. Like every litigant, the federal or provincial Crown must act consistently with the Aboriginal right to the land, the honour of the Crown, and justify and give fair compensation for any regulation of this constitutional right.

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<sup>207</sup> *Johnston v. O'Neill*, [1911] A.C. 552 (H.L.); *Cariño v. Insular Government of Philippine Island* (1909) 212 U.S. 449 at 460; *Nireaha Tamaki v. Baker* [1901] A.C. 461 at 576, 578 (P.C.); *Wallis v. Solicitor-General for New Zealand* [1903] A.C. 173 at 181-82; *Perry v. Clissold* [1907] A.C. 73 at 79 (P.C.); *Bristow v. Cormican* (1878) 3 App. Cas. 641.